

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

Report of the Panel

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Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the panel Report is available from the WTO Secretariat.

I. INTRODUCTION

1.1 On 16 July 1997, the United States requested consultations with India, pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article XXII:1 of the GATT, Article 19 of the Agreement on Agriculture (to the extent it incorporates by reference Article XXII of the GATT), and Article 6 of the Agreement on Import Licensing Procedures (to the extent it incorporates by reference Article XXII of the GATT), concerning quantitative restrictions maintained by India on the importation of a number of agricultural, textile and industrial products (WT/DS90/1). The United States considered that the quantitative restrictions maintained by India, including, but not limited to, those tariff lines notified in Annex I, Part B of WT/BOP/N/24, appeared to be inconsistent with India's obligations under Article XI:1 and XVIII:11 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 3 of the Agreement on Import Licensing Procedures. At the same time, Australia, Canada, the European Communities, New Zealand and Switzerland requested consultations with India on these quantitative restrictions (WT/DS91/1; WT/DS92/1; WT/DS93/1; WT/DS94/1; WT/DS96/1) on the basis of similar claims to those set forth by the United States.¹ Subsequently, Japan, the European Communities, Canada, Australia, Switzerland and New Zealand asked to join in the consultations requested by the United States (WT/DS90/2, WT/DS90/3, WT/DS90/4, WT/DS90/5, WT/DS90/6, WT/DS90/7). The United States and India formally consulted on these measures in Geneva on 17 September 1997, and Japan participated as an interested third party under Article 4.11 of the DSU.

1.2 On 3 October 1997, the United States requested that the WTO Dispute Settlement Body (“DSB”) establish a panel to examine this dispute.² In its request, the United States considered that quantitative restrictions maintained by India, including, but not limited to, the more than 2,700 agricultural and industrial product tariff lines notified to the WTO in Annex I, Part B of WT/BOP/N/24 dated 22 May 1997, appeared to be inconsistent with India's obligations under Articles XI:1 and XVIII:11 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Furthermore, the import licensing procedures and practices of the Government of India are inconsistent with fundamental WTO requirements as provided in Article XIII of GATT 1994 and Article 3 of the Agreement on Import Licensing Procedures. The DSB established the panel on 18 November 1997, with the following terms of reference:

“To examine, in light of the relevant provisions of the covered agreements cited by the United States in WT/DS90/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.”

1.3 On 10 February 1998, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 20 February 1998, the Director-General accordingly composed the Panel (WT/DS90/9) as follows:

Chairman: Ambassador Celso Lafer
Members: Professor Paul Demaret
Professor Richard Snape

1.4 The Panel met with the parties on 7 May and 22 and 23 June 1998 and submitted its report to the Parties on 11 December 1998.

¹ Switzerland did not refer to Article 4 of the Agreement on Agriculture in its request.

² WT/DS90/8, 6 October 1997.

II. FACTUAL ASPECTS

A. CONSULTATIONS IN THE COMMITTEE ON BALANCE-OF PAYMENTS RESTRICTIONS

2.1 At the time the Panel was established, India maintained quantitative restrictions on imports of products falling in 2,714 tariff lines at the eight-digit level of HS96 for which it claimed balance-of-payments justification. These restrictions had been notified to the Committee on Balance-of-Payments Restrictions in May 1997 in the course of consultations being held with India. The restrictions that are within the scope of the dispute appear in Annex I, Part B of WT/BOP/N/24. A previous notification had been made in July 1996 (WT/BOP/N/11 and Corr.1) and included quantitative restrictions maintained for both balance of payments and other reasons.³

2.2 India had been consulting under Article XVIII:B in the Committee on Balance-of-Payments Restrictions regularly since 1957.⁴ During the simplified consultations held on 15 November 1994, the Committee appreciated the courage and sagacity with which India had carried out its economic reform program. It encouraged India to continue implementing its import liberalization programme. The Committee noted that, if the balance of payments showed sustained improvement, India's aim was to move to a regime by 1996-1997, in which import licensing restrictions would only be maintained for environmental and safety reasons. Members of the Committee welcomed the significant improvement in India's balance-of-payments situation since the last consultation but recognized that it remained volatile.⁵

2.3 Full consultations were begun in December 1995, and first resumed on 20-21 January 1997. During the consultations held on 6 and 8 December 1995, the Committees commended India for the wide-scale economic reforms and comprehensive stabilization programme over the past four years, which had resulted in robust economic recovery. The reforms, which included a considerable measure of trade and financial liberalization, exchange rate unification and a move to current account convertibility, had contributed to a large increase in the share of trade in India's GDP. The Committees noted that, since 1992, rapid export growth and capital inflows had been the source of the turnaround in India's external sector and the steady increase in the level of foreign exchange reserves. However, they took note that, in recent months, there had been a deterioration in the trade balance, investment inflows had slowed and the foreign exchange reserves had declined. In addition, the fiscal deficit and the level of indebtedness remained high. The Committees recalled India's stated aim to move, by 1996-97, to a trade régime under which quantitative restrictions are retained only for environmental, social, health and safety reasons, provided sustained improvement was shown in its balance-of-payments. They also took note of the statement by the IMF that, with continued prudent macro-economic management, the transition to a tariff-based import régime with no quantitative restrictions could reasonably be accomplished within a period of two years. The Committees noted that, since the last full consultation, there had been considerable liberalization of India's import régime, including a gradual increase in the number of consumer items which were freely importable; yet almost one-third of tariff lines at eight-digit level under the HS Classification remained subject to quantitative restrictions. The Committees noted the view expressed by India that, in the context of a deteriorating balance-of-payments situation, it would be neither prudent nor feasible to consider the general lifting of quantitative restrictions on imports at this stage. Many Members supported India's continued use of import restrictions under Article XVIII:B for balance-of-payments reasons in view of the uncertainty and fragility they perceived in India's balance-of-payments position, and they felt that liberalization and structural reform policies should continue at a pace and sequence suited to Indian conditions. Many other Members stated that India's balance-of-payments position was comfortable, that India did not currently face the threat of a serious decline in foreign exchange reserves as set out

³According to India, as of 13 April 1998, the number of items on which there were import restrictions had been reduced to 2,296 HS lines at the 8-digit level.

⁴BISD 8S/74.

⁵GATT document BOP/R/221, 1 December 1994.

in Article XVIII, paragraph 9, and that therefore India was not justified in its continued recourse to import restrictions for balance-of-payments reasons. Many Members stated that the continued use of quantitative restrictions was inconsistent with paragraphs 1, 2, 3, 4 and 9 of the Understanding and asked India to present a firm time-table for the phasing out of the restrictions, and further information required, before the resumption of the consultations. Others, in the light of the ongoing liberalization, did not share these views. In the light of the above considerations, the Committees welcomed India's readiness to resume the consultations in October 1996, and to notify to the WTO all remaining restrictions maintained for balance-of-payments purposes soon after the announcement of the 1996/97 Export-Import Policy.

2.4 In its resumed consultations with India, in January 1997, the Committee took note of the positive developments in India's economic situation since 1995. The Committee welcomed the Indian authorities' continued commitment to economic reform and liberalization and noted India's progressive removal of quantitative restrictions notified under Article XVIII:B. The Committee noted the statement of the IMF that India's current monetary reserves were not inadequate and were not threatened by a serious decline.⁶ The IMF also expressed the view that the import restrictions could be removed within a relatively short period of time. However, India cautioned that its balance-of-payments needed close monitoring and that the abrupt removal of import restrictions notified under Article XVIII:B could undermine the stability of its economy and the reform process. The Committee agreed to resume the consultations with India at the beginning of June 1997 to consider a proposal from India on a time-schedule for the elimination of its remaining import restrictions notified under Article XVIII:B and to conclude the consultations consistently with all relevant WTO balance-of-payments provisions.⁷

2.5 On 19 May 1997, India notified the Committee of the import restrictions under Article XVIII:B that were being maintained under its Export-Import Policy for 1997-2002.⁸ At the same time India notified a time-schedule for the removal of its remaining import restrictions pursuant to paragraph 11(d) of the 1994 Understanding. This plan contained a time-schedule of nine years from 1 April 1997 to 31 March 2006, divided into three equal phases. The notification also included a list of products in respect of which quantitative restrictions on imports maintained under Article XVIII:B were removed by India since its last notification of July 1996, as well as the import policy changes announced on 1 April 1997 under its annual Export-Import Policy for 1997-1998.

2.6 On 10-11 June 1997, the Committee resumed its consultations with India to discuss the plan. The representative of the IMF noted that his answers to the questions posed during the January 1997 consultation on India's balance-of-payments situation had not changed during the interim period. At that meeting all Members expressed their appreciation of India's commitment to eliminate the import restrictions over a period of time and commended India on the comprehensiveness, transparency and timeliness of the plan. Many Members however voiced concern about the length of the time-schedule; some agreed that India should adopt a cautious approach, others encouraging an acceleration of the phase out. Some Members considered that India's balance-of-payments situation no longer justified continued recourse to Article XVIII:B. In this meeting India offered to revise the phase-out plan to seven years. Since no consensus on the revised proposal on the time-schedule could be reached, the Chairman suspended the meeting to permit further reflection.

2.7 When the Committee reassembled on 30 June 1997, India submitted a plan containing a time-schedule of seven years, under which most of the import restrictions would be eliminated in two phases of a length of three years each and a number of items of high sensitivity or bound at very low rates of duty would be eliminated during the third phase, reduced from three years to one year.

⁶ WT/BOP/R/22, para.15.

⁷ Ibid.

⁸ WT/BOP/N/24, Annex I, Part B.

However, since no consensus on the revised proposal on the time-schedule could be reached, the Chairman closed the meeting on 1 July 1997, noting that the report of the Committee to the General Council would record the views expressed in the Committee.

2.8 The reports of the Committee of the consultations (WT/BOP/R/11; WT/BOP/R/22 and WT/BOP/R/32) were adopted by the General Council.

B. QUANTITATIVE RESTRICTIONS

2.9 This dispute concerns the 2,714 restrictions listed in Annex I, Part B of document WT/BOP/N/24 dated 22 May 1997. This document is a notification by India to the WTO Committee on Balance-of-Payments Restrictions ("BOP Committee"), the Council on Trade in Goods, and the Committee on Market Access.⁹

1. Legal basis under domestic law for import restrictions and import licensing

2.10 Indian domestic legislation governing import licensing can be found in: (i) Section 11 of the Customs Act, 1962, (ii) the Foreign Trade (Development and Regulation) Act, 1992, (iii) the rules and orders promulgated under the Foreign Trade (Development and Regulation) Act, 1992, and (iv) the Export and Import Policy 1997-2002.

2.11 Section 11 of the Customs Act, 1962 provides that the Central Government of India may, by notification in the Official Gazette, prohibit (absolutely or subject to conditions), as specified in the notification, the import or export of any goods. The listed purposes for such prohibition include, *inter alia*: Indian security; maintenance of public order and standards of decency or morality; conservation of foreign exchange and safeguarding of balance of payments; avoiding shortages of goods; prevention of surplus of any agricultural or fisheries product; establishment of any industry; prevention of serious injury to domestic production; conservation of exhaustible natural resources; carrying on of foreign trade in goods by the State or by a State-owned corporation; and "any other purpose conducive to the interests of the general public." Under Section 111 (d) of the Customs Act, goods imported or exported (or attempted to be imported or exported) contrary to any prohibition are liable to confiscation.

2.12 The Foreign Trade (Development and Regulation) Act, 1992 ("FTDR Act") which replaced the Imports and Exports (Control) Act, 1947, authorizes the Central Government to prohibit, restrict or otherwise regulate the import or export of goods, by Order published in the Official Gazette (Section 3(2)). Under section 3(3) of the FTDR Act, all goods to which any Order under section 3(2) applies are deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (and are therefore subject to confiscation under section 111(d) of the Customs Act).

2.13 The FTDR Act prohibits imports or exports by any person except in accordance with the provisions of the FTDR Act, the rules and orders made thereunder and the Export and Import Policy currently in force (Section 11(1)). Under Section 11(2), when any person makes or abets or attempts to make any import or export in contravention of the FTDR Act, any rules or orders made thereunder, or the Export and Import Policy, he is liable to a penalty of up to 1,000 rupees or five times the value of the goods concerned, whichever is greater. Only persons who have been granted an Importer-exporter Code Number ("IEC Number") by the Director General of Foreign Trade (DGFT) may

⁹ WT/BOP/N/24, p. 1 (including statement by India that this notification also fulfilled the notification obligations of India under the Decision on Notification Procedures adopted by the Council on Trade in Goods on 1 December 1995 (G/L/59), and that a copy of the notification had been sent to the Chairman of the Committee on Market Access).

import or export (Section 7).¹⁰ The Director General, who is authorized to grant, renew or deny import and export licences, under Section 9, may suspend or cancel the IEC Number of any person who has contravened customs laws.¹¹

2.14 Section 9 of the FTDR Act also requires the Director General of Foreign Trade as defined in Section 2(d) of the FTDR Act (the "Director General") to record reasons in writing if he fails to grant or renew an import license. If a license is granted, it specifies both the value and the quantity of the item that may be imported. The reasons for which the Director General may deny a license are clearly set forth in Rule 7(1) of the FTR Rules, and include, among others: that an applicant is not eligible for a license in accordance with any provision of the Export and Import Policy, 1997-2002 (the "Exim Policy"); and, in the case of a license for import, that no foreign exchange is available for the purpose.¹²

2.15 Section 15 of the FTDR Act provides for an appeal against any decision or order made under the Act. This right of appeal extends to any decision to refuse a license. In the case of an order by an officer subordinate to the Director General, appeal lies to the Director General; in the case of an order made by the Director General, an appeal lies to the Central Government. In addition, although Section 15(3) of the FTDR Act states that "the order made in appeal by the Appellate Authority shall be final....", it can be challenged as violating a legal or constitutional right under Article 226 of the Constitution before the High Court of any State that is part of the Indian Union. In addition, if the alleged violation is of a fundamental right contained in Part III of the Constitution, it can be challenged under Article 32 of the Constitution before the Supreme Court of India. A challenge would lie, *inter alia*, on the ground that the decision is arbitrary, irrational or discriminatory. The decision of a High Court in turn can be challenged in an appeal to the Supreme Court of India under various provisions of the Constitution.

2.16 Section 19 of the FTDR Act authorizes the Central Government to make rules for carrying out the provisions of the Act, by notification in the Official Gazette. The Foreign Trade (Regulation) Rules, 1993 were issued under the authority of Section 19 of the FTDR Act. They provide generally for licence applications, licence fees, licence conditions, refusal, amendment, suspension or cancellation of licences, and enforcement.

2.17 Section 5 of the FTDR Act authorizes the Central Government to formulate and announce by notification in the Official Gazette the export and import policy. The first such policy, the Export and Import Policy 1992-1997, was in effect from 1992 until 31 March 1997. The policy currently in effect is the Export and Import Policy 1 April 1997 - 31 March 2002. Export and Import Policy statements have been issued once every five years, effective at the 1 April start of the government fiscal year. Revisions during the five-year period generally are published on 1 April of subsequent years during the five-year period, although changes may be made and announced in public notices at any time. The Export and Import Policy 1997-2002 includes, *inter alia*, the Negative List of Imports ("Negative List") found in Chapter 15 of the Export and Import Policy. The list sets forth various prescribed procedures or conditions for imports, and the eligibility requirements including export performance that must be met to qualify for Special Import Licences. Section 4.7 of the Export-Import Policy 1997-2002 provides that "[n]o person may claim a licence as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to grant or renew a licence in accordance with the provisions of the Act and the Rules made thereunder."

¹⁰ Imports made in contravention of section 7 of the FTDR Act are in contravention of section 11 of the Customs Act, 1962 and may be confiscated under section 111(d) of the Customs Act: *Uniflex Cables Ltd. v. Collector of Customs, Bombay - 1995 (77) EJ, T.737 (Tribunal)*.

¹¹ FTDR Act, section 8(1).

¹² Rule 7(1)(j) and (l).

2.18 The Handbook of Procedures published on 1 April 1997 effective for the period 1997 to 2002 sets out the procedures that must be followed to export or import specific goods, and provides application forms for import licences. The ITC (HS) Classifications relates the rules set forth in the Export and Import Policy and the Handbook to the 8-digit product categories set forth in the Harmonized System of commodity classification. For each product listed at the 8-digit level, the book indicates five types of information in five columns: the 8-digit code; the item description, the applicable policy (prohibited, restricted, canalized or free); any conditions relating to the Export and Import Policy (these conditions appear either indicated with the particular item or in licensing notes at the end of the HS Chapter or section thereof); and an indication of whether the product can be imported under a Special Import Licence.

2. Licensing régime

2.19 India regulates the import of goods by means of the Negative List. If an item is on the Negative List, a prospective importer must apply for a licence to the DGFT.

2.20 The Negative List classifies all restricted imports in one of three categories: prohibited items, restricted items, and canalized items. None of the prohibited items, listed in Part I of the Negative List, are listed in Annex I, Part B of document WT/BOP/N/24. In WT/BOP/N/24, Annex I, Part B, restricted items are identified with the symbol "NAL" (non-automatic licensing), "SIL" or "STR" in the column "QR symbol". Restricted items are listed in Part II of the Negative List. An item classified as "restricted" under the Negative List is only permitted to be imported against a specific import licence or in accordance with a public notice issued for that purpose.¹³ The leading item on the Negative List is "all consumer goods, howsoever described, of industrial, agricultural, mineral or animal origin, whether in SKD/CKD condition or ready to assemble sets or in finished form."¹⁴ Paragraph 3.14 of the Export and Import Policy further defines "consumer goods" as "any consumption goods which can directly satisfy human needs without further processing and include consumer durables and accessories thereof." The Negative List also lists seven product categories to be treated as consumer goods "for the removal of doubts": consumer electronic goods, equipments and systems, howsoever described; consumer telecommunications equipments namely telephone instruments and electronic PABX; watches in SKD/CKD or assembled condition, watch cases and watch dials; cotton, woollen, silk, man-made and blended fabrics including cotton terry towel fabrics; concentrates of alcoholic beverages; wines (tonic or medicated); and saffron.¹⁵

2.21 Canalized items, listed in Part III of the Negative List, may in principle be imported only by a designated canalizing (government) agency. A number of canalized items appear in Annex I, Part B of WT/BOP/N/24 (indicated by "STR" in the column labelled "QR Symbol")

2.22 A person intending to import a restricted item must submit an application for an import licence to the Director General of Foreign Trade in India's Ministry of Commerce ("DGFT"), or an officer authorized by him ("licensing authority") with territorial jurisdiction. Import licences are not transferable. Any person who imports or exports (with or without a licence) must have an Importer-Exporter Code (IEC) number, unless specifically exempted.¹⁶ In addition, any person applying for an import or export licence must present a Registration-cum-Membership Certificate (RCMC) granted by the Export Promotion Council relating to his line of business, the Federation of Indian Exporters Organisation, or (if the products exported by him are not covered by any Export Promotion Council)

¹³ See Export and Import Policy, 10, para. 4.1 ("Any goods, the export or import of which is restricted through licensing, may be exported or imported only in accordance with a licence issued in this behalf). See also the restrictions listed in Part II of the Negative List of Imports, *id.*, para. 15.2. In a few instances, specific licences are not needed, although importation is still restricted. For instance, the import of radioactive material is allowed without a licence, subject to the recommendation of the Department of Atomic Energy.

¹⁴ Export and Import Policy, Chapter 15, Part II "SKD/CKD" is "semi-knocked down/completely knocked down".

¹⁵ *Ibid.*

¹⁶ Export and Import Policy, section 4.9.

the regional licensing authority.¹⁷ The application forms for the RCMC requires the applicant to claim status as a merchant exporter or manufacturer exporter of a specific product or products.¹⁸

2.23 The application form for import of items covered by the Negative List requests information on the applicant's name and address, the type of unit, the applicant's registration number, the end product(s) to be manufactured with licensed capacity, details of the items applied for export, the total CIF value applied for, past production in the previous year, exports done during the previous year, and "justification for import".

2.24 Whenever imports require a licence, only the "Actual User" may import the goods, unless the Actual User condition is specifically dispensed with by the licensing authority.¹⁹ Paragraph 3.4 of the Export-Import Policy defines "Actual User" as an actual user who may be either industrial or non-industrial. Paragraph 3.5 of the Policy defines "Actual User (Industrial)" as "a person who utilizes the imported goods for manufacturing in his own unit or manufacturing for his own use in another unit including a jobbing unit." Paragraph 3.6 of the Policy defines "Actual User (Non-Industrial)" as "a person who utilizes the imported goods for his own use in (i) any commercial establishment carrying on any business, trade, or profession; or (ii) any laboratory, Scientific or Research and Development (R&D) institution, university of other educational institution or hospital; or (iii) any service industry." The Actual User then cannot legally transfer the imported goods to anyone except with prior permission from the licensing authority concerned, except for a transfer to another Actual User after a period of two years from the date of import.²⁰

2.25 About ten per cent of tariff lines subject to import licensing may also be imported under Special Import Licences (SILs). These items are listed in WT/BOP/N/24, Annex I, Part B by the symbol "SIL" in the "QR symbol" column.

2.26 Firms receive SILs from the Indian Government in proportion to their exports or NFE (net foreign exchange) earnings. SILs are issued by the DGFT or regional licensing authorities, and are freely transferable (there are SIL brokers and a resale market for SILs).

2.27 There are various methods by which a person or firm may apply for a Special Import Licence. First, an established private or state-run exporter which meets export performance criteria set forth in Chapter 12 of the Export and Import Policy, and elaborated upon in Chapter 12 of the Handbook, can qualify to be recognized by the regional licensing authority or the DGFT as an Export House, Trading House, Star Trading House, or Super Star Trading House.²¹ Such designated exporters automatically qualify for SILs on the basis of entitlement rates set out in paragraph 12.7 of the Handbook.²² Additional bonuses are earned if a designated exporter exports specified products (products made by small-scale industries; fruits, vegetables, flowers or horticultural products; or products made in the

¹⁷ Export and Import Policy, paras. 4.10 and 13.8 ; Handbook para. 13.3; Handbook Appendix 14 .

¹⁸ See "Form of Application for Registration cum Membership with Export Promotion Councils" and "Form of Registration cum Membership Certificate", from Handbook, App. 3A and 3B.

¹⁹ Export and Import Policy, para. 5.2.

²⁰ Handbook, para. 5.36 .

²¹ Status as an Export House, Trading House, Star Trading House, or Super Star Trading House is accorded by the DGFT or the regional licensing authority on the basis of the FOB/Net Foreign Exchange (NFE) value of exports of goods and services by the exporter concerned during the preceding three years or the preceding licensing year, at the option of the exporter. Export and Import Policy, para. 12.3.

²² Super Star Trading Houses must have made Rp. 2,250 crores in exports or Rp. 1,800 crores in net foreign exchange earnings in the preceding licensing year, or averaged Rp. 1,500 crores in exports/1,200 crores in NFE earnings in the preceding three licensing years. Export and Import Policy, para. 12.5.

North Eastern States) and where over 10% of such an exporter's exports are to one or more of 43 listed Central and Latin American countries and territories.²³

2.28 Other exporters can still receive Special Import Licences equal to 4% of the fob value of their exports, subject to certain minimum export criteria set out in paragraph 11.11 of the Handbook. SILs are also granted to exporters of telecommunications equipment and electronic goods and services;²⁴ to exporters of diamonds, gems and jewelry;²⁵ to deemed exporters;²⁶ and to small scale exporters holding ISO/9000-series or IS/ISO/9000-series quality certification.

III. CLAIMS AND MAIN ARGUMENTS

A. SCOPE OF THE COMPLAINT

3.1 The United States requested the Panel to find that:

- the quantitative restrictions at issue violate Article XI:1 and XVIII:11 of the GATT 1994 and Article 4.2 of the Agriculture Agreement; and
- recommend that India bring its measures into conformity with the GATT 1994 and the Agreement on Agriculture.

3.2 At the request of the Panel, the **United States** clarified that it sought a ruling that India is not currently justified under the balance-of-payments exception. If India asserted that these restrictions were justified under Article XVIII:B of GATT 1994, the United States requested the Panel to accept the findings and determinations made by the IMF. It also requested that the Panel find that the additional evidence presented by the United States corroborated the IMF's determination.

3.3 The United States considered that the Panel should find that Article XVIII:B is in the nature of an affirmative defense with respect to which India bears the burden of proof and requested the Panel to make an alternative conditional finding that even if the burden of proof were on the United States to make a *prima facie* case, that India no longer had any justification for maintaining the measures under Article XVIII:B, the United States would have met this burden.

3.4 The United States further requested the Panel to find that each of the four restrictions, discussed below in paragraph 3.9, constituted a quantitative restriction within the meaning of GATT 1994 and the Agreement on Agriculture in order that there be no confusion as to which measures the Panel's recommendations applied.

²³ Handbook Vol.1, para. 12.7. The countries and territories targeted are: Antigua, Argentina, Bahamas, Barbados, Belize, Bermuda, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Falkland Islands, French Guiana, Grenada, Guadeloupe, Guatemala, Guyana, Haiti, Honduras, Jamaica, Martinique, Mexico, Montserrat, Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, St. Vincent, St. Kitts-Nevis-Anguilla, St. Lucia, Suriname, Trinidad & Tobago, Uruguay, Venezuela, Virgin Islands (U.S.). Appendix 33.

²⁴ Export and Import Policy, para. 11.9.

²⁵ Exports of diamond, gem, and jewelry products are counted at 50% of the actual FOB value of exports.

²⁶ Chapter 10, para. 10.1 of the Export and Import Policy defines "deemed exports" as transactions in which the goods supplied do not leave India and the payment for the goods is made in India by the recipient of the goods. Para. 10.2 of the Policy provides that the following categories of supply of goods by the main or sub-contractors qualify as "deemed exports" if the goods are manufactured in India: (1) Supply of goods against duty-free licences under the Duty Exemption Scheme; (2) Supply of goods to Export Oriented Units or units located in Export Processing Zones or Software Technology Parks or to Electronic Hardware Technology Parks; (3) Supply of capital goods to holders of licences under the Export Promotion Capital Goods scheme, under certain conditions; (4) Supply of goods to projects financed by multilateral or bilateral agencies under international competitive bidding where the legal agreements provide for tender evaluation non-inclusive of the customs duty; (5) Supply of capital goods and spares to fertilizer plants (up to 10% of free-on-rail value) if under international competitive bidding; (6) Supply of goods to any project for which the Ministry of Finance has permitted duty-free imports; (7) Supply of goods to approved projects in the power, oil and gas sector.

3.5 If the Panel did not agree to the request for the ruling on Article XI:1, Article XVIII:11 and Article 4.2 of the Agreement on Agriculture, then the United States in its second written submission, sought a ruling that the measures at issue were not applied in accordance with Article XIII:2:(a).

3.6 **India** requested the Panel to reject the US complaint. India claimed that it was clear from Article XVIII:12 and the 1994 Understanding that the conformity of import restrictions with Article XVIII:9 and 11 must be determined by the General Council and that the Member may maintain the import restrictions until it had been informed of their inconsistency with the criteria set out in Article XVIII:9 and 10 by the General Council. In the absence of such a determination by the General Council, India continued to have the right to maintain the remaining restrictions under Article XVIII:B. In India's view, acceptance of the arguments of the United States would result in making whole paragraphs of Article XVIII:B and whole sections of the 1994 Understanding redundant, altering fundamentally the negotiated balance reflected in the text of Article XVIII:B and the 1994 Understanding. It would also be a serious deviation from practices consistently followed under the GATT 1947 and result in transferring without any basis the authority to determine the legal status of import restrictions from the Committee and the General Council to the IMF and panels. Furthermore India claimed that, in light of Article XVIII:12 (d), as well as Appellate Body rulings, the United States bore the burden of demonstrating that India's restrictions were inconsistent with Article XVIII:11.

3.7 With respect to the violation of Article XI:1, India claimed that no finding was necessary since the measures at issue had been notified as quantitative restrictions within the meaning of Article XI:1 India added that Article XI:1 simply prohibited quantitative restrictions; it did not regulate how quantitative restrictions that Members were allowed to maintain under exceptions to Article XI:1 were to be administered. India claimed that the manner in which import restrictions were administered was regulated by other provisions, including Article XIII of GATT 1994 and the Agreement on Import Licensing. However, findings on the consistency of the administration of the measures should not be considered by the Panel because the requests were not made, not even subsidiarily, in the first submission of the United States.

3.8 India also claimed that Article 4.2 of the Agreement on Agriculture, as clarified in the note to this provision, did not cover measures taken under the balance-of-payments provisions of the GATT. Therefore, the restrictions maintained by India were not inconsistent with Article 4.2 of the Agreement on Agriculture.

[Parties' arguments in Part B through E of Section III deleted from this version]

IV. INTERIM REVIEW²⁵⁴

4.1 The interim report of the Panel was issued to the parties on 11 December 1998. On 14 December, India requested additional time to review the interim report, in accordance with Article 12.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"). On 15 December, the Panel informed the parties that it had decided to extend the due date for the comments on the interim report from 22 December 1998 to 12 January 1999. On 12 January 1999, the United States and India submitted comments regarding the interim report in accordance with Article 15.2 of the DSU. India also requested the Panel to hold a meeting with the parties to discuss the issues raised in its comments. We met with the parties on 15 February 1999, reviewed the entire range of arguments they presented, and finalised our report, taking into account the specific aspects of the parties' arguments we considered to be relevant.

4.2 During our interim review meeting with the parties, we recalled that we had specified cut-off dates for the submission of new material and new arguments. We also specified that we were of the view that the purpose of the interim review stage was not to provide the parties with an opportunity to introduce new legal issues and evidence or to enter into a debate with the Panel. The purpose of the interim review stage is to consider specific and particular aspects of the interim report. Consequently, the Panel addressed the entire range of such arguments presented by the parties which it considered to be sufficiently specific and detailed. In practice, this meant that the parties should limit their comments to the precise aspects raised in the request for review and refrain from introducing new legal issues and evidence.

A. COMMENTS BY THE UNITED STATES

4.3 With respect to the comments made by the United States on the descriptive part of the report, most of them were essentially of a clarifying nature. We took them into account and accordingly modified paragraphs 2.6, 3.82, 3.108 (footnote 98), 3.137, 3.152, 3.279.

4.4 Regarding the findings, we took into consideration the US suggestions which improve the clarity of our findings and accordingly modified paragraphs 5.53, 5.172, 5.178 and 5.179. We also revised our reasoning on burden of proof in paragraphs 5.116 to 5.121 to make it more explicit. We also made minor changes in paragraphs 5.191 and 5.197. Furthermore, we clarified paragraphs 5.206, 5.207, 5.209, 5.210, 5.211, 5.214 and 5.218 to 5.223. With respect to the footnote to paragraph 5.231, we made it clear that we meant a vote in the General Council, not in the BOP Committee. Finally, we slightly amended paragraphs 5.233, 5.234 and 5.235. In reaching our findings, we did not find it necessary to address the request of the United States that we determine which party had the burden of proof in relation to Article XVIII:B in general. The Panel applied the principle recalled by the Appellate Body in the case on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*,²⁵⁵ according to which each party had to support each of its particular claims.

4.5 We declined to expand the scope of our conclusions on the level of India's monetary reserves beyond the date of establishment of the Panel, and we did not follow the US suggestions that paragraphs 5.180 and 5.183 should contain conclusions as to whether India's measures exceeded those that were necessary within the meaning of Article XVIII:9, since these conclusions are contained in paragraph 5.184.

²⁵⁴ According to Article 15.2 of the DSU, "the findings of the final report shall include a discussion of the arguments made at the interim review stage". The following section entitled "Interim Review" is therefore part of the findings of our report.

²⁵⁵ WT/DS33/AB/R, adopted on 23 May 1997.

4.6 Regarding our suggestions in paragraphs 7.1 to 7.7, we agree with the United States that the parties did not address explicitly the phase-out issue in terms of the implementation period provided for in Article 21 of the DSU. However, Article 19.1 of the DSU allows panels to "suggest ways in which the Member concerned could implement the recommendations", and it does not seem that such suggestions are dependent on whether they were discussed as such by the parties. While the term "ways" may be interpreted as referring to specific actions that would ensure an appropriate implementation of the recommendations, it cannot be limited exclusively to that. The Panel did not consider that it fell within its role to suggest particular measures which might accompany the removal of the quantitative restrictions at issue, but it feels justified in suggesting that a certain period of time should be granted to India in order to implement the recommendations.

B. COMMENTS BY INDIA

4.7 India made both general and specific comments on the descriptive part and the findings of the interim report. India also made comments of a procedural nature during the interim review meeting with the Panel.

4.8 With respect to the comments made by India on the descriptive part of the report, India wished to add further information regarding its BOP Committee consultations, including selective references to consultations held in 1992, although these points were not included in the arguments presented to the Panel. The Panel considered that ample history of discussions held in the Committee was provided as of 1994. India also wished to add to paragraph 2.6 that "others agreed that India's residual import restrictions were justified under Article XVIII:B". However, the paragraph refers to the June 1997 consultation and the report of those consultations (WT/BOP/R/32), which records the different views expressed, does not include any such citation; rather, three delegations – including one with observer status - suggested that India had fulfilled its obligations. India also considered that a description of the licensing regime that gives effect to the quantitative restrictions under dispute should not be included under the "Factual Aspects" section. However, the Panel considered that a factual description should be included in this section. It nevertheless took into account some of India's suggestions on that part of the descriptive part of the report and modified paragraphs 2.14, 2.15, 2.18, 2.19, 2.20, 2.21, 2.23, 2.24, 2.25, 2.26, 2.28. On the other hand, India wished to include a specific section on consultations under Article XXII of GATT 1994 held with other trading partners, during which mutually agreed solutions were reached, as "Procedural Events Leading to the Dispute". We deemed that these consultations were not facts directly related to this panel procedure; a full account of these consultations is included in the Section III.D.8(d). India also wished that its basic legal claims be presented in more details in reply to the presentation of the US claims found in Section III.A of the interim report called "Scope of the Complaint". In order to accommodate India's request, we added a summary of India's claims as found in its submissions in paragraphs 3.5, 3.6, 3.7 and 3.8. Finally, we also added paragraph 3.39 and modified paragraph 3.70.

4.9 During the interim review meeting with the parties, India also claimed that, after the IMF had, in the view of India, predicated removal of India's quantitative restrictions on specific changes in India's development policies, India had had no opportunity to present any facts with respect to these aspects of its development policy for purposes of the proviso to Article XVIII:11. India claims that only after the IMF gave its response to the questions from the Panel could India complain that it was being forced to remove its restrictions on the ground that a change in its development policy would render its restrictions unnecessary. However, at that time, the Panel had explicitly instructed the parties that they could not introduce new facts in their comments. We recall that, at the organization meeting, we had reserved our right to set a cut off date for the submission of evidence. At that time, we had considered that the date for receipt of rebuttals would be the cut off date. We also recall that, when we communicated to the parties the replies of the IMF to our questions, we specified that "Parties shall not include in their comments any material or reference that is not yet part of the record". Moreover, we cannot agree with India that it could address this issue only after the IMF

replied to the Panel. The IMF's answers on the removal of the measures and the suggestions made in its replies to the Panel were not new to India. During the consultations that took place in January 1997, the representative of the IMF had already presented the Fund's view in terms similar to those used in the replies to the Panel.²⁵⁶ India also claims that it addressed the issue of development policy as early as its first written submission and its replies to the second series of questions from the Panel. We therefore consider that India had several opportunities to address the question of the impact of the removal of the measures on its development policy and was not denied an opportunity to introduce any facts on its development policy in relation to the proviso to Article XVIII:11.

4.10 Regarding the findings, India's general comments emphasize two themes. Firstly, India objects to the Panel's conclusion that the Panel is competent to review the balance-of-payments justification of India's quantitative restrictions under Article XVIII:B. Secondly, it claims that the Panel is wrong in making a finding that would require the immediate removal of the measures at issue by India.

1. Review of the balance-of-payments justification of India's measures

4.11 India argues that the Panel's interpretation of footnote 1 to the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (hereafter the "1994 Understanding on Balance-of-Payments Provisions" or the "1994 Understanding") is incorrect, essentially focusing on four issues. Firstly, India challenges the interpretation of the Panel based on the ordinary meaning of the terms. Secondly, India also considers that the Panel misconstrued the preparatory work of the 1994 Understanding. Thirdly, it considers that the Panel misconstrued the practice under GATT 1947. Finally, India claims that the Panel's interpretation creates an imbalance between the BOP Committee procedures and the dispute settlement system.

(a) Interpretation of the terms of footnote 1

4.12 Footnote 1 to the 1994 Understanding on Balance-of-Payments Provisions provides that the WTO dispute settlement provisions "may be invoked with respect to any matters arising from the application of restrictive measures taken for balance-of-payments purposes". India claims that our interpretation of the footnote deprives the term "application" of any useful effect. We disagree. We identified the ordinary meaning of the terms which is confirmed by their context and the object and purpose of the WTO Agreement, whereas India's interpretation could be considered rather to support a special meaning (within the meaning of Article 31.4 of the Vienna Convention on the Law of Treaties of 1969 – hereinafter the "Vienna Convention"), in respect of which it has not proved that there was an agreement of the negotiators.

4.13 India also contests our interpretation of the context of the footnote, arguing that we failed to address explicitly its arguments concerning the use of the term "application" in the Understanding on the Interpretation of Article XXIV of the GATT 1994 (hereinafter the "1994 Understanding on Article XXIV"). We have expanded our discussion of this issue in paragraphs 5.70 to make it clear that the use of the term "application" in the 1994 Understanding on Article XXIV, if anything, supports our interpretation.

4.14 India further claims that the Panel does not acknowledge the fact that the terms "the application of" appear only in two references to the DSU, namely the 1994 Understandings on Balance-of-Payments Provisions and Article XXIV, that only in these areas was recourse to Article XXIII at issue in GATT cases, and that the terms "the application of" therefore must have been intended to qualify the right to resort to the DSU. We note, however, that the terms "the application of" appear in several other dispute settlement provisions of the WTO Agreement (such as Article

²⁵⁶WT/BOP/R/22, Annex II, paragraph 12.

XXIII:1(b) of GATT 1994 and Article XXIII:3 of GATS), but are not used in any of these provisions in a way that would lead us to imply a limitation on the availability of dispute settlement. Thus, we cannot accept the claim that the use of the terms "the application of", as such, implies a limitation on the availability of dispute settlement. Moreover, the different phrasing of the two Understandings argues against India's interpretation, as we explain in paragraph 5.70. Indeed, in the 1994 Understanding on Article XXIV, the terms at issue seem to serve the opposite purpose, that of confirming the full applicability of the DSU to Article XXIV agreements in cases where it was once disputed.

4.15 India also complains that the Panel gave inadequate attention to its examples of where it is accepted that dispute settlement procedures do not apply. We have expanded our discussion of this issue (paragraph 5.87, footnote 310). However, even if we were to accept India's point that it could be inappropriate for certain issues to be resolved by dispute settlement panels, that observation in itself does not shed light on whether footnote 1 to the 1994 Understanding on Balance-of-Payments Provisions confirms the availability of dispute settlement in cases such as this one.

(b) Practice under GATT 1947

4.16 India claims that the Panel's analysis of the practice under GATT 1947 is misleading. While we have made minor adjustments in paragraphs 5.39 to 5.46, we maintain our analysis. We do not agree that, with the exception of the Panel Report on *Republic of Korea - Restrictions on Imports of Beef, Complaint by the United States*,²⁵⁷ there has never been a request for the examination of the balance-of-payments justification of restrictions under Article XXIII (see paragraphs 5.37-5.38 and the footnotes attached thereto). The existence of these cases is at variance with India's contention that the question of justification has always been reserved exclusively to the BOP Committee and that no resort to dispute settlement is possible in relation to the justification of measures under Article XVIII:B.

4.17 India also argues that the Panel misinterpreted the finding of the *Korea - Beef* report. Firstly, India claims that we speculate when we state in paragraph 5.45 that we find no evidence that the panel would have refused to review the claims of the complainants as to the justification of the balance-of-payments measures if the BOP Committee had not issued a report. We believe our statement is correct. In the *Korea - Beef* case, the BOP Committee had issued a report, but the panel found it relevant to seek confirmation that the situation was still that which had led the BOP Committee to reach its conclusions. Such a verification, involving the review of additional data published by the Korean authorities and advice from the IMF, would not have been justified if the panel had considered the Committee's opinion to be decisive and had not considered itself competent to review the justification of the Korean measures. No other interpretation can reasonably be given to the analysis found in paragraph 123 of the *Korea - Beef* report. The panel itself reached its conclusion that there was a "continued improvement in the Korean balance-of-payments situation", a conclusion which could not be based solely on the Committee report, which dated back to 1987.

4.18 India also argues that the *Korea - Beef* panel declared itself competent to look at the justification of the measures only because its terms of reference had been agreed by the complaining parties and Korea. However, its terms of reference did not expressly address the Article XVIII:B issue. The panel was directed "to examine [the Korean measures] in light of the relevant GATT provisions". In response to a request from Korea for a ruling on the admissibility of the claim under Article XXIII, the panel made an initial ruling that it clearly had a mandate to examine the merits of

²⁵⁷ Adopted on 7 November 1989, BISD 36S/268 (hereinafter the "*Korea - Beef* case"). Two other complaints were addressed by the same panel, but led to separate reports. See Panel Reports adopted on 7 November 1989, *Republic of Korea - Restrictions on Imports of Beef, Complaint by Australia*, BISD36S/202 and *Complaint by New Zealand*, BISD 36S/234.

the case in accordance with its terms of reference.²⁵⁸ In its findings, it then proceeded to consider "whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII". While the panel did, in its findings, refer to its terms of reference, it did so *after* it had considered the arguments of the parties concerning past deliberations by the CONTRACTING PARTIES on the exclusivity of special review procedures under the GATT and had decided that these earlier deliberations were not directly applicable in the present dispute. Then, the panel added a paragraph on the drafting history of Articles XVIII and XXIII and an analysis of their terms and functions. The panel considered that, by accepting its terms of reference, Korea had agreed to the competence of the panel to review the matter in the light of the relevant GATT provisions. From this general competence, the panel deduced its competence to review the justification of the measure under Article XVIII:B, which is part of the "relevant GATT provisions". Thus the panel's competence under Article XVIII:B was the result of its reasoning, not that of an express acceptance by Korea. This is the meaning of the first reference to Korea's acceptance of the panel's mandate, in paragraph 117. In its context, the sentence cannot be read as meaning that the panel relied on a specific acceptance by Korea of its competence under XVIII:B, and even less that it relied *exclusively* on Korea's acceptance of its mandate to look at the justification of the measures under Article XVIII:B.²⁵⁹ The reference to the fact that "the parties have chosen to proceed under Article XXIII" is obviously based on the same reasoning. We therefore consider that India's references in the *Korea - Beef* case do not support its argument according to which the panel in that case did not conduct its own analysis of the justification of the measure and only reviewed the justification of measures essentially because Korea had accepted that it do so.

(c) Preparatory work

4.19 India further claims that we did not properly address the preparatory work of the 1994 Understanding. As mentioned in paragraph 5.110, we did not need to look at the preparatory work since the meaning resulting from our analysis under Article 31 of the Vienna Convention was neither ambiguous or obscure, nor did it lead to a manifestly absurd or unreasonable result. It is a well established principle of interpretation of international law not to refer to the preparatory work if the ordinary meaning of the text, taken in its context and in the light of the object and purpose of the treaty, is clear. On the other hand, recourse to the preparatory work must always be undertaken with caution and prudence.²⁶⁰ The purpose of paragraphs 5.106 to 5.111 was to show that limited use could be made of the document invoked by India, since India could not provide evidence that the US-Canada proposal was rejected specifically because of the part of the proposal that dealt with recourse to Article XXIII. Indeed, several other reasons could have contributed to the rejection of the proposal, which makes relying on it problematic. In any event, we have expanded our discussion of the preparatory work in paragraphs 5.106-5.111 to make those points more clearly.

(d) Allocation of decision-making in balance-of-payments matters

4.20 In respect of its argument that the interim report improperly allocates decision-making authority in balance-of-payments matters between panels and the BOP Committee, India first contends that, in application of the principle *lex specialis derogat legi generali*, the general provisions according to panels the right to make legal findings cannot override the specific provisions giving the BOP Committee and the General Council the power to make specified determinations. India did not really present its argumentation in terms of *lex specialis* during the Panel's proceedings and the Panel considers that this concept does not apply in the present case. While the two procedures may be said to apply to the same subject matter, the second condition for the application of the principle of *lex*

²⁵⁸ Op. Cit., para. 10.

²⁵⁹This is consistent with Korea's later contention on justification: Korea could challenge the competence of the panel to look at the justification without negating its consent to the terms of reference.

²⁶⁰ Ian Sinclair, The Vienna Convention on the Law of Treaties (1980), p. 142.

specialis, i.e. the existence of a conflict between the two, is not met. The objective of the Committee procedure under Article XVIII:12(b)²⁶¹ is a general review of a Member's policy by the BOP Committee and the General Council, whereas the DSU applies in case of a dispute between two Members related to specific measures. Moreover, the Panel in its analysis of the operation of the two procedures found no circumstances where, in practice, those procedures would conflict (see paragraphs 5.92-5.97). In any event, the principle of *lex specialis* is only subsidiary. If the treaty provides for the relationship between the two "conflicting" rules, the principle no longer applies.²⁶² In the present case, footnote 1 to the 1994 Understanding on Balance-of-Payments Provisions clearly confirms the application of the DSU to balance-of-payments matters.

4.21 As to the argument of India that our findings lead to the anomalous result that the power to make the same decision is accorded to two different organs, we consider that it is based on an inappropriate assumption. As explained above, the two procedures (that under Article XVIII:12(b) and that under the DSU) fulfill two different and complementary objectives. One is meant to allow the review of a policy by the WTO, the other one is meant to preserve the rights of Members under the WTO Agreement. As explained in paragraphs 5.92-5.97, which we have modified slightly, we see no problem of conflicts. India also argues that it is a denial of due process to have dispute resolution available to an aggrieved Member only. We disagree. In our view, a Member invoking Article XVIII:B to justify its restrictions has nothing to complain about since it may maintain its restrictions until the Committee recommends that they should be removed. Comparatively any other Member may have reasons to complain at any time that the measures for which Article XVIII:B is invoked are not, or no longer, justified. We do not agree either that the Panel declares itself competent only to take decisions that are potentially adverse to the Member imposing balance-of-payments measures. If balance-of-payments measures are found to be justified, a panel will not find against that Member on that aspect. Moreover, while that Member may not be able to block adverse findings by a panel, as a practical matter it can do so with Committee recommendations. In light of this, the Panel considers its conclusion as to the availability of dispute settlement concurrently with the Committee procedures more in compliance with the basic principles of procedural justice than an interpretation that would allow measures not in conformity with Article XVIII:B to be maintained at the will of the Member imposing them.

4.22 India also claims that we failed to address its argument that "the transfer to panels of the competence explicitly assigned in Article XV:2 and XVIII:12 to the General Council would eliminate the procedural rights which Article XVIII:B and the Balance-of-Payments Understanding accord to Members in balance-of-payments difficulties". India's reasoning that it would be deprived of its procedural rights is based on the fundamental assumption that (i) Members have a right to "an assessment of their difficulties and corrective policies by peers" and (ii) that if a panel decides on the issue before the BOP Committee has completed its own examination, the BOP Committee will be bound by the findings of the panel. Nowhere in our report do we say this. The initiation of a dispute settlement procedure with respect to certain measures does not prevent the examination of their justification in the BOP Committee. Moreover, the BOP Committee is not constrained by the aspects of due process which require that a panel set a cut-off date for the facts on which it will rely. In other words, the Committee may always decide on the basis of new facts. Thus, just as the panel in *Korea - Beef* made its own assessments of the facts that followed the BOP Committee's decision, the BOP Committee can make its own assessment of the facts subsequent to the date of establishment of the Panel. India's arguments are of course concentrated on its position as a consulting Member. However, the situation of the Members whose rights under the WTO Agreement are affected by India's measures should not be forgotten. If one were to follow India's arguments, pursuant to which a Member can maintain measures as long as no decision to the contrary has been taken by the General Council, even when there is no longer any balance-of-payments justification, the rights of other

²⁶¹ In the course of which inconsistent measures may be identified by the BOP Committee, pursuant to Article XVIII:12(c).

²⁶² Sinclair, *Op. Cit.*, p. 97, Daillier and Pellet, *Droit international public* (1994), p. 263 and 265.

Members under the Agreement would be unduly affected, with no effective means of redress, as noted in paragraph 4.21.

2. Immediate removal of the measures and consequence thereof

4.23 India claims that the Panel's finding that the Note Ad Article XVIII:11 requires India to remove all its import restrictions at once lacks any basis in law and facts. The Panel addresses the arguments of India in relation to this issue in paragraphs 5.201 to 5.215. We were required to determine whether a given measure was consistent with the provisions of Article XVIII:B. We concluded that India was in violation of Article XVIII by still maintaining in November 1997 measures that were no longer justified under Article XVIII:B. The fact that the Panel found that, as from November 1997, the measures were not justified does not mean that they should be removed immediately.²⁶³ We could not rule on a phase-out period, but we suggested that the reasonable period of time to implement the DSB recommendations on this matter be considered in the light of a number of factors listed in paragraph 7.5. For that reason, we think that our decision is consistent with the facts and the applicable norms.

4.24 India also claims that our interpretation of the word "thereupon" in the Note Ad Article XVIII renders that provision inoperative in practice. We disagree. We consider that our interpretation of the word "thereupon" is consistent with the principles of interpretation of the Vienna Convention and is the only one that could give a useful meaning to that term. As shown in paragraphs 5.196 to 5.198, the interpretation suggested by India (*inter alia*: "by direct agency" in English, "sans intermédiaire" in French) would make the word "thereupon" redundant, since the causal link in the Ad Note is clear without that word. Moreover, saying that the relaxation or removal of the measures would "directly" (in the sense of not indirectly) produce the conditions foreseen in Article XVIII:9 would also simply restate the causal link, which is not necessary.

4.25 India comments at length on the nature of its development policy and the fact that the Panel did not address this central issue. We note first that India has submitted new data at the interim review stage. There is no trace either in the record of the Planning Commission's estimate that India faces an additional threat to its reserves from an increase in the trade deficit and a fall in its foreign exchange reserves to "significantly below" US\$16 billion in a period ranging between a few months and one year. We agree with the United States that this submission of additional information is untimely. We consequently decided not to take it into account. Secondly, we remain unconvinced that India "has argued in detail and at length" regarding the changes that an immediate removal of the measures at issue would require in India's development policy. We do not disagree that India discussed the first sentence and the proviso of Article XVIII:11, or the impact of the removal of the measures on its development policy. Accordingly, we revised the part now corresponding to paragraphs 5.216 to 5.223. However, we do not agree that India produced sufficient evidence to support a claim that the removal of the measures at issue actually would require a change in its development policy. Nor can we share India's view as to the risks entailed by India's economy as a result of the removal of the measures. In paragraph 5.204, we note the IMF views that the restrictions should be removed over a relatively short period of time, not immediately, but we also note that this period has nothing to do with a gradual phase-out accompanying a reduction of balance-of-payments difficulties. This is why we suggest that they should be removed within a reasonable period of time.

4.26 We note in this regard that India, in support of its contention that immediate removal of its measures would immediately lead to balance-of-payments difficulties, refers to a potential surge in imports. India does not always take into account the distinction between a projected change in imports and a projected change in its reserves. The removal of the measures at issue will most

²⁶³Article 21.3 of the DSU does not require immediate compliance with DSB recommendations and rulings if it is impracticable to do so.

probably lead to an increase in imports, but showing that imports will increase, even substantially, does not demonstrate that balance-of-payments difficulties within the meaning of Article XVIII:9 will occur *ipso facto*. For instance, India does not take into account in its assessment the positive effects that would result from the removal of import restrictions. In relation to this, we clarified our own statements in paragraph 5.207.

3. Other specific comments

4.27 India claims in relation to paragraphs 5.159-5.163 that the Panel should not use the date of its establishment as the date at which India's balance-of-payments and reserve situation should be reviewed. Rather, India claims that "The respondent party must be able to prepare its defence as from the request for the establishment of the Panel." We first recall that our terms of reference were set as of the date of establishment and added practical reasons for using this date, as contained in paragraph 5.161-5.162. Our decision on this issue is also consistent with past practice under GATT 1947.²⁶⁴ Secondly, we note that India was, during the course of the proceedings, in favour of taking into account the latest economic developments possible, i.e., using a date *after*, not *before*, the date of establishment of the Panel. The Panel therefore finds no reasons to modify paragraphs 5.159 to 5.163.

4.28 India claims that the Panel presents in paragraph 5.232 and 5.235 "speculations on the scope of the authority of the BOP Committee and the General Council under paragraph 13 of the Understanding". The Panel addressed this matter in reply to India's arguments related to its alleged right to a phase-out period. It finds it appropriate to keep this discussion.

4.29 Finally, in light of the comments by India, we also modified paragraphs 5.34, 5.47, 5.53, 5.84, 5.114, 5.244, 5.245.

V. FINDINGS

5.1 The United States requests the Panel to find that the challenged measures, notified by India in Annex I, Part B of document WT/BOP/N/24, are quantitative restrictions subject to Article XI:1 and are not justified under the provisions of Article XVIII:11 of GATT 1994. The United States also claims that the measures are in violation of Article 4.2 of the Agreement on Agriculture. India requests the Panel to note that both parties agree that the import restrictions at issue fall under Article XI:1, but disagree on their justification under Article XVIII:B.

5.2 In the event that the measures are found not to be in violation of Article XVIII:11, the United States also requests a finding that the challenged measures violate Article XIII of GATT 1994. The United States also identified in its request for establishment of the Panel a violation of Article 3 of the Agreement on Import Licensing Procedures.

5.3 In the course of the proceedings, the Panel made a preliminary ruling and consulted the International Monetary Fund. These actions are addressed first (in Part B). We then clarify the scope of the complaint to be addressed by the Panel (Part C). In its defence, India raised issues relating to the extent of the competence of this Panel to address issues relating to the justification of import restrictions taken for balance-of-payments purposes under Article XVIII:B of GATT 1994. We consider these arguments and determine the scope of our competence in this dispute in Part D, before addressing the issue of burden of proof in Part E. In Part F, we address the claim of violation of Article XI:1 of GATT 1994, and then in Part G, we consider the claim of violation of Article XVIII:11 and the possible justification of the measures under Article XVIII:B. The claim of violation of Article 4.2 of the Agreement on Agriculture is then addressed in Part H. The claim of violation of Article XIII of GATT 1994 is addressed in Part I.

²⁶⁴Panel Report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, para. 5.2.

5.4 Before proceeding further in our examination, it is useful to recall the main events which preceded the establishment of this Panel.

A. FACTS LEADING TO THE DISPUTE

5.5 India has, for the past fifty years, applied quantitative restrictions justified for balance-of-payments reasons. These were applied under Article XII of GATT 1947 between 1950 and 1957 and, since, under Article XVIII:B. India has been consulting regularly under Article XVIII:B since 1957. After a serious crisis in 1990-1991 where India's monetary reserves were depleted, its balance-of-payments situation has gradually improved and it has implemented economic reforms and import liberalization programmes, including reduction of its quantitative restrictions. At the conclusion of the 1994 simplified consultations with the Committee on Balance-of-Payments Restrictions (hereafter the "BOP Committee" or the "Committee"), the Committee noted that, if the balance of payments of India showed sustained improvement, India's stated aim was to move by 1996/97 to a regime in which import licensing restrictions would only be maintained for environmental and safety reasons. Members of the Committee welcomed the significant improvements in India's balance-of-payments position but recognized that it remained volatile. The Committee concluded that a full consultation in the second half of 1995 was desirable.²⁶⁵

5.6 During the 1995 full consultations, the Committee invited the International Monetary Fund (IMF) to participate in the consultations in accordance with Article XV:2 of GATT 1994. In an official statement to the Committee, the IMF representative noted that, with continued prudent macroeconomic management, the transition to a tariff-based import regime with no quantitative restrictions could reasonably be accomplished within a period of two years. The Committee also noted the view expressed by India that, in the context of a deteriorating balance-of-payments situation, it would be neither prudent nor feasible to consider the general lifting of existing quantitative restrictions on imports at this stage. Many Members supported India's continued use of import restrictions under Article XVIII:B for balance-of-payments reasons in view of the uncertainty and fragility they perceived in India's balance-of-payments position. Many other Members stated that India's balance-of-payments position was comfortable, that India did not currently face the threat of a serious decline in foreign exchange reserves as set out in Article XVIII:9 and that therefore India was not justified in its continued recourse to import restrictions for balance-of-payments reasons. Many Members asked India *inter alia* to present a firm time-table for the phasing out of the restrictions. The Committee did not reach any conclusions and welcomed India's readiness to resume consultations in October 1996.²⁶⁶

5.7 During the resumed consultations which were held in January 1997, the BOP Committee took note of the IMF's statement that India's current monetary reserves were not inadequate and that there was no threat of a serious decline in India's monetary reserves. The Committee agreed to resume consultations in June 1997 to consider a plan to be presented by India to eliminate the measures notified under Article XVIII:B and to conclude the consultations consistently with all relevant WTO balance-of-payments provisions.²⁶⁷ On 19 May 1997, India presented a new notification in document WT/BOP/N/24, including a nine year phase-out plan for removal of the measures. At the June 1997 consultations, the IMF representative stated that the views of the IMF as expressed during the January 1997 consultations on India's balance-of-payments situation had not changed during the interim period. In the course of consultations, India proposed a phase-out period of six years, plus one year for a limited number of products. A number of Members were of the view that the phase-out period for the existing measures should not exceed five years.²⁶⁸ The BOP Committee concluded its

²⁶⁵ BOP/R/221, 1 December 1994, para. 4.

²⁶⁶ WT/BOP/R/11, 23 January 1996.

²⁶⁷ WT/BOP/R/22, 3 March 1997.

²⁶⁸ Finally, a period of six years was proposed by India in bilateral consultations.

consultations with India by recording the different views on the issue, without reaching a consensus on a Committee recommendation to the General Council.²⁶⁹

B. RULINGS MADE BY THE PANEL IN THE COURSE OF THE PROCEEDINGS

1. Request by India for sufficient time to prepare and present its argumentation, pursuant to Article 12.10 of the DSU

5.8 On 7 April 1998, the Panel received a letter from the Permanent Mission of India requesting, pursuant to Article 12.10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "the DSU"), that India be granted up to 12 May 1998 to prepare and present its first written submission. India claimed that the case was of a systemic importance and covered a wide range of issues. The case occurred at a time when a new government had recently assumed office. The post of Attorney General, associated with disputes of this type, had not yet been filled and other administrative difficulties made it virtually impossible for India to adhere to the time-limit originally set for India to present its first submission.

5.9 In a letter dated 8 April 1998, the United States opposed the granting of additional time to India. The request was untimely. The WTO rules imposed very strict deadlines to which all Members had agreed. The United States would face administrative constraints if the proceedings had to be rescheduled. In any event, the United States' first submission was straightforward and India had the necessary expertise available in Geneva to deal with it.

5.10 On 15 April 1998 we ruled as follows:

"The Panel has carefully reviewed the arguments of the parties. The Panel notes that India could have raised several of the reasons mentioned in its letter during the organizational meeting held on 27 February 1998. However, pursuant to Article 12.10 of the DSU, "in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation." In light of this provision, and considering the administrative reorganization taking place in India as a result of the recent change in government, the Panel has decided to grant an additional period of time to India to prepare its submission. However, bearing in mind also the need to respect the time frames of the DSU and in light of the difficulties of rescheduling the meeting of 7 and 8 May, the Panel considers that an additional period of ten days would represent "sufficient time" within the meaning of Article 12.10 of the DSU. India is therefore granted until 1 May 1998 (5 p.m.) to submit its first written submission to the Panel. The original date of the first meeting remains unchanged as 7 and 8 May."

2. Consultation with the International Monetary Fund

5.11 During the course of its proceedings, the Panel decided to consult with the International Monetary Fund. The parties had divergent opinions on the possible role of the IMF in this instance. The United States was of the opinion that the Panel had before it sufficient evidence, but should consult the IMF if the Panel had any doubts. For the United States, the terms of Article XV:2 of GATT 1994, read as per paragraph 2(b) of the Incorporation Clause of GATT 1994 in Annex 1A of the WTO Agreement, require the WTO to consult with the IMF in specific matters, and the WTO includes panels. For India, on the contrary, to interpret the terms of Article XV to refer to panels ignores the division of functions between the different bodies of the WTO, and only the General Council and BOP Committee are covered by this provision. The parties also had diverging views on the extent of the discretion enjoyed by the Panel with regard to determinations of the IMF. In the view

²⁶⁹ WT/BOP/R/32, 18 September 1997. See also Section II:A *supra*.

of the United States, the Panel must accept as dispositive the determination of the IMF on the matters of fact specified in Article XV:2, and in particular concerning whether the facts of India's balance-of-payments and reserve situation placed India within the criteria listed in Article XVIII:9(a) and (b). This took nothing away from the efficacy of the Panel's final decision phase. For India, the text of Article XV:2 made it clear that the Committee and the General Council must accept certain determinations of the IMF "in reaching their final decision". In India's view, the argument of the United States, however, allowed the determination of the IMF on the financial aspects of the consultations to determine the legal status of a restriction notified under Article XVIII:B. For India, Articles XV:2 and XVIII:12 left no doubt that the IMF did not take final decisions on the legal status of restrictions under the WTO.

5.12 Article 13.1 of the DSU provides that each panel has "the right to seek information and technical advice from any individual or body which it deems appropriate." Article 13.2 further provides that panels may "seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter". With regard to balance-of-payments issues, the IMF, as a recognized body with extensive expertise in these matters, is obviously a highly relevant source of information. We find that, whatever the interpretation of Article XV:2 of GATT 1994, Article 13.1 of the DSU entitles the Panel to consult with the IMF in order to obtain any relevant information relating to India's monetary reserves and balance-of-payments situation which would assist us in assessing the claims submitted to us. Although the BOP Committee had previously consulted with the IMF, there were two particular reasons for the Panel to consult the IMF on its own account. First, the BOP Committee itself had not made a determination based on Article XVIII:B following its consultation with the IMF. Secondly, the balance-of-payments situation of India might have changed in the meantime. Consequently, the Panel submitted a number of questions to the IMF, by a letter dated 3 July 1998, having regard to Article 13 of the DSU and to Article XV:2 of the GATT 1994.²⁷⁰ The IMF provided answers to these questions on July 17, 1998. These answers were duly taken into account in our assessment of the claims before us.

5.13 We do not find it necessary for the purposes of this case to decide the extent to which Article XV:2 may require panels to consult with the IMF or consider as dispositive specific determinations of the IMF. As will be seen in Section V.G *infra*, we accept in the circumstances of this case certain assessments of the IMF. In this regard, however, we note that whether or not the provisions of Article XV:2 extend to panels, the Panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU.

C. SCOPE OF THE COMPLAINT

5.14 We note that the product coverage of the complaint is not at issue here. In its first submission, the United States clearly stated that its claims were limited to the measures applicable to the 2,714 HS tariff lines notified by India on 19 May 1997 in Annex I, Part B of document WT/BOP/N/24 under paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (hereafter the "1994 Understanding on Balance-of-Payments Provisions" or the "1994 Understanding"). However, in light of the arguments exchanged by the parties, we need to define more precisely our understanding of some of the claims made by the United States. In particular, we must consider (1) whether the claims of violation of Article XIII of GATT 1994 and Article 3 of the Agreement on Import Licensing Procedures are properly before the Panel, (2) the extent to which we should consider the provisions of Article XVIII:B, other than Article XVIII:11, which is the only paragraph of Article XVIII expressly contained in the United States' request for

²⁷⁰ The parties were provided with the opportunity to comment on the questions put to the IMF.

establishment of a panel and (3) the relationship of the United States' claim to India's claim that it is entitled to a phase-out period for its balance-of-payments measures.

1. Claims of violation of Article XIII of GATT and of Article 3 of the Agreement on Import Licensing Procedures

5.15 In its first written submission, the United States claimed that the measures at issue violate Articles XI:1 and XVIII:11 of GATT 1994, as well as Article 4.2 of the Agreement on Agriculture. The United States did not refer at that stage to Article XIII of GATT 1994 or to Article 3 of the Agreement on Import Licensing Procedures (hereafter the "Import Licensing Agreement"), which were mentioned in its request for the establishment of a panel and hence incorporated in our terms of reference.²⁷¹ India claimed that, since the United States did not elaborate on its claims under Article XIII of GATT 1994 and Article 3 of the Licensing Agreement in its first submission, it could not do so later. The United States replied that it is only in the event the Panel does not agree that India lacks justification for the challenged measure that the United States requests a finding that the measures are not applied in accordance with the requirements of Article XIII:2(a) of GATT 1994.

5.16 A claim of violation of Article 3 of the Import Licensing Agreement is contained in the United States' request for establishment of a panel and thus, in our terms of reference. The United States, however, did not develop any legal arguments relating to such claim at any point of the proceedings, nor did it request a finding on the basis of that provision. We therefore do not address that claim.

5.17 With regard to the claim of violation of Article XIII of GATT 1994, since the resolution of the claims under Articles XI and XVIII:B may make it unnecessary to resolve that claim, we will defer consideration of this issue.

2. Provisions of Article XVIII:B other than Article XVIII:11

5.18 India has raised the issue of the extent to which the Panel should consider the provisions of Article XVIII:B and the 1994 Understanding on Balance-of-payments Provisions in its analysis of the US claims. In this regard, we note that the United States has not raised any claim regarding violations of Article XVIII:B or the 1994 Understanding, apart from Article XVIII:11. Accordingly, we will not address any claims of the United States based on the 1994 Understanding or on provisions of Article XVIII:B other than Article XVIII:11.

5.19 However, the provisions of Article XVIII:B (other than Article XVIII:11) and the 1994 Understanding are part of the context of those provisions alleged by the United States to have been violated. In addition, India also refers to various provisions of Article XVIII:B in its defence. In our view, the defending party is not restricted in the provisions of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "WTO Agreement") that it can invoke in its defence. In these circumstances, we find it relevant to consider the provisions of Article XVIII:B and the 1994 Understanding as part of the context in deciding on the claims of the United States and to examine them in relation to the defence raised by India.

3. Phase-out period

5.20 India claims that the central issue in this dispute is the length of the time-schedule that India should be permitted in order to relax progressively and eliminate certain restrictions on imports that India has maintained for balance-of-payments purposes. The United States replies that the case is not about the phase-out schedule for the Indian restrictions. We note that the United States does not seek any findings or recommendations regarding the duration of the phase-out period. The United States

²⁷¹ WT/DS90/8 and WT/DS90/9.

seeks findings that the challenged measures are quantitative restrictions subject to Article XI:1 and that they are not justified under the provisions of Article XVIII:11. We therefore consider the issue of the phase-out only to the extent relevant to the defence raised by India and in our suggestions for implementation of the recommendations of the DSB.

D. COMPETENCE OF THE PANEL

5.21 In their submissions, the parties raise fundamental issues relating to the competence of panels to review balance-of-payments measures and their justification under Article XVIII:B. We therefore examine at the outset these issues of competence.

1. **The issue: are panels competent to review the justification of balance-of-payments measures under Article XVIII:B?**

5.22 In response to the claim of the United States that its balance-of-payments measures violate Articles XI:1 and XVIII:11, India's defence is that, even if its measures violate Article XI:1, they are permitted as balance-of-payments measures under Article XVIII:B and, as such, do not violate Article XVIII:11. Moreover, India considers that this Panel is not competent to make findings with respect to the justification of the measures taken under Article XVIII:B, as this is a matter in respect of which, according to India, exclusive authority has been assigned by GATT 1994 to the BOP Committee and the General Council. India claims that a panel cannot substitute itself for the BOP Committee or the General Council with regard to the justification of measures under Article XVIII:B and that acceptance of the arguments of the United States would result in making whole paragraphs of Article XVIII:B and whole sections of the 1994 Understanding redundant, altering fundamentally the negotiated balance reflected in the text of Article XVIII:B and the 1994 Understanding.

5.23 The United States argues that the texts of neither Article XII nor Article XVIII:B prohibit recourse to dispute settlement under Article XXIII. Nor does the text of Article XXIII or of the DSU contain any such prohibition. Article XVIII of GATT 1994 is among the WTO provisions that have been made subject to the DSU as set forth in Appendix 1 to the DSU and for which no special or additional provisions are found in Appendix 2 of the DSU. In that light, the United States argues that India's suggestion that the committee that holds Article XVIII:12(c) consultations is the sole body able to decide the question before this Panel is an untenable interpretation of GATT 1994. The United States further argues that footnote 1 of the 1994 Understanding confirms the availability of dispute settlement in relation to measures taken for balance-of-payments purposes.²⁷²

5.24 Pursuant to Article 3.2 of the DSU, our task is to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. The Appellate Body has stated that these rules are the criteria contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaty (1969) (hereafter the "Vienna Convention").

5.25 In addition, on the basis of Article XVI:1 of the WTO Agreement, we are also guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947. Indeed, the parties refer to the practice of GATT CONTRACTING PARTIES and the role of the procedures under Article XVIII:B of GATT in their arguments regarding the competence issue. Moreover, the first sentence of footnote 1 of the 1994 Understanding, which was negotiated as part of the WTO Agreement, provides that "[n]othing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994".

5.26 In the light of these elements, we first examine, to the extent relevant to our discussion, the mechanisms which the GATT provided for the surveillance and review of balance-of-payments

²⁷² For a detailed description of the arguments of the parties, see Section III.D.1 *supra*.

measures prior to the entry into force of the WTO Agreement. Our focus is first on Article XVIII:B, the provision applicable to balance-of-payments measures taken by developing countries which came into effect in 1957, and its Ad Note, together with relevant texts adopted in 1970, 1972 and 1979 (with a reference, as appropriate, to Article XII, the balance-of-payments provision applicable to developed countries), then on Article XXIII, the provision regarding the settlement of disputes in general under GATT 1947.

5.27 We then proceed with the analysis of the applicable provisions under the WTO Agreement. The text of Article XVIII:B is unchanged. It should now be read together with the 1994 Understanding. The text of Article XXIII of GATT is also unchanged in the WTO. However, it should now be read in conjunction with the DSU.

2. Surveillance and review of balance-of-payments measures prior to the entry into force of the WTO

(a) Article XVIII:B

5.28 Article XVIII:B was added to the GATT text in 1957 to provide special and differential treatment for developing countries in respect of their balance-of-payments measures.²⁷³ Article XVIII:12 established several procedures through which the CONTRACTING PARTIES collectively could exercise surveillance over balance-of-payments measures taken by developing contracting parties and review their consistency with Article XVIII:B. Hereafter, we first identify the nature of these procedures, then examine the practice under Article XVIII:12.

(i) Article XVIII:12 procedures

5.29 Article XVIII:12 provided for two different types of procedures: procedures for consultations (Article XVIII:12(a) and (b)) and dispute-settlement like procedures (Article XVIII:12(c) and (d)). Procedures for consultations on balance-of-payments restrictions were further detailed in decisions approved on 28 April 1970 ("full consultation procedures") and on 19 December 1972 ("simplified consultations"),²⁷⁴ and in the Declaration on Trade Measures taken for Balance-of-Payments Purposes adopted on 28 November 1979 (hereinafter "the 1979 Declaration"). Article XVIII:12(a) required a contracting party applying new or substantially intensified measures under Article XVIII:B to consult as to the nature of its balance-of-payments difficulties, alternative corrective measures which might be available and the possible effect of the restrictions on the economies of other contracting parties.²⁷⁵ Article XVIII:12(b) provided for the review of measures applied under Article XVIII:B and for regular consultations on such measures.

5.30 Article XVIII:12(c)(i) provided that if in the course of consultations, the CONTRACTING PARTIES found that the restrictions were not consistent with the provisions of Article XVIII:B or Article XIII, they "*shall*" indicate the nature of the inconsistency and "*may*" advise that the restrictions be suitably modified. Article XVIII:12(c)(ii) further provided that if in the course of consultations, the CONTRACTING PARTIES determined that the restrictions were being applied in a manner involving an inconsistency "*of a serious nature*" with the provision of Article XVIII:B or Article XIII and that damage to the trade of any contracting party was caused or threatened thereby, they "*shall*" make appropriate recommendations for securing conformity with such provisions within a specified period. If the recommendations were not complied with, the CONTRACTING PARTIES could release any contracting party, whose trade was adversely affected by the restrictions, from such

²⁷³ For a fuller description of the special and differential treatment provided for in Article XVIII, see *infra* paras. 5.152-5.157.

²⁷⁴ BISD18S/48-53 and BISD 20S/47-49.

²⁷⁵ A similar provision is found in Article XII:4(a).

obligations under GATT to the contracting party applying the restrictions as they determined to be appropriate.

5.31 Under the terms of Article XVIII:12(d), the CONTRACTING PARTIES were to invite any contracting party applying balance-of-payments restrictions under Article XVIII:B to enter into consultations with them at the request of any contracting party which could establish a *prima facie* case that the restrictions were inconsistent with the provisions of Article XVIII:B or Article XIII and that its trade was adversely affected thereby. If the consultations were unsuccessful and the CONTRACTING PARTIES determined that the restrictions were being applied inconsistently with such provisions and that damage to the trade of the complaining contracting party was caused or threatened, they were to recommend the withdrawal or modification of the restrictions within a prescribed time period. If the recommendations were not complied with, the CONTRACTING PARTIES could release the complaining contracting party from such GATT obligations to the contracting party applying the restrictions as they determined to be appropriate.

5.32 Determinations under Article XVIII:12 were to be made expeditiously and if possible within 60 days of the initiation of consultations.²⁷⁶

5.33 Paragraph 13 of the 1979 Declaration provides that if the BOP Committee finds an inconsistency with, *inter alia*, Article XVIII, it shall in its report to the Council make such findings as will assist the Council in making appropriate recommendations designed to promote the implementation of Article XVIII. The Council is directed to keep under surveillance any matters on which it has made recommendations.

(ii) *Practice of the BOP Committee/Council*

5.34 Numerous consultations were held in the past under Article XVIII:B concerning balance-of-payments measures taken by developing countries. The consultations led to reports which expressed in most cases the unanimous view of all the contracting parties present and which were subsequently adopted by the Council. We are not aware of instances, at least since 1970,²⁷⁷ where consultations led to formal recommendations, explicitly based on Article XVIII:12(c)(ii), that measures determined to be unjustified under Article XVIII:B had to be brought into conformity with that provision.

5.35 A Secretariat note concerning the period from 1975 to 1988 indicates that, in a number of cases, the BOP Committee explicitly recognized the existence of a balance-of-payments justification. On the other hand, the Committee never explicitly determined that a particular measure was unjustified under the balance-of-payments provisions of the GATT. Rather, various levels of tone have been used to indicate the strength of the Committee's doubts concerning the justification of measures in particular circumstances. Strong language was, for instance, used in the 1987 report concerning Korea. The report stated that "[t]he prevailing view expressed in the Committee was that the current situation and outlook for the balance-of-payments was such that import restrictions could no longer be justified under Article XVIII:B."²⁷⁸ With regard to the discussion and adoption of reports, the same Secretariat note indicates that

"on a number of occasions contracting parties, while not opposing the adoption of reports, have used the occasion of their adoption to express regret at the continued maintenance of import restrictions and to press for faster or more complete liberalization. In some cases, countries have also reserved their GATT rights in relation to measures which they saw as

²⁷⁶ Article XVIII:12(f).

²⁷⁷ L/4200, 18 July 1975, para. 39 and document MTN.GNG/NG7/W46, 24 June 1988, para. 66, further discussed *infra* at para. 5.35.

²⁷⁸ BOP/R/171, para. 22.

damaging their interests and whose maintenance they believed not to be in conformity with GATT. For example, in 1985 Japan reserved its rights in relation to measures maintained by Portugal, and Hungary did so in relation to a Turkish measure (...). In November 1987 the point was made that contracting parties retain all their GATT rights in respect of measures maintained for balance-of-payments purposes, and that review of such restrictions by the Balance-of-payments Committee, and adoption by the Council of the Committee's report, did not constitute acceptance that they were consistent with GATT."²⁷⁹

We also note that it appears that Article XVIII:12(d) has not been resorted to.²⁸⁰

(b) Article XXIII

(i) *The general procedure for the settlement of disputes*

5.36 At the origin of GATT, the general procedure contemplated for the settlement of disputes between contracting parties bore marked similarities with the procedure which was available to contracting parties under Article XVIII:12(d). In the course of time, the procedure based on Article XXIII evolved as a result of the development of the system of panels.

(ii) *Practice under Article XXIII with respect to balance-of-payments measures*

5.37 Prior to the WTO Agreement, recourse to dispute settlement with regard to balance-of-payments measures occurred from time to time, but it was infrequent. The United States cites in particular the *Belgian Dollar Import Restrictions* case and the *German Import Restrictions* case. The *Belgian Dollar Import Restrictions* case concerned measures maintained by Belgium on imports from the dollar area, which in the view of the United States were not justified by Belgium's dollar balance-of-payments position. A Working Party was established in 1952 following a request under Article XXIII, but no ruling was made on the issue, since a settlement was reached between the parties. The measures were progressively reduced and eliminated.²⁸¹ The *German Import Restrictions* case did not directly involve a determination of consistency of measures with Article XII through dispute settlement.²⁸²

5.38 In another case, not cited by the parties and involving the United States and India, the United States initiated consultations regarding the justification of balance-of-payments measures maintained by India. Although a panel was established in November 1987, the parties reached a mutually agreed solution and no report was issued by the panel.²⁸³

²⁷⁹ *Consultations held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975*, Note by the Secretariat, MTN.GNG/NG7/W/46, 24 June 1988, para. 66.

²⁸⁰ Footnote 289 to para.5.47 *infra*.

²⁸¹ GATT/CP.6/50, GATT/IC/7, GATT/IC/SR.3 and SR.7/11.

²⁸² In the *German Import Restrictions* case, Germany consulted within the Consultations Committee in June 1957, under Article XII:4(b). At their twelfth session, the CONTRACTING PARTIES decided that the Federal Republic of Germany was no longer entitled to maintain import restrictions under Article XII for balance-of-payments purposes. When the report was presented for approval by the CONTRACTING PARTIES, the Federal Republic of Germany presented a statement announcing further phased liberalization measures and presenting "some facts and points of view" it considered of importance for appreciating the measures. A Working Party was established under Article XII to consider this statement and "to collect and present in an orderly fashion for transmission to the German government the initial reactions and comments of contracting parties [...]". The issue was further examined in 1958 and 1959, and a waiver was eventually adopted, without prejudice to the legal arguments raised by Germany that it was entitled to maintain import restrictions under paragraph 1 (a) (ii) of the Torquay protocol (as existing legislation).

²⁸³ The US request for establishment of a panel was based on Article XXIII:2 of GATT. The United States argued that the import restrictions maintained by India on almonds were "impermissible under Article XI

5.39 The only adopted panel report to have addressed explicitly the issue of the availability of dispute settlement procedures under Article XXIII, in relation to the justification of measures taken for balance-of-payments purposes under Article XVIII:B, concerned a dispute relating to measures applied by Korea on the importation of beef.²⁸⁴

5.40 In that instance, the BOP Committee had previously reviewed these measures and in its conclusions, noted that

"The prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B" [...] "[T]he Committee therefore stressed the need to establish a clear timetable for the early, progressive removal of Korea's trade measures maintained for balance-of-payments purposes"²⁸⁵

5.41 In the panel proceedings, Korea argued that its import restrictions could not be challenged under Article XXIII and the panel therefore examined the issue of availability of dispute settlement procedures under Article XXIII in relation to import restrictions applied on balance-of-payments grounds:

"The Panel examined Korea's contention that its import restrictions, referred to under paragraph 111(b) above, were justified under the provisions of Article XVIII:B. The Panel noted Korea's view that the compatibility with the General Agreement of Korea's import restrictions could not be challenged under Article XXIII because of the existence of special review procedures in paragraphs 12(b) and 12(d) of Article XVIII:B, and the adoption by the CONTRACTING PARTIES of the results of the paragraph 12(b) reviews in the Balance-of-Payments Committee. The Panel decided first to consider whether the consistency of restrictive measures with Article XVIII:B could be examined within the framework of Article XXIII.

The Panel considered the various arguments of the parties to the dispute concerning past deliberations by the CONTRACTING PARTIES on the exclusivity of special review procedures under the General Agreement. However, the Panel was not persuaded that any of these earlier deliberations in the GATT were directly applicable to the present dispute. Moreover, the Panel had a clear mandate to examine Korea's beef import restrictions under Article XXIII. The Panel's terms of reference, as agreed by Korea and the United States, and approved by the Council, required the

of the General Agreement" and were "not justified under Article XVIII, Section B, as claimed by the Government of India, because India ha[d] not followed the requirements incumbent on a contracting party imposing restrictions under that section." In the discussions of the Council prior to the establishment of the panel, a number of delegations questioned the appropriateness of resort to dispute settlement procedures in relation to balance-of-payments measures taken by developing countries under Article XVIII:B and expressed concern that a precedent might be set by the establishment of a panel in this matter. Other delegations, however, supported the view that there was no reason for dispute settlement procedures under Article XXIII not to be available with regard to balance-of-payments measures as for other measures. Although a panel was established, the parties reached a mutually agreed solution and no report was issued by the panel (See L/6197, C/M/215, p. 5-7, C/154 and C/154/Add.1.).

²⁸⁴ There were in fact three complaints, leading to almost identical reports. See Panel Report on *Republic of Korea - Restrictions on Imports of Beef, Complaint by the United States*, adopted on 7 November 1989, BISD 36S/268 (hereinafter the "*Korea - Beef case*"). See also Panel Reports adopted on 7 November 1989, *Republic of Korea - Restrictions on Imports of Beef, Complaint by Australia*, BISD36S/202 and *Complaint by New Zealand*, BISD 36S/234.

²⁸⁵ BOP/R/171, 10 December 1987, p. 7.

Panel, however, to examine the beef import restrictions "in the light of the relevant GATT provisions", which included Article XVIII:B.

The Panel examined the drafting history of Article XXIII and Article XVIII, and noted that nothing was said about priority or exclusivity of procedures of either Article. The Panel observed that Article XVIII:12(b) provided for regular review of balance-of-payments restrictions by the CONTRACTING PARTIES. Article XVIII:12(d) specifically provided for consultations of balance-of-payments restrictions at the request of a contracting party where that party established a *prima facie* case that the restrictions were inconsistent with the provisions of Article XVIII:B or those of Article XIII, but the Article XVIII:12(d) provision had hitherto not been resorted to. In comparison, 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. [...]"

5.42 The panel highlighted the differences between the dispute settlement procedures under Article XXIII and the procedures under Article XVIII:B:

"[T]he 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." (footnote omitted)

5.43 It concluded that it was competent to review balance-of-payments measures in the following terms:

"[...]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."²⁸⁶

5.44 The panel then considered Korea's balance-of-payments justification under Article XVIII:B and examined the balance-of-payments situation of Korea. The panel "considered that it should take into account the conclusions reached by the Committee on balance-of-payments in 1987". The panel also looked at other information available up to February 1989, noted that there was a continued improvement in Korea's balance-of-payments situation and then reached a conclusion similar to that of the CONTRACTING PARTIES when they adopted the Committee report in 1987. The CONTRACTING PARTIES adopted the panel report in November 1989.²⁸⁷

5.45 India argues that in the *Korea - Beef* case, the panel did not make its own finding on the balance-of-payments situation, since conclusions had been reached in the Committee, which the panel took into account. However, we find no evidence in the report that the panel would have refused to review the claims of the complainants as to the justification of the balance-of-payments measures if the Committee had not issued any report. Indeed, as noted in paragraph 5.41 above, the panel states in its report that it has a clear mandate to examine Korea's beef import restrictions under Article XXIII and that the wording of its mandate was all embracing; it provided for the panel to review the matter in the light of the relevant GATT provisions, which included Article XVIII:B. In particular, the panel

²⁸⁶ Op. Cit., para. 119.

²⁸⁷ BISD 36S/268.

discussed expressly the availability of dispute settlement procedures with regard to balance-of-payments measures and concluded that it was competent without reference to the existence of specific Committee conclusions in the case submitted to it. Furthermore, in its assessment of the balance-of-payments situation of Korea, it had not simply taken note of the existence of a violation on the basis of the Committee's conclusions alone. Rather, the panel determined the absence of a balance-of-payments justification, in light of the conclusions of the Committee, and also of updated information relating to the period elapsed since the adoption of the Committee's conclusions. The report thus tends rather to show that even in a situation where conclusions had emerged from the Committee's consultations, the panel, while taking account of such conclusions, felt itself competent to carry out its own updated assessment of the balance-of-payments situation of Korea.

5.46 Thus the *Korea - Beef* case is an example of recourse to the GATT dispute resolution mechanism under Article XXIII with respect to Article XVIII:B. Although it is the only case where the justification of balance-of-payments measures was clearly challenged and fully examined by a panel, its relevance is increased by the fact that it contains a reasoned discussion of the issue and that there was a consensus to adopt it.²⁸⁸ This would tend to support the view that, as recently as 1989, the time of its adoption, a GATT contracting party could have recourse to Article XXIII with respect to measures for which Article XVIII:B justification was claimed.

(c) Summary

5.47 Numerous consultations were held in the framework of Article XVIII:12(b). However, as indicated in paragraphs 5.34 and 5.35, the specific provisions of Article XVIII:12(c)(ii) and XVIII:12(d) have not been explicitly referred to by the GATT CONTRACTING PARTIES for the purpose of prescribing the removal of measures unjustified under Article XVIII:B. However, GATT contracting parties, at times, did resort to the general dispute settlement procedures of Article XXIII of GATT in order to obtain a ruling with respect to balance-of-payments measures, including regarding their justification. There are thus instances suggesting acceptance that prior to the entry into force of the WTO Agreement, recourse could be had either to the special procedures of Articles XII or XVIII or to Article XXIII in respect of balance-of-payments measures.²⁸⁹

3. Applicable provisions under the WTO Agreement

(a) Article XVIII:B

5.48 As already indicated, the text of Article XVIII:B is unchanged.²⁹⁰ It should now be read in light of the 1994 Understanding, which clarifies the provisions of Articles XII and XVIII:B and of the

²⁸⁸ In that respect, we recall that the Appellate Body, in its report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, stated, at p. 14, that "Adopted panel reports are an important part of the GATT *acquis*. [...] They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."

²⁸⁹ Indeed, a leading treatise on GATT commented in 1969: "All four of these "release remedy" procedures in Article XII and XVIII parallel in many respects the provisions of Article XXIII. But the BOP procedures are both more restrictive than those of Article XXIII, so in all probability a damaged party is likely to use Article XXIII rather than the BOP procedures. This author can find no record of any procedure actually brought under the subparagraph (d) complaint procedures and no record of a release approval under either the (c) or (d) subparagraphs of Article XII, paragraph 4, or Article XVIII, paragraph 12, but some Article XXIII complaints might have been eligible for the BOP procedure". (John H. Jackson, *World Trade and the Law of GATT* (1969), p. 706).

²⁹⁰ The Ministerial Conference has not formally assigned the functions of the CONTRACTING PARTIES in Article XVIII to any body. However, under the 1979 Declaration and the 1994 Understanding and decisions referred to therein, the oversight of Articles XII and XVIII:B is assigned to the BOP Committee, which reports to the General Council. The General Council acts on recommendations of the BOP Committee.

1979 Decision. The 1994 Understanding, which refers to the procedures for balance-of-payments consultations adopted in 1970 ("full consultation procedures") and 1972 ("simplified consultation procedures") as well as the 1979 Decision, contains provisions on the application of balance-of-payments measures, as well as provisions relating to the procedures for balance-of-payments consultations and their conclusion, but it does not explicitly refer to Articles XVIII:12(c) and (d). Footnote 1 to the 1994 Understanding, however, as was previously noted, indicates that "[n]othing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994". The same footnote further states that "[t]he provisions of Article 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". The exact meaning of this reference, which is a subject of debate between the parties, is discussed *infra*.²⁹¹

5.49 Since the entry into force of the WTO Agreement, WTO Members have not to date made express use of or reference to the procedures under Articles XII(c) and (d) and XVIII:12(c) and (d). It should nevertheless be mentioned that the BOP Committee has in one instance found that the measures under review, maintained by Nigeria, "could no longer be justified under Article XVIII:B and the Understanding on Balance-of-Payments Provisions of GATT 1994" and "recalled Nigeria's commitments to make all restrictive trade measures price-based and to eliminate them by disinvoking Article XVIII:B".²⁹² The Committee did, not, however, expressly refer to a particular provision of Article XVIII:12 in making this determination.

(b) Article XXIII and the DSU

5.50 Article XXIII is now elaborated by the DSU. Pursuant to its Article 1, the Dispute Settlement Understanding applies to all the multilateral agreements, subject to special or additional provisions contained therein. We must therefore first consider whether any such provisions exist which would apply to this dispute and be relevant to the determination of the scope of competence of panels in relation to balance-of-payments measures. We note in this instance that there is no specific provision in the DSU or in Article XVIII that would establish such special or additional rules and procedures applicable to this dispute.

5.51 While parties disagree as to the degree of inter-relation between the DSU and Article XVIII of GATT 1994, neither party claims that the Panel is subject to specific procedures under Article XVIII other than the normal DSU procedures.

5.52 The only provision of Article XVIII:B, the DSU or the WTO Agreement which expressly addresses the relationship between dispute settlement under the DSU and measures taken for balance-of-payments purposes is the second sentence of footnote 1 to the 1994 Understanding, which provides that:

"The provisions of Article 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."

5.53 Hereafter, we discuss the meaning of the second sentence of footnote 1 to the 1994 Understanding, since it bears directly on the relation between Article XVIII:12 and Article XXIII of GATT 1994. As noted in paragraphs 5.24 and 5.25 above, the discussion will be based on the criteria

²⁹¹ See *infra* the discussion starting para. 5.55.

²⁹² WT/BOP/R/18, 16 October 1996, para. 10. See also the reports of the Committee on the resumed consultations in 1997 and 1998, in WT/BOP/R/25 (27 March 1997) and WT/BOP/R/41 (7 April 1998).

set forth in Articles 31 and 32 of the Vienna Convention. It will also be guided by decisions, procedures and customary practices under GATT 1947.

4. Competence of panels to review the justification of measures taken under Article XVIII:B

5.54 Pursuant to Article 31 of the Vienna Convention, we must interpret the relevant provisions by relying on the ordinary meaning of the terms taken in their context and in the light of the object and purpose of the WTO Agreement. While all these elements are part of one single assessment, for the sake of clarity, we examine the different elements of Article 31 successively, examining first the terms of Footnote 1 of the 1994 Understanding (a), before considering them in their context (b) and in relation to the object and purpose of the WTO Agreement (c).²⁹³

(a) Terms of the second sentence of footnote 1 to the 1994 Understanding

5.55 The parties disagree on the interpretation of the terms of the second sentence of footnote 1 to the 1994 Understanding, and in particular on the interpretation of the indication that dispute settlement procedures are available regarding "any matters arising from the *application* of measures (...)"(emphasis added). We recall the arguments of the parties relating to the terms of the second sentence of the footnote before analysing these terms.

(i) *Arguments of the parties*

5.56 In the view of India, the reference in footnote 1 to the 1994 Understanding to "matters arising from the application of restrictive import measures" requires that a distinction be made between "application" of measures and their "justification" under the balance-of-payments provisions of GATT 1994. According to India, the scope of the footnote is limited to import restrictions that have a valid balance-of-payments justification and it does not modify a Member's right to a determination of the justification of its import restrictions by the BOP Committee in accordance with the provisions of Article XVIII:12. India argues that the consistency of balance-of-payments measures with Articles I, II, X, and XIII of the GATT and the provisions of other WTO agreements, such as the Agreement on Import Licensing Procedures, could be examined by a panel but the question of their balance-of-payments justification should be determined in accordance with the procedures set out in Articles XV:2 and XVIII:B of GATT 1994, the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes and the 1994 Understanding. India is of the opinion that the footnote indirectly confirms that disputes arising from the other matters regulated in the 1994 Understanding, in particular the matters regulated in paragraph 13, are not meant to be resolved by panels. In contrast, the reference to "restrictions... being applied in a manner involving an inconsistency" in Article XVIII:12(c)(ii) must be interpreted to refer both to import restrictions lacking balance-of-payments justification and import restrictions administered in a GATT-inconsistent manner.

5.57 The United States replies that the text of footnote 1 to the 1994 Understanding confirms rather than denies the availability of dispute settlement. In the view of the United States, had the drafters of the GATT 1994 intended to impose restrictions on dispute settlement, they would have used words of prohibition or limitation. For the United States, even if India's interpretation of footnote 1 were to be accepted, this dispute would be properly before the Panel since it has "arisen" precisely because of India's "application" of quantitative restrictions that it originally instituted for balance-of-payments purposes: India is applying the challenged measures in excess of what is necessary to address its balance-of-payments situation. For the United States, lawful application of measures taken for

²⁹³ Arguments have been raised relating to the negotiating history. These are addressed as relevant in the course of our discussion in this section, in accordance with Article 32 of the Vienna Convention (see *infra* paras. 5.106-5.111).

balance-of-payments purposes includes the obligation not to apply measures in excess of what is necessary to address the balance-of-payments situation and the removal of unjustifiable measures is a part of the "application" of such measures. For the United States, footnote 1 served a function by confirming the availability of dispute settlement under Article XXIII in balance-of-payments cases, shortly after the panel reports on *European Communities – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* (hereafter *EC – Citrus*),²⁹⁴ *EEC – Member States' Import Regimes for Bananas* (hereafter *EC- Bananas I*)²⁹⁵, and *Korea - Beef*.²⁹⁶ Negotiators were aware of the possibility that panels would examine quantitative restrictions for which balance-of-payments cover had been claimed and intentionally did not exclude them from the scope of panel review in the WTO system. Finally, India's argument would unnecessarily restrict the application of the WTO Agreement. If India's approach were accepted, a mere claim of balance-of-payments cover could be used to frustrate justified access to dispute settlement.²⁹⁷

(ii) *Ordinary meaning of the terms "application of measures" in footnote 1 to the 1994 Understanding*

5.58 We must first consider the ordinary meaning of the terms "application of measures". A dictionary definition of "application" includes "use, employment, a specific use or purpose for which something is put, the bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter; applicability in a particular case."²⁹⁸ The "application" of a measure would thus refer to the fact that a measure is in use. The terms "application of restrictive measures taken for balance-of-payments purposes", in their ordinary meaning, therefore seem to refer simply to the fact that a measure is applied for balance-of-payments purposes. The use of these words, in themselves and taken in their ordinary meaning, therefore does not suggest an opposition between the "application" of the measures and their "justification" under Article XVIII:B. To so interpret them would require additional terms to express a restriction or an opposition between two concepts that does not appear in the sentence at issue.

5.59 Furthermore, taking a word in isolation would be applying Article 31 of the Vienna Convention incorrectly.²⁹⁹ We therefore look at the other terms of the sentence. The expression "*any matters arising from the application of restrictive import measures taken for balance-of-payments purposes*" (emphasis added), taken in its ordinary meaning, does not contain an explicit limitation to issues relating to the manner in which measures are administered, to the exclusion of their

²⁹⁴ L/5776, 7 February 1985, not adopted. This case, which does not relate to Article XVIII:B of GATT, is discussed in paras. 5.104-5.105 *infra* in section (d) on "Related GATT practice".

²⁹⁵ DS32/R, 3 June 1993, not adopted. This case, which does not relate to Article XVIII:B of GATT, is discussed in paras. 5.104-5.105 below in section (d) on "Related GATT practice".

²⁹⁶ See paras. 5.39-5.46 *supra*.

²⁹⁷ For a detailed description of the arguments of the parties, see Section III.D.1.(b) *supra*.

²⁹⁸ See *New Oxford Shorter English Dictionary* (1993), p. 100.

²⁹⁹ See *PCIJ Advisory Opinion on the Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922) Series B, No. 2, p. 23:

"In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."

See also M. Yassen, *L'Interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, in *Recueil des Cours de l'Académie de La Haye* (1974), p. 9, at p. 26:

"Il ne s'agit donc pas d'un sens ordinaire abstrait, mais d'un sens ordinaire concret qui ne peut être discerné que par l'examen du terme en question dans le contexte de ce terme et à la lumière du but et de l'objet du traité."

justification, as suggested by India. The sentence is in the form of an affirmative statement, and the expression "any matters arising from" is very broad and all-encompassing. It does not distinguish between one or another possible legal basis for action. The sentence therefore seems to be an affirmation of the availability of dispute settlement rather than an expression of restriction. The use of the term "any matters" suggests that the matters that may be considered by a panel include, as in the present case, a question of justification of the measure under Article XVIII:9, i.e. whether the Member actually faces balance-of-payments difficulties within the meaning of Article XVIII:9 and whether it is entitled to maintain balance-of-payments measures. Indeed, if the meaning of the footnote had been intended to be restrictive (i.e. to mean that dispute settlement procedures may only be invoked with respect to matters arising from the "application" of measures, as opposed to their justification), the use of the words "any matters" would not have been necessary to convey this meaning. In fact it would have confused the meaning of the sentence.

5.60 We also note that reviewing the application of measures is the purpose of dispute settlement. WTO dispute resolution is typically initiated with respect to measures³⁰⁰ and a measure can only be reviewed by a panel if it is applied (a measure that is not applied can only be reviewed if it is mandatory legislation, i.e., it is certain that it will be applied).³⁰¹ Moreover, in a practical sense, the consideration of the application of a measure must necessarily embrace its justification. The notion of application includes both the mode of application and the level of application. Even if one were to confine the review of a measure to its "application" within the meaning that India claims it has, then the review still could find that the level of application consistent with the rule under which it is claimed to be justified is zero. In effect, "justification" within the meaning given to it by India inevitably would have been reviewed. As a result, the wording used by the drafters of the footnote is consistent with dispute settlement principles: by saying that the DSU can be invoked with respect to matters arising from the application of restrictive import measures, the footnote does not in our view qualify the role of dispute settlement in the context of balance-of-payments problems. Rather, as the United States pointed out, it seems to re-affirm the application of the DSU.

5.61 The terms of the second sentence of footnote 1 to the Understanding, in their ordinary meaning, therefore appear to affirm, rather than restrict, the availability of dispute settlement provisions with regard to measures taken for balance-of-payments purposes.

(b) Context

5.62 Our examination of the ordinary meaning of the terms of the second sentence of footnote 1 to the 1994 Understanding so far has not led us to conclude that the indication that dispute settlement procedures are available regarding "any matters arising from the application of restrictive import measures taken for balance-of-payments purposes" would imply that panels are precluded from reviewing the justification of measures taken for balance-of-payments purposes under Article XVIII:B. We must now consider whether, taken in their context, these terms should be understood to imply a distinction between a strict notion of "application" of a measure, as advocated by India, and the "justification" of the measure under the terms of Article XVIII:B.

5.63 We examine successively different elements of the relevant context of the second sentence of footnote 1 to the 1994 Understanding. Firstly, we consider whether the use of the terms "application of measures" or "measures being applied" in the rest of the Understanding and in Article XVIII:B suggests the proposed distinction. We then turn to a broader examination of the functions of the consultation procedures for balance-of-payments measures under Article XVIII:B in order to

³⁰⁰ Panel Report on *Japan - Trade in Semiconductors*, L/6309, adopted on 4 May 1988, paras. 106-107.

³⁰¹ Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances ("Superfund")*, adopted on 17 June 1987, BISD 34S/136, paras. 5.2.1-5.2.2.

determine whether, as argued by India, exclusive authority has been assigned to the BOP Committee and General Council to make certain determinations, thereby preventing panels established in accordance with Articles XXII and XXIII of GATT 1994 and the DSU from making such determinations. Finally, we consider whether our interpretation of the terms of the provision is consistent with the terms of the first sentence of footnote 1 of the 1994 Understanding, which provides that "[n]othing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994".

(i) *Meaning of the terms "application of measures" or measures "applied" in other provisions of the 1994 Understanding, in Article XVIII:B and in other GATT provisions*

5.64 The terms "measures being applied" or "application of measures" appear in other provisions of the 1994 Understanding and of Article XVIII:B. It is therefore relevant to consider whether these uses of the notion of "application" are helpful in interpreting the term as used in the footnote.

5.65 The terms "application of measures", "applied" or "applies" are used in various instances in the Understanding. Paragraphs 1 to 4 of the Understanding are grouped under the heading "Application of Measures". The use of these terms in these paragraphs seems to refer to the fact that a measure is in use. There is no suggestion that the terms are used in a way that assumes the measures referred to are justified, or that their justification cannot be reviewed under the dispute settlement mechanism. Indeed, the first sentence of paragraph 4 implies that the "Application of Measures" encompasses the requirement that measures may not exceed what is necessary to address the balance-of-payments situation.³⁰² As argued by the United States, if a measure exceeds what is necessary to address the balance-of-payments difficulties within the meaning of Article XVIII:9, then, to the extent that it is excessive, it is not necessary. If there is no justification for balance-of-payments restrictions, no measure applied for that reason can be considered as necessary any longer. Indeed, to the extent that paragraph 4 of the Understanding refers to the way a measure is being implemented, it uses the terms "administration" or "administer", not "application".³⁰³

5.66 Paragraph 6 of the Understanding also refers to "[a] Member *applying* new restrictions or raising the general level of its existing restrictions [...]" to describe situations where consultations may be requested under Article XII:4 (a) or Article XVIII:12 (a). Paragraph 7 further states that "All restrictions *applied* for balance-of-payments purposes shall be subject to periodic review under paragraph 4 (b) of Article XII or under paragraph 12 (b) of Article XVIII [...]". In both instances, the text refers to situations where review under the consultation procedures of Article XVIII:12 could or would take place and it cannot be assumed that this would refer only to measures having a valid balance-of-payments justification, but rather suggests a situation where measures are being applied and a balance-of-payments justification is claimed for them.

5.67 Thus, it is clear that the word "application" (or "applied" or "applies") is not used in the 1994 Understanding in a way that suggests that a consideration of justification, i.e., whether a balance-of-payments measure is necessary, would be excluded from dispute settlement.

5.68 Since the Understanding aims at clarifying the provisions of, *inter alia*, Article XVIII:B, the terms of the 1994 Understanding should also be read in light of the provisions of Article XVIII:B. In this respect, it is worth noting that Article XVIII:B does not require measures to be authorized before they can be applied. The very mechanism of surveillance and review of import restrictions under Article XVIII:12 rests on the notification of measures which are in application and for which a balance-of-payments justification is claimed. This does not mean that they could not be found to be inconsistent with the provisions of Article XVIII:B in the course of consultations. In this context, the provisions of Article XVIII:B frequently refer to measures being "applied" under Article XVIII:B, but

³⁰² This "necessity" test is also found in Article XVIII:9 of GATT 1994.

³⁰³ Paragraph 4 of the 1994 Understanding.

this reference cannot be assumed only to encompass measures which have a valid balance-of-payments justification.

5.69 Likewise, under Article XVIII:12(c) and (d), the Committee and General Council are called upon to determine whether "restrictions are being applied" in a manner involving an inconsistency with Article XVIII:B or Article XIII. Article XVIII:12 (d) refers to the establishment of a *prima facie* case "that the restrictions are inconsistent with the provisions of [Article XVIII:B] or with those of Article XIII" and to a determination that the restrictions are "being applied inconsistently with such provisions". Accordingly, these references to measures being "applied" cannot be assumed to refer exclusively to measures consistent with Article XVIII:B. The fact that consistency with both Article XVIII:B and Article XIII may be reviewed under Articles XVIII:12 (c) and (d) precludes an interpretation of the word "applied" as limiting consideration to the administration of restrictions having a valid balance-of-payments justification.³⁰⁴

5.70 India also draws comparisons between Footnote 1 of the 1994 Understanding and the terms of paragraph 12 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (hereafter the "Understanding on Article XXIV"), claiming that they are identical in their reference to the application of measures and represent a compromise between the conflicting positions taken by the contracting parties in relation to the application of dispute settlement in those fields. The fact that the same word "application" is found in another provision of GATT 1994 is not in itself sufficient to justify an analogy. In paragraph 12 of the Understanding on Article XXIV, what is referred to is the "application of [...] provisions of Article XXIV", not the "application of measures" as in the 1994 BOP Understanding. The phrase "the application of those provisions of Article XXIV" plainly means "the implementation of the provisions of Article XXIV..." and does not allow for a distinction such as the one proposed by India. India's argument that the terms of paragraph 12 of the Understanding on Article XXIV would represent a compromise limiting the scope of review of panels with respect to Article XXIV agreements is based on the assumption that such a compromise had to be reached because of the debate generated by some panel reports. India did not supply any evidence on this matter that would suggest that we should depart from the plain meaning of the terms of paragraph 12. In any case, such a comparison alone would not have been sufficient to change our conclusion on the meaning of the terms in the footnote to the 1994 Understanding.

5.71 India further refers to Article XX of GATT 1994 to support the proposed distinction between the application and the justification of a measure. Here, the wording of the two provisions is quite distinct, as the preamble of Article XX expressly requires that measures "are not applied *in a manner* which would constitute a means of arbitrary or unjustifiable discrimination"(emphasis added). In that case, the text is explicit in its reference to the *manner* in which the measure is applied. There is no similar wording in the footnote to the 1994 Understanding.

5.72 These elements of context clearly suggest that the terms of the footnote refer to the fact that a measure is being applied, i.e. is in effect, nothing more.

(ii) *Respective roles of DSU procedures and Article XVIII:B procedures*

5.73 Part of the context of the second sentence of footnote 1 to the 1994 Understanding is Article XVIII:B and the rest of the 1994 Understanding. India argues that this context compels the conclusion that dispute settlement panels are not competent to decide on the justification of balance-of-payments measures. In India's view, a WTO Member has the right to institute balance-of-

³⁰⁴ India itself actually interprets the words "applied in a manner" as used in Article XVIII:12(c)(ii) to cover not only measures which are administered in violation of Article XIII, but also measures which no longer have a justification under Article XVIII:9 (see para. 3.98 in Section III.D.1.(b) *supra*).

payments measures without prior approval of any WTO body and it has the right to maintain those measures until the BOP Committee or General Council advises it to modify them under Article XVIII:12 or establishes a time-period for their removal under paragraph 13 of the 1994 Understanding. According to India, its position reflects the carefully negotiated balance struck by WTO Members on this issue, and, in particular, a decision that the justification of balance-of-payments should be determined by WTO Members by consensus in a political setting, not by dispute settlement panels. If the justification of balance-of-payments measures could be decided by dispute settlement panels, India alleges that significant parts of Article XVIII:B and the 1994 Understanding would be rendered redundant and serious conflicts could arise.

5.74 The United States responds that the consultation procedures established in Article XVIII:B are independent of dispute settlement procedures under Article XXIII and the DSU. For the United States, there are two independent tracks for enforcing Article XVIII:B and either may be followed in order to determine the justification of balance-of-payments measures.³⁰⁵

5.75 In this section, we examine the position of India on this aspect of the context of the second sentence of footnote 1 and the US response. We start with India's argument that it has a right to maintain balance-of-payments measures until the BOP Committee or the General Council decides otherwise. We then consider whether the procedures of Article XVIII:12(c)-(d) are an exclusive mechanism for assessing compliance with Article XVIII:B. Third, we analyze whether dispute settlement panels are capable of making the necessary determinations on issues related to the justification of balance-of-payments measures. Finally, we assess whether recognizing a role for dispute settlement in determining the justification of balance-of-payments measures would render Article XVIII:B and the 1994 Understanding redundant or result in serious conflicts.

The right to maintain balance-of-payments measures

5.76 India's basic argument is that it has a right to institute balance-of-payments measures without the prior approval of any WTO body and a right to maintain those measures until the BOP Committee or the General Council advises it to modify them under Article XVIII:12 or establishes a time-period for their removal under paragraph 13 of the 1994 Understanding. In the absence of such action by the Committee or General Council, India asserts that the issue of whether its measures are justified under Article XVIII:B cannot be raised in dispute settlement.

5.77 Under Article XVIII:B, it is clear that a Member has the right to institute balance-of-payments measures without the prior approval of any WTO body. India correctly notes that proposals in the past to require such approval were not adopted. As explained above, when a Member institutes or intensifies balance-of-payments measures, it is required to consult with the BOP Committee. Pursuant to Article XVIII:12(c)-(d), the Committee and the General Council³⁰⁶ have certain powers to advise or recommend that such measures be modified because of an inconsistency with Article XVIII:B or Article XIII. Paragraph 13 of the 1994 Understanding authorizes the General Council to approve a phase-out period for balance-of-payments measures.

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

³⁰⁵ For a detailed description of the arguments of the parties, see Section III.D.1.(a) *supra*.

³⁰⁶ As noted earlier, in the absence of a Ministerial Conference allocation, these powers still formally reside in the CONTRACTING PARTIES, but on the basis of the 1979 Declaration (in particular para. 13) and the 1994 Understanding, it is appropriate to refer to the BOP Committee and General Council as the decision-makers. We refer to both bodies, although the BOP Committee only makes recommendations to the General Council, which is the actual decision-making body in these matters.

maintained. Article XVIII:11, which is analyzed in more detail in Part G below, specifies that a Member:

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

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

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

Are Article XVIII:12 procedures exclusive?

5.81 India also argues that the procedures of Article XVIII:12(c)-(d) are the exclusive route for determining whether balance-of-payments measures taken under Article XVIII:B are justified. This issue is related to the issue of whether India has a right to maintain its balance-of-payments measures in the absence of a Committee or General Council decision. However, the conclusion that India does not have such a substantive right does not necessarily dispose of the procedural question of how other Members may challenge India's balance-of-payments measures as unjustified.

5.82 In considering whether the Article XVIII:12 procedures are exclusive, we start with the fact that the text of Article XVIII:12 in itself does not indicate that the BOP Committee procedures thereunder would be exclusive of procedures under Article XXIII or the DSU. Indeed, in the first part of our examination of the context of the second sentence of footnote 1 to the 1994 Understanding, we noted that the authorization in Article XVIII:12 to consider whether balance-of-payments measures were being "applied" in a manner involving an inconsistency with Articles XVIII:B or XIII tended, amongst other contextual elements, to confirm that footnote 1 should be interpreted as permitting dispute settlement panels to consider the justification of balance-of-payments measures (see paragraph 5.69 *supra*). Thus, the text of Article XVIII:12 as a whole does not suggest that Article XVIII:12 procedures are the exclusive means of determining whether balance-of-payments measures are justified under Article XVIII:B.

5.83 Further textual support for the non-exclusivity of Article XVIII:12 procedures is found in the fact that those procedures are specifically authorized to consider violations of Article XIII. In this regard, we note that India concedes that violations of Article XIII may be considered in regular dispute settlement proceedings under the DSU. We understand India's distinction that while certain aspects of the administration (for India, "application") of balance-of-payments measures may be considered under either Article XVIII:B procedures or DSU procedures (such as those involving Article XIII), the issue of the justification of balance-of-payments measures is reserved to Article XVIII:B procedures. We find it significant, however, that India's distinction (i) necessarily concedes that issues subject to Article XVIII:12 procedures are not always exclusively subject thereto, and (ii) has no textual basis in Article XVIII:B.

5.84 The conclusion that Article XVIII:12 procedures do not exclude the application of the general dispute settlement system is also confirmed by the fact that Article XVIII:12(d) is not mentioned as a special or additional procedure within the meaning of Article 1.2 of the DSU.³⁰⁷ If it had been intended that the DSU should apply subject to Article XVIII:12(d), it could have been expected that this would be specified in the DSU. Moreover, Article 8.5 of the Agreement on Subsidies and Countervailing Measures, which is one of the provisions to which India refers in support of its argument that exclusive procedures exist in the WTO Agreement, is mentioned in Appendix 2 to the DSU. The Panel therefore concludes that the nature of the procedures applied under Article XVIII:B is not a decisive factor in determining whether Article XVIII:B procedures are exclusive.

5.85 We find accordingly that the Article XVIII:12 procedures are not the exclusive means for determining whether balance-of-payments measures are justified under Article XVIII:B.³⁰⁸ We reach this conclusion on a provisional basis, however, as India presents several other arguments justifying its position that dispute settlement panels cannot consider the justification of balance-of-payments measures taken pursuant to Article XVIII:B.

The nature of decisions on the justification of balance-of-payments issues

5.86 India argues that the very nature of a decision as to whether balance-of-payments measures are justified or not makes it unsuitable for consideration by a dispute settlement panel. India argues that WTO Members have agreed on a number of provisions that assign the task of determining the legal status of politically delicate issues not to panels but to specialized bodies acting under particular procedures. These include decisions on whether balance-of-payments measures are consistent with Article XVIII:B and whether a phase-out period is appropriate, decisions which are not technical, legal matters in India's view.

5.87 In our view, panels are frequently required to examine issues which may call on consideration of specialized, or more generally "non-legal" matters. With regard to specialized matters, panels have the possibility of consulting with experts and seeking information and technical advice from any individuals and bodies they deem appropriate, under the terms of Article 13 of the DSU. With respect to balance-of-payments issues in particular, the IMF plays an important role and indeed, the panel has consulted with the IMF on the issues pertaining to its areas of expertise (see paragraphs 5.11-5.13 *supra* regarding the consultations with the IMF). In addition, it is quite possible that some disputes submitted to panels may concern politically sensitive matters. The role of panels is defined in Article 3.2 of the DSU which provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Panels are in all instances required to make an objective assessment of the facts of the case and apply the relevant WTO provisions to those facts.³⁰⁹ We are therefore not convinced that

³⁰⁷ Since the present complaint is based on Article XXIII and not on Article XVIII:12(d), it is not for this Panel to discuss whether the DSU would apply to a procedure based on Article XVIII:12(d).

³⁰⁸ To support its argument that panels cannot determine the justification of balance-of-payments measures taken under Article XVIII:B, India also relies on paragraph 13 of the 1994 Understanding, which authorizes the General Council to approve a phase-out period for removal of balance-of-payments measures. In our view, the fact that the General Council has been granted such authority does not affect our conclusion. See *infra* the discussion in paras. 5.229-5.235.

³⁰⁹ Article 7.1 of the DSU defines standard terms of reference: "To examine, in the light of the relevant provisions in (name of the covered agreement (s) cited by the parties to the dispute, the matter referred to the DSB by (name of the party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Finally, Article 11 specifies that "the function of panels is to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

the specialized or "non-legal" nature of the issues involved in examining the justification of balance-of-payments measures should prevent panels from examining such issues in the light of Article XVIII:B.³¹⁰

Potential redundancies

5.88 According to India, if the Panel were to interpret the right to resort to the DSU confirmed in the footnote to the 1994 Understanding as implying a complete transfer of the competence to determine the justification of balance-of-payments restrictions, including phased removal of such restrictions, from the Committee and the General Council to panels and the Appellate Body, it would reduce the whole of Article XVIII:12 and most of the provisions of the 1994 Understanding and the 1979 Declaration to redundancy or inutility.

5.89 In our view, India's argument overstates the effect of a decision that dispute settlement panels may consider the justification of balance-of-payments measures in individual cases. In most cases, it is reasonable to assume that there will be no resort to dispute settlement procedures on such issues. Past practice supports that assumption.

relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

³¹⁰ India further argues that numerous provisions in the WTO Agreement assign the task of determining the legal status of a measure to WTO bodies other than panels. (For a detailed description of the arguments of the parties, see *supra* in Section III.D.1 (a)). However, the examples given by India to illustrate its arguments do not persuade us that our conclusion on this issue is incorrect. These arguments are not directly relevant to Article XVIII:B.

Firstly, in the case of non-actionable subsidies, a specific provision exists to exclude the application of the dispute settlement procedures to notified subsidies and, provided the subsidy being reviewed is found to conform with Article 8.2 of the Agreement on Subsidies and Countervailing Measures (hereafter the "SCM Agreement"), to non-notified subsidies. No similar provision exists in the case of Article XVIII. If anything, the second sentence of footnote 1 to the 1994 Understanding *affirms* the application of the DSU. It is only by interpreting extensively one word of this sentence that India reaches the conclusion that panels are not supposed to review the "justification" of balance-of-payments measures under Article XVIII:B. However, since we found this interpretation unsupported by the ordinary meaning of the terms of footnote 1 in their context and in the light of the object and purpose of the WTO Agreement, we cannot make any analogy with the provisions of Article 8 of the SCM Agreement. In addition, we are not convinced that India's arguments reflect an accurate description of the situation resulting from the cited provisions. Regarding the procedure of Article 8.3 of the SCM Agreement, footnote 35 to that Agreement states that the provisions of Parts III and V of the Agreement shall not be invoked with respect to measures considered non-actionable. However, a subsidy referred to in Article 8.2 conferred pursuant to a non-notified programme can be subject to panel review, even though such subsidy shall be treated as non-actionable if it is found to conform with Article 8.2.

Secondly, the example of Argentina's request for the establishment of a panel to determine its principal supplying interest under Article XXVIII of GATT 1947 in respect of the renegotiation of the concession covering its soyabean exports to the EC is not conclusive. In that case, the discussions of the Council reveal divergent opinions of contracting parties on the appropriateness of recourse to Article XXIII to resolve this issue. The matter was however considered to have been satisfactorily resolved, without establishment of a panel, as the European Communities recognized Argentina's principal supplying interest in the concessions at issue, "without prejudice to any future decision by the CONTRACTING PARTIES with regard to Note 5 to Article XXVIII:1, nor to the future application of the Memorandum relating to Article XXVIII" (C/M/260).

Finally, Article V of GATS contains no express reference to dispute settlement procedures. It is therefore difficult to compare the situation with respect to Article V GATS with one where a provision exists that expressly addresses the relationship between the DSU and Article XVIII:B.

In any case, the argument that the provisions referred to by India provide for exclusive Committee procedures, even if it were to show that such possibility exists in the WTO Agreement, is of no relevance for Article XVIII:B, since no analogy can be deduced from the terms or the structure of the agreement itself.

5.90 Even if some balance-of-payments issues are considered in the dispute settlement system, it is our view that the BOP Committee procedures would play a significant role in these cases. To begin with, the issues will first be discussed in the BOP Committee and the results of the Committee process may influence the results of the dispute settlement process (see *infra* paragraphs 5.92-5.97 on potential conflicts). It should also be noted that dispute settlement procedures and the BOP Committee consultation procedures differ in nature, scope, timing and type of outcome. A review of the 1970 and 1979 Declarations, for example, confirms that the BOP Committee is called upon to address a wider range of issues than panels. Moreover, while resort to dispute settlement procedures under Article XXIII was not common in the GATT system, we have seen that recourse to Article XXIII was recognized, without calling into question the utility of the BOP Committee process, which has always provided the permanent framework for considering balance-of-payments issues.

5.91 Thus, we find that allowing dispute settlement panels to consider whether balance-of-payments measures are justified under Article XVIII:B would not render redundant or reduce to inutility either that article or related WTO provisions dealing with balance-of-payments issues. Article XVIII:B and the 1979 Declaration and 1994 Understanding taken together would continue to provide the basic instrument for review of balance-of-payments issues, with the dispute settlement procedures playing a complementary role, if and when necessary.

Potential conflicts

5.92 India argues that if dispute settlement panels are permitted to make findings on whether balance-of-payments measures are justified under Article XVIII:B, there will be a risk of normative conflicts within the WTO system because such decisions may be inconsistent with decisions on the same issue reached by other WTO bodies. In this regard, India additionally notes that different panels acting on different complaints could reach inconsistent conclusions. Moreover, India sees a significant increase in the risk of such conflicts in the WTO system, as opposed to the GATT 1947 system, because of the "automatic" adoption of dispute settlement reports under the DSU. We examine each of these issues in turn.

5.93 **Potential conflicts between a panel report and the BOP Committee.** It is possible that a panel and the BOP Committee could examine successively³¹¹ the issue of whether the same balance-of-payments measures are justified under Article XVIII:B. If there has been no decision in the BOP Committee or General Council at the time of the panel's consideration of the issue, the issue of conflict does not arise at the panel stage, which is the situation in this case. While the BOP Committee and the General Council have considered the justification of India's balance-of-payments measures at issue in this case, they made no determinations and reached no agreed conclusions. Even if this Panel were to decide that India's measures are not justified, nothing would prevent the Committee and the General Council from reaching different conclusions on the basis of new, different facts, in which case the Council could take a decision on a phase-out period under paragraph 13 of the 1994 Understanding on Balance-of-Payments Provisions. Moreover, what Members accepted in the DSB could be modified in the General Council. The discretionary competence of the General Council to waive India's obligations under Article IX of the WTO Agreement would remain unaffected. Similarly, a decision by the Panel that India's measures were justified as of November 1997 would not preclude re-examination by the BOP Committee or the General Council of India's measures in the future.

³¹¹ It is most unlikely that a dispute settlement procedure and a Committee procedure would reach conclusions at the same time. Even if this were to occur, the basis of review by the panel and the Appellate Body is limited to the facts and claims in existence at the time of the establishment of the panel, while the Committee is not under such constraint regarding the materials it can consider in terms of fact, implying that the factual basis of the conclusions of the Committee is likely to be different.

5.94 If the measures before a panel have been the subject of determinations or recommendations by the BOP Committee or General Council, we see no reason to assume that the panel would not appropriately take those conclusions into account. If the nature of the conclusions were binding (e.g., a decision on a phase-out period pursuant to paragraph 13 of the 1994 Understanding, which provides that the General Council may recommend that "in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations" or a determination on the basis of Article XVIII:12 (c) or (d)), a panel should respect them. Indeed, paragraph 13 of the Understanding provides that "[w]henever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations". If the conclusions are based on factual matters as of a given point of time, we assume that a panel would take those conclusions into account, as did the panel in the *Korea - Beef* case. In such a case, the fact that a matter before a panel is being considered at a later point in time necessarily means that a different result could be reached because the underlying factual situation may have changed. But in such circumstances, it could not be said that there would be an actual conflict between the Committee and panel determinations.

5.95 **Potential conflicts between panels.** India notes that the question of whether or not a Member's balance-of-payments measures are justified must be answered consistently. Yet, if panels may consider the issue of justification, successive panels may reach different results. While such a result cannot be excluded, we do not think it is likely. If the panels are commenced at or about the same time, Article 9.3 of the DSU provides for the same individuals to serve on the panels to the greatest extent possible. In all cases, the reports of such panels would be subject to review by the Appellate Body, which provides a mechanism to ensure consistent decisions. To the extent that the panels were established at significantly different points of time (such that Article 9.3 could not be applied), we note that, if the same factual situation obtained, it is likely that the second panel would take into account the results of the first panel, for the reasons expressed by the panel in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Complaint by the European Communities and their Member States (hereinafter *India - Patents II*).³¹² If the same factual situation did not obtain, a different decision would not necessarily be in conflict.

5.96 **"Automatic" adoption of panel reports.** It is certainly true, as noted by India, that the WTO dispute settlement system functions differently from that of the GATT dispute settlement system, particularly in respect of the procedures for the adoption of panel reports. In the WTO, in the absence of a consensus to the contrary (a "negative" consensus), panel and Appellate Body reports are adopted, while consensus decision-making prevails elsewhere in the WTO. We do not see why this would increase the risk of conflict, however. In fact, the practice of consensus decision-making in the WTO generally reduces the possibility of conflicts since opposition by one Member results in no decision being taken. While the negative consensus rule could result in the adoption of conflicting panel reports, that is true generally for dispute settlement in the WTO and not a problem specific to the balance-of-payments area. But such conflicts are unlikely, as discussed in the preceding paragraph.

5.97 Thus, we cannot accept India's argument that the problem of potential conflicting decisions (panel *vs.* Committee, panel *vs.* panel) in cases considering whether balance-of-payments measures under Article XVIII:B are justified, requires a finding that panels are not competent to consider such issues. In any case, the arguments raised by India concerning any potential conflict do not seem to outweigh the drawbacks which could result from the absence of availability of dispute settlement procedures to deal with balance-of-payments measures taken under Article XVIII:B.

³¹² Panel Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Complaint by the European Communities and their Member States, adopted on 2 September 1998, WT/DS79/R, para. 7.30.

(iii) *First sentence of footnote 1 of the 1994 Understanding*

5.98 Having considered the first two elements of the context of the second sentence of footnote 1 of the 1994 Understanding – the use of the word "applied" in other provisions and the relationship of the BOP Committee procedures to dispute settlement procedures, we now turn to the third element of that context – the first sentence of footnote 1 of the 1994 Understanding. This sentence provides that "[n]othing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994."

5.99 Our interpretation of the second sentence of footnote 1 so far, which has been based on the ordinary meaning of its terms, taken in their context, and which is consistent with past practice under GATT 1947, does not affect the right of developing country Members to take measures under Article XVIII:B. Nor does it prevent Members from resorting to the procedures of the BOP Committee under Article XVIII:12 and the 1994 Understanding. As such, our interpretation does not modify Members' rights and obligations under Article XVIII:B of GATT 1994.

(c) Object and purpose of the WTO Agreement

5.100 In relation to the object and purpose of the WTO Agreement, we note that the first sentence of Article 3.2 of the DSU provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." It has been one of the major achievements of the Uruguay Round to strengthen the operation of settlement of disputes through the institution of a single integrated framework for the examination of disputes relating to all the multilateral trade Agreements negotiated as part of the "Single Undertaking". This includes GATT 1994 which contains the relevant provisions relating to balance-of-payments measures. It has clearly been intended that this mechanism be very widely available for the preservation of the rights and obligations of Members under the WTO Agreement, subject only to special or additional rules and procedures which are specifically listed.

5.101 With regard to measures taken for balance-of-payments purposes, we have noted that, under GATT 1947, the panel in *Korea - Beef* concluded that it was competent to review balance-of-payments measures. That panel, the only one to have expressly addressed this issue under GATT 1947, found that the availability of dispute settlement procedures with regard to balance-of-payments provisions was consistent with the complete application of the GATT 1947. Under the WTO, the rule of law has been strengthened through increased automaticity of dispute settlement and detailed integrated dispute settlement procedures. All the more so in this context of "thickening of legality", it would be inconsistent with the object and purpose of the WTO Agreement to interpret the relevant provisions as precluding panels from reviewing the justification of measures taken for balance-of-payments purposes in the absence of a clear textual basis to this effect.

5.102 The purpose of Article XVIII:B is to allow developing countries to deviate temporarily from the provisions of the GATT by adopting, under certain specified conditions, import restrictions to safeguard their external position and ensure a level of reserves adequate for the implementation of their programme of economic development. However, to interpret footnote 1 to the 1994 Understanding to confirm the availability of dispute settlement in relation to measures taken for balance-of-payments purposes is not in contradiction with that purpose. The right of developing country Members to take such measures is not affected by the availability of dispute settlement in relation to these measures. This is also consistent with the overall object and purpose of the WTO Agreement described above, as it enables the preservation of Members' rights and obligations in relation to such measures.

5.103 These elements confirm our interpretation that, in the absence of a provision clearly limiting the application of the DSU in balance-of-payments matters, no such limitation should be read in footnote 1 to the 1994 Understanding.

(d) Related GATT practice

5.104 India also referred to practice under Article XXIV of GATT 1947 to support its argument that under the GATT 1947, the established practice was not to allow review by dispute settlement panels of measures justified under provisions for which a specific review procedure exists. India thus refers to the report on *EC-Citrus*, and the panel report on *EC – Bananas I*, both unadopted reports which have addressed the issue of the relationship between Article XXIV and Article XXIII procedures under GATT 1947.³¹³

5.105 The reference to panel reports concerning Article XXIV could be relevant, to the extent that they also address issues relating to the availability of dispute settlement procedures to challenge measures taken on the basis of a provision, Article XXIV, under which a specific review procedure exists. However, since both reports cited remained unadopted, they have a very limited weight as a reflection of past practice of the GATT Contracting Parties.³¹⁴ Also, they can only be relevant to this dispute by analogy, as they consider the issue of the relationship between Article XXIII and Article XXIV, which is not the issue we are required to examine here. Moreover, these reports do not seem to support India's claim that the past practice under GATT 1947 had been not to allow a review under dispute settlement procedures when a specific review procedure exists, such as Article XXIV. At best, this past practice would seem uncertain, and the most recent report on this issue, the second panel report on *EC – Import Regime for Bananas* (hereinafter *EC - Bananas II*), shows an evolution with respect to Article XXIV towards a result similar to that applied for Article XVIII:B in the *Korea - Beef* case.³¹⁵ In addition, the Understanding on the Interpretation of Article XXIV of GATT 1994, concluded after these reports, includes some specific language on the availability of dispute settlement in relation to Article XXIV.

(e) Preparatory work

5.106 India also refers to a US-Canadian proposal for a "Declaration on Trade Measures Taken for Balance-of-Payments Purposes", presented in June 1990 during the Uruguay Round negotiations. The proposal contained detailed provisions relating to surveillance of balance-of-payments measures³¹⁶, including, in a final section entitled "Review of Measures Following Balance-of-payments Consultations", the following text:

³¹³ See *supra* notes 294 and 295 the references for *EC – Citrus* and *EC – Bananas I* respectively.

³¹⁴We recall that the Appellate Body specified, in its report on *Japan - Taxes on Alcoholic Beverages*, that unadopted panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members. Likewise we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.'" (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, p.14-15) The Appellate Body confirmed this analysis in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparels and other Items* (See Report of the Appellate Body, WT/DS56/AB/R, adopted on 22 April 1998, para. 43).

³¹⁵ In *EC - Bananas II*, the panel "could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential agreement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. If this view were endorsed, a mere communication of a contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XXIII:2, and therefore also of the effective protection of their substantive rights, in particular those under Article I:1. The Panel concluded therefore that a panel, faced with an invocation of Article XXIV, first had to examine whether or not this provision applied to the agreement in question." (DS38/R, 11 February 1994, not adopted, para. 158.).

³¹⁶ The US-Canada proposal included strongly worded provisions relating to preference to be given to price-based measures over quantitative restrictions, and specific deadlines to announce time-schedules for relaxation and removal of measures and maximum time-periods for such relaxation or removal. This proposal as tabled was not accepted.

"In those cases in which the Committee has been unable to agree on a specific recommendation, the question of the consistency of the measures under review with the Articles and this Declaration has not been resolved. The consulting contracting party or affected contracting parties can, if they wish, attempt to resolve the question in the Council. Alternatively, affected contracting parties can, if they wish, pursue the matter through normal GATT dispute settlement procedures pursuant to Articles XXII and XXIII".³¹⁷

5.107 From the fact that the US-Canadian proposal of June 1990 was not adopted, India derives that the notion of recourse to dispute settlement as an "alternative" mode of determination of the legal status of restrictions taken for balance-of-payments purposes was rejected.³¹⁸

5.108 India does not point to any particular source supporting its position. The provision relating to recourse to dispute settlement was only one element of the US-Canadian proposal, which addressed a broad range of issues relating to balance-of-payments measures. At the time this proposal was put forward, there was no agreement to negotiate balance-of-payments matters and discussions in the Negotiating Group seemed to reflect a general lack of support for the proposal by a number of developing countries. A report of the Chairman of the Negotiating Group, dated 23 July 1990,³¹⁹ notes that :

"The Group has discussed at considerable length a number of proposals for negotiations on trade measures taken for balance-of-payments reasons [one from the EC, one from Canada and the United States]. It has not however been able to agree to engage in negotiations on this subject. In these circumstances it is not possible for me to present a text which would have the character of a profile of an agreement. This note therefore describes the main positions taken in the Group's discussions to date." [...]

"The general thrust of these proposals has been supported by a substantial number of developed contracting parties, though some have said that while being prepared to negotiate stronger disciplines in Article XII, it would be difficult for them, at this stage, to commit themselves to avoid recourse to it.

A considerable number of developing countries, on the other hand, have argued that no convincing case has been made out as to why it is necessary to address this issue in the Round, given that as recently as 1979 the CONTRACTING PARTIES approved the Declaration on Trade Measures Taken for Balance-of-Payments Purposes [...]. The payments situation of many developing countries [...] remains critical: if there were to be negotiations regarding trade measures taken under Article XVIII:B, the objective should be to provide greater flexibility in its use rather than to impose more stringent conditions. This applied in particular to countries undertaking major economic reforms. In general, however, these participants have taken the view that the existing provisions and the related procedures in the Balance-of-Payments Committee have worked well and that any perceived problems in their functioning should be addressed in the Committee rather than in the context of the Round."

5.109 However, this document does not specify whether the dispute settlement aspects played any role in the rejection of the US-Canada proposal. Moreover, one should be cautious in drawing from this report any conclusion as to the meaning of the texts finally adopted since negotiations actually continued in spite of the attitude of the parties recorded in that document.

³¹⁷ "Proposal by Canada and the United States", MTN.GNG/NG7/W/72, 15 June 1990, para. 19.

³¹⁸ For a detailed description of the parties' arguments, see Section III.D.(c) *supra*.

³¹⁹ MTN.GNG/NG7/W/73, Annex 2, para. 1 and 4-5.

5.110 Article 32 of the Vienna Convention allows a treaty interpreter to have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or when interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable. In this instance, we find that the meaning resulting from the application of Article 31 is neither ambiguous nor obscure, and does not lead to a manifestly absurd or unreasonable result. We therefore do not need to consider the preparatory work as reflected in the negotiating history to determine the meaning of the terms.³²⁰

5.111 We also note that the piece of drafting history referred to by India is not unequivocal. The US-Canadian proposal of June 1990 addressed several aspects of the balance-of-payments surveillance. India did not point to any source, such as minutes, which would have expressly stated that the reasons for its rejection was related to the alternative recourse to Article XXIII. The additional negotiating material available to the Panel on the reasons for the rejection of that proposal does not address specifically this aspect.³²¹ We can only conclude that the piece of negotiating history submitted by India is insufficient evidence that recourse to the general dispute settlement mechanisms was rejected during the Uruguay Round and to lead us to change the conclusions we reached on the basis of the criteria of Article 31.

5. Conclusion

5.112 Our examination of the ordinary meaning of the words of footnote 1 to the 1994 Understanding, the only provision expressly addressing the relationship between dispute settlement procedures under the DSU and balance-of-payments measures, has revealed that it could not be assumed, from the use of the terms "application of measures" in the provision, that an implicit distinction is intended between such "application" and the justification of the measure under Article XVIII:B. The ordinary meaning of the words suggests rather that this is a positive requirement that there be a measure currently applied, which will form the basis for the complaint. We find that this wording affirms the application of the WTO dispute settlement system to balance-of-payments matters. It does not limit it. In order to find, as suggested by India, an implicit opposition contained in

³²⁰ See PCIJ *Lotus* (France vs. Turkey), 7 September 1927, PCIJ Reports Series A (1927), No. 10 p. 16.

³²¹ The results of the negotiations on this issue has been described in the following terms:

"In November 1989 the Americans and Canadians put their earlier views into concrete form in a joint proposal [...] [According to the proposal] action under the balance-of-payments articles should be allowed only in accordance with agreed guidelines. [...] Any deviations from the guidelines, unless explicitly approved by the Committee, would permit other countries to seek redress through the GATT dispute settlement procedures for damage done to their trade, with the onus on the restricting country to show that its measures are justified. [...] The reaction of developing countries was totally negative. [...] By June 1990, the Americans and Canadians had recognized that their earlier proposals were not negotiable, and moved to a position fairly close to that of the Community, although still calling for time limits for the removal of restrictions and not offering anything for infant industries. This was still not enough, however, to persuade developing countries to negotiate on the subject[...]" ... "The fragile compromise that emerged [in 1991] [...] was [...] carried into the Draft Final Act [...]. For the most part, it deals with the procedures for balance-of-payments consultations [...] The Agreement also makes clear that countries resorting to the balance-of-payments provisions may still be subject to complaints under the GATT dispute settlement procedures if they do not follow the rules. As a whole, the Agreement is a far cry from the ambitious controversial and ultimately non-negotiable proposals originally put forward by some countries. But it stands as (in Maciel's words) "a serious effort to clarify the existing provisions and procedures without undermining the right to use balance-of-payments measures". (J. Croome, Reshaping the World Trading System. A History of the Uruguay Round, World Trade Organization, 1995, pp. 223-224 and 307. Ambassador Maciel, of Brazil, was Chairman of the Negotiating Group on Rule-Making and Trade-Related Investment Measures during the Uruguay Round negotiations.) This text, apart from being a secondary source of information, is also imprecise on this issue.

this text between this notion of "application" and that of "justification", with the effect of very significantly restricting the scope of dispute settlement review by panels regarding balance-of-payments measures, we would have needed to find clear elements supporting such an interpretation. An examination of the context of the provisions and object and purpose of the agreement, as well as past GATT practice, has not led us to a conclusion other than that initially suggested by the terms of the provisions.

5.113 Therefore, we find that the terms of the second sentence of footnote 1 to the 1994 Understanding cannot be construed in such a narrow sense as to preclude the examination by panels of issues relating to the justification of measures taken for balance-of-payments purposes under Article XVIII:B of GATT. Nothing in past panel reports leads us to change our conclusions in this respect. Our finding is also consistent with the terms of the first sentence of footnote 1 of the 1994 Understanding which provides that "[n]othing in this Understanding is intended to modify the rights and obligations of Members under Articles XIII or XVIII:B".

5.114 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, making the Committee procedure redundant and depriving Members of their rights under Article XVIII:B procedures. On the one hand, as shown in paragraphs 5.92 to 5.97, the likelihood of a conflict between conclusions reached under the dispute settlement mechanism and conclusions of the Committee is very low in practice. It is also clear that panels could not ignore determinations by the BOP Committee and the General Council. Moreover, our findings do not affect the right of developing country Members to invoke Article XVIII:B when they face balance-of-payments difficulties. They do not affect their right to maintain those measures in accordance with the requirements of Article XVIII:11 and the Committee procedure remains the only procedure for Members to obtain the authorisation to maintain balance-of-payments measures under certain circumstances. On the other hand, our findings also preserve the right of Members aggrieved by balance-of-payments measures to secure the protection of their rights under the WTO Agreement if the measures at issue are no longer justified under Article XVIII:B. If India's interpretation were endorsed, a mere notification by a Member under Article XVIII:B could deprive other Members of their procedural rights under the WTO dispute settlement provisions and therefore also of the effective protection of their substantive rights. This would also be contrary to the principle expressed in Article 3.2 of the DSU, which provides that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.³²²

5.115 Having determined our degree of competence in this case, we must address the substantive claims of the United States. Before proceeding with this examination, we clarify the manner in which burden of proof is distributed in the examination of the different claims submitted to us.

E. BURDEN OF PROOF WITH RESPECT TO THE CLAIMS

5.116 We consider that the evidence and arguments submitted by the parties regarding Article XI and Article XVIII requires us to state how we review the evidence in this case. In relation to Article XI, the United States has presented detailed evidence regarding four types of measures applied by India to a number of products which it considers violate Article XI:1 of GATT 1994. India does not submit a point-by-point rebuttal of the evidence presented by the United States. Rather, India contests

³²² Panel Report on *European Communities – Import Regime for Bananas*, 11 February 1994, DS38/R, not adopted, para. 158.

the need for a ruling of the Panel on the question of the legality of the import restrictions at issue since they were notified to the BOP Committee as falling under Article XI:1. With respect to Article XVIII, the issue in this case is the extent to which the United States needs to prove its claim of a violation of Article XVIII:11, when India invokes Article XVIII:B as its justification for the measures at issue.

5.117 We recall that the Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*,³²³ stated that:

"the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

5.118 In addition, we recall that the Appellate Body, in its report on *EC Measures concerning Meat and Meat Products (Hormones)*, stated that:

"The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency of a provision [...] before the burden of showing consistency with that provision is taken by the defending party is *not* avoided by simply describing the same provision as an exception" (emphasis in original)³²⁴

5.119 We view the above-mentioned principle as requiring the following in terms of burden of proof in this case. In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie* case that the Indian balance-of-payments measures are not justified by reference to Articles XI:1 and XVIII:11 of GATT 1994.³²⁵ Should the United States do so, India would have to respond in order to rebut the claim.

5.120 In this instance, the United States has presented a *prima facie* case for each of its claims. India has responded and presented several defences to which the United States has responded. Subsequently, having regard to Article XV:2 of GATT 1994 and Article 13 of the DSU, we have consulted the IMF on a number of issues related to India's balance-of-payments situation. We have then weighed, on each claim, the evidence favouring India against that favouring the United States to determine on the basis of all evidence before the Panel whether the United States has established its claim. Of course, where the balance of evidence is inconclusive, the party asserting the particular claim or defence will have failed to establish it.

5.121 In the case of the claim of violation of Article XI:1, we shall take into account the fact that the United States intends to prove violations in specific situations, and that India does not deny or reply specifically to some of those allegations. We accordingly determine whether the evidence made available by both parties allows the Panel to reach a conclusion for each measure. In the case of Article XVIII, the United States has claimed that India has violated Article XVIII:11 by maintaining

³²³ WT/DS33/AB/R, adopted on 23 May 1997.

³²⁴ Op. Cit. para. 104.

³²⁵ Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, paras. 257-259.

balance-of-payments measures that are no longer justified. If the evidence before us supports the US position, the United States will at the same time have negated India's Article XVIII defence.

F. ARTICLE XI:1

5.122 India regulates the importation of goods found in a "Negative List of Imports", contained in Chapter 15 of India's Export and Import Policy 1997-2002. The United States identifies four measures which are implemented under India's Export and Import Policy and which it claims constitute quantitative restrictions within the meaning of Article XI:1: (a) discretionary import licensing; (b) canalization of imports through government agencies; (c) the Special Import Licensing (SIL) system; (d) the "Actual User" condition on import licensing. These measures are described in more detail in paragraphs 5.125, 5.132, 5.137 and 5.140. To the extent that India applies these four measures as balance-of-payments restrictions on the products specified in Annex I, Part B of WT/BOP/N/24, we refer to these measures as the "measures at issue" in this dispute.

5.123 While India seeks to rebut some of the United States' arguments, it does not challenge the status of the measures under Article XI:1. India argues that it has already notified all of the import restrictions at issue to the BOP Committee as falling under Article XI:1. In the view of India, there is consequently no dispute regarding the legality of the import restriction under Article XI:1 and it would be sufficient for the Panel to record that India has notified all the measures at issue as import restrictions falling under Article XI:1 and then proceed with the examination of their consistency with Article XVIII:B.

5.124 In our opinion, the notification by India of the measures at issue to the Committee is more than a simple admission of facts, since such notification implies a recognition that the measures at issue are "quantitative restrictions". The fact that India also notified that these measures were justified under Article XVIII, with the legal consequences attached to it (including consultations within the BOP Committee) also gives added value to the statement of India.³²⁶ However, we consider that we need to make a finding on the violation of Article XI:1, for two reasons. First, it is an established practice under GATT and under the WTO that, even when the legal nature of a particular measure is not challenged, panels have made findings to determine the existence of a violation before addressing any justification invoked by the defending party. Secondly, the United States has asked for a ruling on the legality of each of the import restrictive measures at issue in this case. The United States claims that specific findings on the violation of Article XI:1 would assist in the implementation of the Panel's recommendations. Such a finding would not constitute, as argued by India, a "declaratory judgment" on "potential future inconsistencies". It will be based on an examination of the measures at issue as they are submitted to the Panel, and is required for the effective resolution of this dispute concerning these measures.

1. India's import licensing system for products on the "Negative List of Imports"³²⁷

5.125 The United States claims that imports of goods falling within the "Restricted Items" list, found in Annex II of the Negative List, require a licence issued by the Director-General of Foreign

³²⁶ We recall in this context that, as recently stated by the Panel on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/R, "it is usual legal practice for domestic and international tribunals, including GATT panels, to consider that, if a party admits a particular fact, the judge may be entitled to consider such fact as accurate" (footnote omitted). See also the panel reports cited in reference in the footnote to the cited text: *EEC – Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9 and *EEC- Quantitative Restrictions against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, para. 31.

³²⁷ For a detailed description of the measures at issue and of the arguments of the parties, see Sections II.B and III.B *supra*.

Trade (DGFT). The "Restricted Items" list covers a number of products, including consumer goods (defined as consumption goods which can directly satisfy human needs without further processing and includes consumer durables and accessories). In WT/BOP/N/24, Annex 1, Part B, the products subject to this condition are identified by the notation "NAL", which stands for "Non-automatic Licensing". According to the United States, imports of these products into India are subject to an arbitrary, non-transparent and discretionary import licensing system, under which licences are granted "on merit" and only to a category of operators called "Actual Users".

5.126 India responds that this system is transparent and rules-based, and notes in particular that under the Foreign Trade (Development and Regulation) Act, 1992, criteria are provided for the granting of licences, refusals to grant a licence must be motivated in writing and decisions on the granting of licences, including refusals, are open to appeal.

5.127 Article XI contains one of the fundamental principles of the GATT/WTO legal system, the general prohibition of quantitative restrictions. Article XI:1 reads as follows:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product of the territory of any other [Member]."

5.128 We note that the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges". As was noted by the panel in *Japan - Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies "to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges."³²⁸ The scope of the term "restriction" is also broad, as seen in its ordinary meaning, which is "a limitation on action, a limiting condition or regulation".³²⁹

5.129 Under the GATT 1947, panels have examined whether import and export licensing systems are restrictions under Article XI:1. For example, in a case involving a so-called "SLQ" regime, which concerned products subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or value, permit applications being granted upon request, the panel noted "that the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the *automatic* issuance of licences".³³⁰ A similar conclusion was reached in the above-cited *Japan - Trade in Semi-conductors*, where the panel found that "export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI".³³¹ These reports are consistent with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude

³²⁸ Panel Report on *Japan – Trade in Semi-conductors*, adopted on 4 May 1988, BISD 35S/116, para. 104.

³²⁹ *New Shorter Oxford Dictionary* (1993), p. 2569.

³³⁰ Panel Report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, para. 31 (emphasis added). See also Panel Report on *EEC – Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9.

³³¹ *Op. Cit.*, para. 118.

that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.

5.130 In light of the foregoing, we note that it is agreed that India's licensing system for goods in the Negative List of Imports is a discretionary import licensing system, in that licences are not granted in all cases, but rather on unspecified "merits". We note also that India concedes this measure is an import restriction under Article XI:1.³³²

5.131 In light of these elements, we find that the import licensing system maintained by India for the products found in Annex II of the Negative List of Imports, to the extent that it applies to the products specified in WT/BOP/N/24, Annex I, Part B, operates as a restriction on imports within the meaning of Article XI:1.

2. Canalization of imports through government agencies³³³

5.132 The United States also claims that imports of goods specified as "Canalized Items" in Part III of the Negative List may in principle be imported only by designated canalizing (government) agencies. Among these items are petroleum products, certain fertilizers, various sorts of oil and certain cereals. The DGFT may grant import licences for canalized products to other entities than the designated canalizing agency, but this is subject to a "no objection" certificate from the canalizing agency normally entitled to import. According to the United States, the "canalization" of imports, i.e. the exclusive importation of certain goods through designated government agencies, constitutes restrictions within the meaning of Article XI:1. The United States refers to the Note Ad Articles XI, XII, XIII, XIV and XVIII and to a number of working party and panel reports under GATT 1947 in support of the proposition that import restrictions are no less subject to Article XI:1 when they are imposed through state trading. In this regard, the United States has produced tables indicating the quantities and values of imports of some "canalized" items, taken from India's notification to the State Trading Committee to show that canalization resulted in zero imports in 1992-1995 for wheat and rice.

5.133 As to India, we note that it considers that the restrictions on canalized items are "restrictions" within the purview of Article XI:1, since it has notified them as balance-of-payments restrictions in WT/BOP/N/24.

5.134 In analyzing the US claim, we note that violations of Article XI:1 can result from restrictions made effective through state trading operations. This is made very clear in the Note Ad Articles XI, XII, XIII, XIV and XVIII, which provides that "Throughout Article XI, XII; XIII; XIV; and XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations." It should be noted however, that the mere fact that imports are effected through state trading enterprises would not in itself constitute a restriction. Rather, for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.³³⁴

³³² We note that a finding that a discretionary licensing system is a restriction for purposes of Article XI does not imply that discretionary licensing systems cannot be used where an exception to Article XI is applicable. Indeed, their use is foreseen by the Import Licensing Agreement, which regulates their use.

³³³ For a detailed description of the measures at issue and of the arguments of the parties, see: respectively, Sections II.B and III.B *supra*.

³³⁴ Panel Report on *Korea - Beef*, Op. Cit., para 115: "The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1".

5.135 As noted above, the United States has shown in some instances that there have been zero imports of products reserved to state trading enterprises by India. We note, however, that canalization *per se* will not necessarily result in the imposition of quantitative restrictions within the meaning of Article XI:1, since an absence of importation of a given product may not always be the result of the imposition of a prohibitive quantitative restriction. For instance, the absence of importation of snow ploughs into a tropical island cannot be taken as sufficient evidence of the existence of import restrictions, even if the right to import those products is granted to an entity with exclusive or special privileges.

5.136 In this case, however, the inclusion by India of the canalized items as quantitative restrictions under Article XI:1 in its notification to the BOP Committee, combined with the evidence submitted by the United States, leads us to conclude that the "canalization" measures specified in Part III of the Negative List of Imports, to the extent that they apply to products specified in WT/BOP/N/24, Annex I, Part B, operate as a restriction on imports within the meaning of Article XI:1.

3. The Special Import Licence (SIL) system³³⁵

5.137 The United States claims that imports of certain designated goods require a Special Import Licence (SIL) issued by the DGFT or an authorized licensing authority. SILs are granted in proportion to the applicant's exports or net foreign exchange earnings (Chapter 12 of India's Export and Import Policy 1997-2002). According to the United States, the SIL system is a non-automatic licensing regime under which approval of licence applications is not granted in all cases. The United States considers that the restrictive effect of the SIL system on imports is shown by the quota premium for purchase of special import licences (which may be transferred in certain cases). As such, the United States argues that the SIL system is equally in violation of Article XI:1.

5.138 As for India, we note that it considers that the SIL system is a "restriction" within the purview of Article XI:1, since it has notified it as a balance-of-payments restriction in WT/BOP/N/24.

5.139 It appears that the SIL system, like the general import licensing regime examined above, is a discretionary or non-automatic licensing regime. Licences under this regime can be granted only to certain categories of exporters and licences are not always granted. Accordingly, we find that the SIL system, to the extent that it applies to the products specified in WT/BOP/N/24, Annex 1, Part B, operates as a restriction on imports within the meaning of Article XI:1.

4. The Actual User requirement

5.140 The United States also claims that under India's Export and Import Policy 1997-2002, import licences are generally available only to "Actual Users", which are defined in Chapter 3 thereof as follows: an "Actual User" means an actual user who may be either industrial or non-industrial. "Actual User (industrial)" means a person who utilises the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit. "Actual User (non-industrial)" means a person who utilises the imported goods for his own use in (i) any commercial establishment carrying on any business, trade or profession; or (ii) any laboratory, scientific or research and development institution, university or other educational institution or hospital; or (iii) any service industry.

5.141 The United States argues that the granting of licences only to "Actual Users" also constitutes a restriction on imports, as it effectively prevents imports by intermediaries. Although India states that licences might be granted to any person "including an industrial user who was engaged in production

³³⁵ For a detailed description of the measures at issue and of the arguments of the parties, see: respectively, Sections II.B and III.B *supra*.

solely for the domestic market", the definition of "actual user" quoted above appears to include only persons who will employ the imported goods "for their own use".

5.142 As noted above, Article XI:1 is "comprehensive" in that it prohibits import restrictions "made effective through quotas, import or export licences *or other measures*"³³⁶, excluding from its coverage only "duties, taxes or other charges". In considering the scope of the prohibition, it is instructive to consider how it has been dealt with in prior panel reports. For example, a minimum import price system has been considered to be a restriction within the meaning of Article XI:1.³³⁷ In a case involving limitations on the points of sale available to imported beer, a panel found that such limitations were restrictions within the meaning of Article XI:1.³³⁸ These reports are in accord with the ordinary meaning of the term "restriction", which, as noted above, is "a limitation on action, a limiting condition or regulation".³³⁹ Applied to the "Actual User" condition, they lead to the conclusion that it is a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.

5.143 Accordingly, we find that the Actual User condition, to the extent that it applies to the products specified in WT/BOP/N/24, Annex I, Part B, operates as a restriction on imports within the meaning of Article XI:1.

5. Summary

5.144 In conclusion, we find that the import licensing system applied by India to the importation of goods falling within the "Restricted Items" list found in Annex II of the Negative List of Imports, the canalization through government agencies of imports specified in Part III of the Negative List of Imports, the SIL system and the Actual User requirement, to the extent that they apply to the products specified in WT/BOP/N/24, Annex I, Part B, impose restrictions or prohibitions on imports within the meaning of Article XI:1 of GATT 1994 and therefore violate Article XI:1.

G. ARTICLE XVIII:B OF GATT 1994

5.145 Having determined that the measures at issue are quantitative restrictions within the meaning of Article XI:1 and therefore prohibited, we must examine the United States' second claim, i.e. violation of Article XVIII:11, and India's defence under the balance-of-payments provisions of GATT 1994 in order to determine whether India, by maintaining the measures at issue, violates Article XVIII:11.

5.146 The claims of the parties can be summarized as follows: the United States claims that India's measures are in violation of Article XVIII:11 because they are not necessary under the terms of Article XVIII:9. In the view of the United States, Article XVIII:11 allows for progressive relaxation of balance-of-payments measures as the balance-of-payments situation improves, but this progressive relaxation is required to take place only during the period when the conditions of Article XVIII:9 are

³³⁶ (emphasis added).

³³⁷ Panel Report on *EEC – Programmes of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9. Similarly, a panel found that a measure limiting exports below a certain price was within the scope of Article XI:1. Panel Report on *Japan – Trade in Semiconductors*, Op. Cit., para. 105.

³³⁸ Panel Report on *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, adopted on 22 March 1988, BISD 35S/37, para. 4.24. This case involved state trading operations and the panel emphasized that the Note Ad Articles XI, XII, XIII, XIV and XVIII referred to "restrictions" generally and not to "import restrictions". It accordingly considered restrictions on distribution as within the meaning of "other measures" under Article XI:1, even though such measures might be examined also under Article III:4. Here the restrictions at issue, although related to distribution, are on importation.

³³⁹ New Shorter Oxford Dictionary (1993), p. 2569.

met, not afterwards. For the United States, the concept of a phase-out after that period is entirely absent from Article XVIII:B, and once there is no longer any balance-of-payments justification, the measures must be eliminated. India considers that it is allowed to maintain balance-of-payments measures until the General Council decides, upon recommendation by the BOP Committee, that they are no longer justified. India further claims that under the Note Ad Article XVIII:11, even if it is not currently experiencing balance-of-payments difficulties within the meaning of Article XVIII:9, it should not be 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. Moreover, India claims that, in any event, it is entitled, under the 1994 Understanding and other GATT 1994 provisions, to a gradual phase-out of its quantitative restrictions.³⁴⁰

5.147 Under the terms of Article XVIII:9,

"the import restrictions instituted, maintained or intensified shall not exceed those necessary:

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

due regard being paid to any special factors that may be affecting the reserves of the Member or its need for reserves.

5.148 The second sentence of Article XVIII:11 provides:

"[The Member concerned] 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 Member shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this section.*"

5.149 The Note Ad Article XVIII:11 provides:

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

5.150 In light of these provisions and the arguments of the parties, it is therefore necessary to examine in the first instance whether India's balance-of-payments situation is such that the conditions foreseen in Article XVIII:9 are fulfilled. If this were the case, India would be in the situation in which the United States admits that it would be entitled to maintain and progressively relax any measures maintained for balance-of-payments purposes as the balance-of-payments situation improves, without being required to eliminate them. If we determine that this is not the case, however, we will need to consider India's position that restrictions can be maintained on the basis of Article XVIII:11 even when the balance-of-payments situation does not meet the conditions of Article XVIII:9. Finally, we must consider whether India could claim a right to maintain the measures as long as the General

³⁴⁰ For a detailed description of the arguments of the parties, see Section III.D.3-4 *supra*.

Council has not determined them to be inconsistent with Article XVIII:B³⁴¹ or otherwise has a right to phase out its balance-of-payments measures.

5.151 Before we address these claims and having regard to Article 12.11 of the DSU, we first consider the concept of special and differential treatment in relation to Article XVIII:B of GATT 1994, which is relevant to our examination under Article XVIII:B of GATT 1994 as a whole.

1. Special and differential treatment

5.152 India argues that Article XVIII:B is the most important expression of the principle of special and differential treatment in the GATT. India further argues that the provisions of Article XVIII:B embody a presumption that developing country Members would face balance-of-payments difficulties on account of economic development and that the sequence of the terms of Article XVIII:11 suggested a dynamic linkage between domestic policy reform and improvements in the balance-of-payments and that such improvements would enable Members to progressively relax and eliminate import restrictions as the balance-of-payments situation improved. Therefore, Article XVIII:11 was premised on the notion that trade liberalization must follow upon improvements of the balance-of-payments situation and not vice-versa. In the view of India, there was no requirement in Article XVIII:B that a Member must provide evidence that maintaining import restrictions would result in improvements in its balance-of-payments or conversely, that the removal of import restrictions would cause deterioration in its balance-of-payments. For India, in view of the presumption underlying Article XVIII:B, the burden was on the United States to establish that maintaining import restrictions would not result in improvement, or would cause a deterioration, in India's balance of payments.³⁴²

5.153 In Article XVIII:8, Members recognize that developing countries "tend, when they are in rapid process of development, to experience balance-of-payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade." In Article XVIII:2, it is recognized that

"it may be necessary for those Members, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. [Members] agree, therefore, that those members should enjoy additional facilities to enable them [...] (b) to apply quantitative restrictions for balance-of-payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development."

5.154 Article XVIII:4(a) further provides that:

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

5.155 It is clear from these provisions that Article XVIII, which allows developing countries to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes, is premised on the assumption that it "may be necessary" for them to adopt such measures in order to

³⁴¹ This issue was already considered in paras. 5.76-5.80 *supra*, but as it is relevant to the analysis of India's defence under Article XVIII:B, we also address it in this context, with reference to our previous conclusions.

³⁴² For a detailed description of the arguments of the parties, see Section III.D.5 *supra*.

implement economic development programmes. It allows them to "deviate temporarily from the provisions of the other Articles" of GATT 1994, as provided for in, *inter alia*, Section B. These provisions reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes. Article XVIII:B of GATT 1994 thus embodies the special and differential treatment foreseen for developing countries with regard to such measures. In our analysis, we take due account of these provisions. In particular, the conditions for taking balance-of-payments measures under Article XVIII are clearly distinct from the conditions applicable to developed countries under Article XII of GATT 1994.³⁴³

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

5.157 Article 12.11 of the DSU requires us to indicate explicitly the form in which account was taken of relevant provisions on special and differential treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures. In this instance, we have noted that Article XVIII:B as a whole, on which our analysis throughout this section is based, embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes. This entire part G therefore reflects our consideration of relevant provisions on special and differential treatment, as does Section VII of our report (suggestions for implementation).

2. Is India experiencing balance-of-payments difficulties within the meaning of Article XVIII:9?

(a) Conditions under Article XVIII:9

5.158 As noted above, Article XVIII:11 requires Members to "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 [...]". We recall that, under the terms of Article XVIII:9, "the import restrictions instituted, maintained or intensified shall not exceed those necessary:

(a) to forestall the threat of, or to stop, a serious decline in monetary reserves, or

(b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves"

due regard being paid to any special factors that may be affecting the reserves of the Member or its need for reserves.

(b) Date at which the situation of India's monetary reserves must be reviewed

5.159 The United States argues that the dispute began with the United States' request for consultations on 15 July 1997 and that the DSU treats consultations as the initiation of a dispute.

³⁴³ In particular, the conditions to be met for the institution of balance-of-payments measures are different in Article XVIII:9 and Article XII, and an Ad Note which applies to the conditions for progressive relaxation and elimination of restrictions under Article XVIII:11 has no analogue in Article XII.

Therefore, in its view, 15 July 1997 is the date as of which this Panel should determine whether India's measures were justified under Article XVIII:B. If the Panel disagrees, the United States considers that the latest date should be the date of establishment of the Panel. India generally considers that the Panel must determine the legality of the import restrictions under India's obligations "as of the date the United States submitted this request". However, India also considers that taking into account external or internal developments affecting India's economy since the establishment of the Panel would be appropriate because much of the evidence introduced by the United States in the dispute relates to the period after the establishment of the Panel.³⁴⁴

5.160 With respect to the date at which India's balance-of-payments and reserve situation is to be assessed, we note that practice, both prior to the WTO and since its entry into force, limits the claims which panels address to those raised in the request for establishment of the panel, which is typically the basis of the panel's terms of reference (as is the case here).³⁴⁵ In our opinion, this has consequences for the determination of the facts that can be taken into account by the Panel, since the complainant obviously bases the claims contained in its request for establishment of the panel on a given set of facts existing when it presents its request to the DSB.

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

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

5.163 We note that, in the case on *Korea - Beef*, the panel relied on the conclusions of the BOP Committee reached before its establishment, but also considered "all available information", including information related to periods after the establishment of the panel.³⁴⁶ In this case, the parties and the IMF have supplied information concerning the evolution of India's balance-of-payments and reserve situation until June 1998. To the extent that such information is relevant to our determination of the consistency of India's balance-of-payments measures with GATT rules as of the date of establishment of the Panel, we take it into account.³⁴⁷

³⁴⁴ For a detailed description of the arguments of the parties, see Section III.D.9(c)(i) *supra*.

³⁴⁵ Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R, para. 143 and Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, paras. 87-89.

³⁴⁶ Adopted on 7 November 1989, BISD 36S/268, paras. 122-123.

³⁴⁷ We note for instance that such information might be relevant to an examination of the existence of a threat of serious decline in monetary reserves under Article XVIII:9 or to an examination of the conditions contemplated in the Note Ad Article XVIII:11.

(c) Information provided by the IMF

5.164 The Panel put the following questions to the IMF which are relevant to our examination of India's balance-of-payments situation:

"1. (a) (i) As of 18 November 1997, the date of establishment of the Panel, was India experiencing a serious decline in its monetary reserves, or facing a threat thereof? (ii) Was India experiencing an inadequate, or a very low level of monetary reserves? (iii) Was India experiencing a reasonable rate of increase in its monetary reserves?

(b) In connection with responding to these questions, could the IMF indicate what would have constituted a serious decline in India's monetary reserves, what would have constituted an inadequate, or a very low level of monetary reserves for India, and what would have constituted a reasonable rate of increase in India's monetary reserves?"

5.165 The IMF's replies to the questions show that foreign currency reserves of India's monetary authorities stood at US\$25.1 billion (excluding gold) on 21 November 1997, which represented an increase of US\$5.6 billion from a year earlier, and of US\$2.8 billion from end-March 1997. The IMF indicates that "[a]t about six months of imports of goods and non-factor services, India's reserves appeared to provide sufficient external liquidity and a reasonable degree of protection against unforeseen external shocks. In particular, reserves were sufficient to deal with debt service payments and potential outflows of portfolio investment, covering 2½ times the amount of maturing debt obligations in the next twelve months and 1½ times the stock of short-term debt and cumulative inflows of portfolio investment. Therefore, it was the Fund's view that India's level of foreign currency reserves on November 18, 1997 was adequate". The IMF notes that the establishment of the panel coincided with a period of turbulence in the foreign exchange market in India, but concludes that "with an appropriate macroeconomic response and the containment of contagion, India's foreign currency reserves on 18 November 1997 did not appear to be under a threat of a serious decline; since there was no threat, the question of whether an imminent threat existed is moot". Having noted that gross foreign currency reserves fell by US\$1.9 billion in November 1997, the Fund nevertheless determines that "there has been a reasonable rate of accumulation of reserves since India's balance-of-payments crisis in 1991".

5.166 In response to question 1 (b), the Fund, noting the considerable degree of subjective judgment involved in an assessment of the adequacy of the level and rate of change of reserves, based its view on "the size of the existing and potential claims on reserves, examined in the context of the country's economic circumstances. In the case of India, policy had prudently aimed at ensuring that reserve coverage is ahead of the outstanding short-term liabilities (by remaining maturity) and potential outflows of portfolio investment. As of November 1997, short-term liabilities (by remaining maturity) and the stock of portfolio investment (after marking to market) were estimated at US\$16 billion. A decline in reserves to significantly below this level would be considered serious, and such levels could be deemed inadequate or very low".

TABLE 1: EVOLUTION OF INDIA'S LEVEL OF RESERVES (1995-1998)

Year	31 March 1995	31 March 1996	31 March 1997	31 March 1998	30 June 1998
Level of reserves (US\$ billions)	20.8	17	22.4	26	24.1

(Source: IMF)

5.167 India comments that the events described by the IMF in its answer to question 1(a)(i) constitute recognition by the IMF of the threat of a serious decline in India's reserves. India notes that the Reserve Bank of India (RBI) had to change its monetary policy goals in order to defend the rupee, and would not have done so had it not felt that it faced a threat of a serious decline in foreign currency reserves which it had been unable to control using other policy instruments. With regard to questions 1(a)(ii) and 1(b), India notes that experts have suggested alternative indicators to evaluate the adequacy of India's foreign currency reserves, which, in India's view, would be more appropriate than the standard measure used by the IMF.³⁴⁸ Using these measures, India calculated that its reserves should be at higher levels to ensure adequacy.

5.168 The United States comments that the IMF's replies are fully consistent with the evidence furnished by the United States to the Panel and make it clear that India's balance-of-payments situation does not meet the criteria of the proviso of Article XVIII:9. The United States also points out that the IMF's analysis of India's balance-of-payments situation is more complete than that presented by India, in that it considers the whole balance-of-payments situation, whereas India's analysis focuses mostly on its trade account, which is only one element of the analysis.³⁴⁹

(d) Assessment of India's balance-of-payments situation in relation to the conditions of Article XVIII:9

(i) *Article XVIII:9(a)*

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

5.170 The United States relies principally upon the following evidence and argument: it notes in the first instance that in the view of the IMF, as of 18 November 1997³⁵⁰ India was not facing a threat of a serious decline in monetary reserves and that the IMF had expressed an identical view to the BOP Committee in January 1997 and June 1997. In addition, the United States notes the statement in the Annual Report of the Reserve Bank of India for the year July 1, 1996 to June 30, 1997 (para. 7.23), where it is stated:

"The level of foreign exchange reserves (including gold and SDRs) rose to US\$ 29.9 billion by August 14, 1997³⁵¹ equivalent to seven months of imports and well above the thumb rule of reserve adequacy (three months of imports). In the context of the changing interface with the external sector and the importance of the capital account,

³⁴⁸ For a description of these methods, see para. 5.171 *infra*.

³⁴⁹ For a detailed description of the arguments of the parties, see Section III.D.9.(c)(iii) *supra*.

³⁵⁰ The IMF relied on Indian balance-of-payments data as of 21 November 1997, which was closest date to the date of the establishment of the Panel for which the relevant Indian balance-of-payments data were available.

³⁵¹ The IMF statistics exclude gold.

reserve adequacy needs to be evaluated in terms of indicators other than conventional norms. By any criteria, the level of foreign exchange level reserves appears comfortable. They are equivalent of about 25 months of debt service payments and 6 months of payments for imports and debt service taken together. Thus, even if exchange market developments accentuate the leads and lags in external receipts and payments, the reserves would be adequate to withstand both cyclical and unanticipated shocks."

5.171 India responds that its monetary authorities had to change their monetary policy goals in the latter part of 1997 in order to defend the rupee during this period and argues that they would not have taken such actions if there had not been a threat of a serious decline in monetary reserves. Moreover, it contends that there are different ways to measure reserve adequacy. In this regard, it points to the answers of the IMF, where the IMF states that "A considerable degree of subjective judgment is involved in an assessment of the adequacy of the level and rate of changes of reserves". According to India, there are four other methods of assessing reserve adequacy:

- (a) import coverage of at least 6 months: US\$22 billion;
- (b) import coverage of three months plus 50% of debt service payments plus one months' imports and exports to account for leads and lags: more than US\$22 billion;
- (c) short-term debt and portfolio stock should not exceed 60% of reserves and incremental short-term debt and portfolio liabilities should be accompanied by equivalent increases in reserves: more than US\$27 billion; and
- (d) foreign assets to currency ratio should not be less than 40% and a desirable level would be 70%: US\$16 billion (minimum); US\$28 billion (desirable).

5.172 In evaluating the evidence and arguments presented by the parties, we note India's argument that its monetary authorities changed their monetary policy goals in the latter part of 1997 to defend the rupee. However, the Indian authorities' action does not in itself demonstrate that there was a serious decline in India's monetary reserves or a threat thereof during that period, in terms of Article XVIII:9(a).

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

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

5.175 We have also considered the four alternative methods of assessing reserve adequacy cited by India. We note that India concedes that its reserves of US\$25.1 billion would have been adequate under two of the alternatives (a and b). Under a third alternative (d), the reserves of US\$25.1 billion were at the higher end of the range between the minimum (US\$16 billion) and desirable (US\$28 billion) reserve levels. Under the fourth method (c), reserves of US\$27 billion would be considered adequate. While it might be following a prudential approach in suggesting method (c), India does not explain why it would be superior to the IMF method or to the other three Indian alternatives under which reserves could be considered adequate. Moreover, India's alternatives do not seem to be consistent with the approach of the Reserve Bank of India quoted above.

5.176 Having weighed the evidence before us, we note that only one of the four methods suggested by India for measuring reserve adequacy supports a finding that India's reserves are inadequate, and even under that method, the issue is a close one (US\$25.1 billion vs. US\$27 billion, or less than 10 per cent difference). Overall, we are of the view that the quality and weight of evidence is strongly in favour of the proposition that India's reserves are not inadequate. In particular, this position is supported by the IMF, the Reserve Bank of India and three of the four methods suggested by India. Accordingly, we find that India's reserves were not inadequate as of 18 November 1997.

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

5.178 The anticipated evolution of India's reserves after June 1998 shows that no serious decline was foreseen. Indeed, in response to a question as to whether there had been developments since November 1997 that could lead to a modification of the IMF's answers to the Panel's questions, the IMF responded:

"There has been a deterioration in the economic outlook and market sentiment over the past few months, and short-term risks have increased. [...] [O]n the basis of developments thus far, the balance-of-payments situation is expected to worsen and a decline in reserves (\$2½-4 billion) is anticipated for 1998/99. Nevertheless, it remains the Fund view that the external situation can be managed using macroeconomic policy instruments and that quantitative restrictions are not needed for balance-of-payments adjustment."

Thus, not only the evolution until June 1998, but also assessments in relation to 1998 as a whole and 1999 support the view that no threat of serious decline existed as of November 1997.

5.179 As a result, the evolution of India's reserve situation in the seven months after November 1997 does not, in our view, call into question our conclusion that as of the date of the establishment of the Panel, India was not facing a serious decline or a threat of a serious decline in its monetary reserves as those terms are used in Article XVIII:9(a).

5.180 Accordingly, we find that as of the date of establishment of this Panel, there was not a serious decline or a threat of a serious decline in India's monetary reserves, as those terms are used in Article XVIII:9(a).

(ii) *Article XVIII:9(b)*

5.181 The issue to be decided under Article XVIII:9(b) is whether India's balance-of-payments measures fall into the category of those "necessary ... in the case of a Member with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves". In deciding this issue, we must weigh the evidence favouring India against that favouring the United States and determine whether on the basis of all evidence before the Panel, the United States has established its claim under Article XVIII:11 that India does not meet the conditions specified in Article XVIII:9(b).

5.182 The United States relies upon the views of the IMF and the statement of the Reserve Bank of India, as cited in paragraph 5.170 above. As noted therein, in the view of the IMF, as of 18 November 1997 an adequate level of monetary reserves for India was US\$16 billion. As noted above in paragraph 5.171, India suggests use of four other ways of measuring the adequacy of its reserves, which lead to a calculation of adequate reserves being between US\$16 and US\$28 billion.

5.183 For the reasons outlined in paragraphs 5.174-5.176 above, we find that as of the date of establishment of this Panel, India's monetary reserves of US\$25.1 billion were not inadequate as that term is used in Article XVIII:9(b) and that India was therefore not entitled to implement balance-of-payments measures to achieve a reasonable rate of growth in its reserves.

(e) *Summary*

5.184 We find that, as of the date of establishment of this Panel, India's balance-of-payments measures were not necessary to forestall the threat of, or to stop, a serious decline in its monetary reserves and that its reserves were not inadequate. As a result, its measures were not necessary and therefore "exceed those necessary" under the terms of Article XVIII:9 (a) or (b). Therefore, India would appear to be in violation of the requirements of Article XVIII:11 by maintaining its measures. However, a Note Ad Article XVIII:11 specifies that a Member need not remove its balance-of-payments measures, if such removal would thereupon produce conditions justifying their reinstatement. Moreover, a proviso to Article XVIII:11 states that a Member shall not be required to withdraw balance-of-payments measures on the grounds that a change in its development policy would render them unnecessary. Accordingly, we now turn to an examination of the Ad Note and the proviso of Article XVIII:11.

3. Is India entitled under the Ad Note to Article XVIII:11 to maintain measures for balance-of-payments purposes when the conditions contemplated in Article XVIII:9 are no longer met?

5.185 India argues that it should not be required to remove its quantitative restrictions immediately, even if it were found that it currently does not experience balance-of-payments difficulties within the meaning of Article XVIII:9, because immediate removal would create the conditions for their reinstatement. India's argument is based on the Note Ad Article XVIII:11. The United States argues that those conditions are not met and that, since India does not experience any current balance-of-payments difficulties, it should disinvoke Article XVIII:B, with the possibility of invoking it again if such difficulties were to occur in the future. The United States recalls that the terms of Article XVIII:4 show that balance-of-payments measures must be temporary.

5.186 The arguments of the parties raise three questions: (a) Does the Ad Note cover situations where the conditions of Article XVIII:9 are no longer met? (b) What conditions must be met in order

to allow for the maintenance of measures under the Ad Note? (c) Are these conditions met in the present case? We examine these three questions successively.

(a) Does the Ad Note cover situations where the conditions of Article XVIII:9 are no longer met?

5.187 We recall that the Note Ad Article XVIII:11 reads as follows:

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

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

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

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

5.191 The Ad Note clarifies that the relaxation or removal should not result in a worsening of the balance-of-payments situation such as to justify strengthened or new measures. It thus seeks to avoid a situation where a developing country would be required to remove the measures, foreseeing that in doing so, it will create the conditions for their reinstatement. In light also of the need to restore equilibrium of the balance-of-payments on a sound and lasting basis, acknowledged in the first sentence of Article XVIII:11, it appears that removal should be made when the conditions actually allow for it. In this sense, we can agree with India that the developing country Member applying the measures is not required to follow a "stop-and-go" policy. It is worth noting, however, that in circumstances where the balance-of-payments situation has gradually improved, if measures have been gradually relaxed as conditions improved under the terms of Article XVIII:11 and maintained only to the extent necessary under the terms of Article XVIII:9, it could be anticipated that only a minor portion of the measures initially instituted would remain to be removed by the time the balance-of-payments conditions have improved to the extent that the country faces neither a serious decline in monetary reserves or a threat thereof, or inadequate reserves. The elimination of these measures would thus constitute the final stage of a gradual relaxation and elimination.

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

(b) Conditions to be met to allow for the maintenance of measures under the Ad Note

5.193 We recall that the Ad Note provides that the second sentence of Article XVIII:11 shall not be interpreted to require relaxation or removal of measures "*if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.*"

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

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

5.195 The first two conditions appear to be quite clear. The expression "conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII" would seem to refer necessarily to the two situations envisaged in paragraph 9, i.e. (a) a threat of or a serious decline in monetary reserves or (b) inadequate monetary reserves. We have determined in the previous section that the Ad Note covers situations where these circumstances would not currently exist but would reoccur. The second element ("would produce") states the requirement of a causal link between the occurrence of these conditions and the removal. The assessment of the existence of the conditions foreseen in the Ad Note thus requires a prospective assessment of whether, if the measures were relaxed or removed, this relaxation or removal would *result* in the conditions of paragraph 9 reoccurring (in cases where they do not currently exist).

5.196 The text further foresees that the relaxation or removal would "thereupon" produce the conditions. This term requires further interpretation. Dictionary definitions of the term "thereupon" are "upon that or it", "on that being done or said", "(directly) after that", "in consequence of that"³⁵², "immediately" or "at once".³⁵³ While several variations of meaning can be identified in those definitions, we are of the view that the most appropriate meaning should be "immediately". In particular, we note that this interpretation is consistent with, and arguably compelled by the Spanish and French versions of the Agreement ("inmediatamente" and "immédiatement", respectively). The context of the term tends to confirm this choice. If "thereupon" had been intended to mean only "in consequence of that", the word would not have been necessary. The causality between the removal of the measures and the occurrence of the "conditions" is clear without that word.³⁵⁴

³⁵² New Shorter Oxford English Dictionary (1993), p. 3275.

³⁵³ Webster's New Encyclopedic Dictionary (1993), p. 1075.

³⁵⁴ In this regard, we note that in its report on *Japan-Taxes on Alcoholic Beverages*, Op. Cit., at p. 12, the Appellate Body recalled that:

5.197 We conclude that, in order to give an effect to the word "thereupon", we have to interpret it as meaning "immediately". We do not consider that our interpretation would introduce an additional condition to Article XVIII:9, nor would it be contrary to the purpose of Article XVIII:B. In particular, bearing in mind that the conditions foreseen for the institution of balance-of-payments measures by developed countries under Article XII are not the same as those applicable to developing countries under Article XVIII:B, we note that saying that removal would thereupon produce the conditions of Article XVIII:9 does not imply that we would introduce in that paragraph the condition of "imminent" threat found in Article XII, but not in Article XVIII.³⁵⁵ "Produce *immediately* conditions such that action is necessary to forestall a threat" is not the same as "produce conditions such that action is necessary to forestall an *imminent* threat". We mean that those conditions would have to appear immediately, and that they would have to be of the type and degree contemplated in Article XVIII:9. Our interpretation implies that not every balance-of-payments difficulty that might occur as the liberalisation process continues could be considered as falling within the scope of the Note Ad Article XVIII:11. The location of the term in the sentence shows in our opinion that "thereupon" refers to the situation where re-occurrence of the conditions justifying balance-of-payments measures would immediately follow removal of the measures.

5.198 This is in our view the only useful meaning possible for the word "thereupon". Other interpretations, in addition to being contrary to the principles of interpretation followed in this paragraph and the paragraphs above, could in practice turn the provision into providing a means to maintain balance-of-payments indefinitely, which would be contrary to the objective of Articles XVIII:4, XVIII:9 and the Ad Note, as well as contrary to the object and purpose of the WTO Agreement. Our interpretation of the term "thereupon" as a notion of time is also consistent with the structure of the sentence which deals with the moment when measures may have to be removed. 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. We consider that the purpose of this word is to ensure that measures are not maintained because of some distant possibility that a balance-of-payments difficulty may occur, which would be possible if India's interpretation was accepted.

5.199 We therefore conclude that, in order to be allowed to maintain the measures at issue, 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. Such an interpretation could lead to the maintenance of balance-of-payments measures for indefinite periods, as it could almost always be argued that there exists a risk of worsening of balance-of-payments conditions at some time in the future. This would be in contradiction with the terms of the second sentence of Article XVIII:11 and the principle expressed in Article XVIII:4 that balance-of-payments measures should be temporary. Our interpretation is of course without prejudice to the possibility of

"A fundamental tenet of treaty interpretation flowing from the general rules of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*). [...] [O]ne of the corollaries of the general rules of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. 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".

³⁵⁵ See India's argument highlighting the absence of requirement of an "imminent" threat under Article XVIII:11, Section III.D.3 *supra*, para. 3.180).

institution of measures for balance-of-payments purposes if the circumstances should justify such measures again.

5.200 Having determined the conditions under which measures can be maintained in accordance with the Ad Note to Article XVIII:11, we now examine whether these conditions are fulfilled in this instance.

(c) Are the conditions contemplated in the Ad Note met in this case?

5.201 We have determined that under the Note Ad Article XVIII, three aspects have to be taken into account: (i) that a situation contemplated in Article XVIII:9 (a) or (b) would occur; (ii) that such situation would occur immediately after the removal or the relaxation of the measures at issue and (iii) that such a situation be causally linked to the removal. We recall that we have already determined that India did not face the situation foreseen in Article XVIII:9 as of the date of establishment of the panel. The question here is to determine whether the removal of the measures would immediately produce such conditions so as to justify India's maintenance of the measures at issue under this provision.

5.202 The United States' argument that India does not meet the conditions contained in the Ad Note and is not entitled to a phase-out period may be summarized as follows. First, it notes that India told the BOP Committee in 1994 that if its balance-of-payments showed sustained improvement, India's aim was to move by 1996/97 to a regime in which import licensing restrictions would only be maintained for environmental reasons. The United States notes that India's reserves increased from US\$20.3 billion in 1994 to US\$25.0 billion in 1997. Second, the United States recalls the statements by the IMF in the January 1997 BOP Committee consultations to the effect that India's "external situation can be well managed using macroeconomic policy instruments without recourse to QRs", that "India should be able to meet all external payments requirements without difficulties, and to weather the consequences of potential external shocks without undue disruption", and that "the removal of quantitative restrictions, in conjunction with other measures, could be expected [*inter alia*] to strengthen the external position over the medium term". Third, the United States notes the IMF statement at the June 1997 BOP Committee consultations that "[i]t remains the Fund's view that the external situation can be well managed using macroeconomic policy instruments alone, [quantitative restrictions] are not needed for balance-of-payments adjustment".

5.203 In addition, the United States notes that the IMF's answers to questions 3 and 5 of the Panel support its position that India does not meet the conditions in the Ad Note. In this regard, we note that in response to Panel Question 3 on whether relaxation or removal of India's restrictions as of 18 November 1997 would have been likely to produce thereupon the conditions specified in the Ad Note, the IMF repeated the view it had already expressed before the Committee and further stated:

"A time-bound program for eliminating the remaining QRs over a relatively short period would reduce distortions to investment and promote an efficient, export-oriented consumer goods sector."

5.204 In reply to Panel Question 5 concerning the impact of immediately removing quantitative restrictions on India's development policy, the IMF stated:

"Some problems in import substituting sectors and a temporary decline in reserves cannot be ruled out in the event India immediately removed the remaining QRs. ... However, there would also be considerable benefits to such a move, if it were implemented in a phased manner over a relatively short period. First, increased customs revenue from the tariffs applied to previously restricted consumer goods imports would contribute toward deficit reduction and could provide the necessary

resources for essential spending in infrastructure and the social sectors. Second, a more competitive, efficient, and quality-conscious consumer goods sector could contribute strongly to export growth. Finally, the structural measures advocated in response to question 3 would improve the allocation of investment, promote efficiency, and enhance the growth prospects of the economy."

5.205 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.

5.206 In commenting on the IMF answer to Question 3, India first notes that the IMF admits in answering Question 5 that there may be a temporary decline in reserves on removal of its balance-of-payments restrictions and that the IMF endorses removal of the restrictions in a "relatively short period of time", not immediately. As we noted earlier (paragraph 5.173), a decline in reserves does not necessarily mean that balance-of-payments restrictions may be imposed consistently with Article XVIII:9; one must examine the size of the decline in relation to the stock of reserves. We do not believe that the possibility of some decline in reserves calls into question the IMF's conclusion that the removal of the measures would not thereupon produce the conditions foreseen in the Ad Note. Nor does the IMF condition its conclusion on the use of a phase-out as opposed to an immediate lifting of the restrictions. However, we note that the IMF suggests that it would be advisable from the standpoint of adjustment in the Indian economy as a whole - as opposed to the standpoint of managing India's monetary reserves -, for the restrictions to be removed within a relatively short period of time, rather than immediately. We view this as a matter of how India should implement an adverse DSB ruling or recommendation, as opposed to a justification for maintaining its balance-of-payments restrictions. We discuss this issue below in Section VII.

5.207 Second, according to India, the removal of import restrictions would certainly lead to an increase in imports, although the magnitude of the increase would depend upon a number of factors. India notes, however, that if the percentage share of products that are currently subject to import restrictions rises to the level reached by products that are no longer subject to such restrictions, the additional import bill from the removal of import restrictions would have been approximately US\$30.6 billion in 1996-1997, as compared to the total merchandise import bill for that year of US\$ 43.5 billion. Moreover, India argues that private transfers and investment flows which in the recent past have helped to finance the increase in imports may not be adequate to do so in the future. While we agree that the removal of restrictions will lead to an increase in imports over time, we do not consider that the information presented by India about possible future problems establishes that conditions justifying reimposition of balance-of-payments measures would occur immediately on lifting the current balance-of-payments measures. We note in this respect that India does not appear always to take into account the distinction between a projected change in imports and a projected change in its reserves. Expecting a surge in imports is not sufficient to establish that the conditions of Article XVIII:9 will immediately reoccur. India does not give much attention to the potentially favourable effects on India's balance-of-payments following the removal of import restrictions, such as the attraction of foreign capital into the distribution of consumer goods and other service industries, stating instead that private transfers and investments flows may be inadequate in the future.

5.208 Third, India argues that the robust growth in non-oil imports in the past couple of years is partially attributable to the surge in consumer goods imports as a result of the removal of import restrictions on some consumer goods. In its comments to the IMF answers to Question 5, India expands on this point to note the problems of transitional adjustment that removal of balance-of-payments restrictions may cause in its consumer goods industry. We note, however, that problems of structural adjustment to import competition are not *per se* justifications for balance-of-payments measures. The WTO Agreement on Safeguards has established rules for dealing with such problems.

Moreover, we note that Article XVIII:C of GATT 1994 also allows developing countries to adopt, under certain conditions, measures to promote the establishment of a particular industry.

5.209 Fourth, India notes that in response to Questions 3 and 5, the IMF suggests various other policy reforms that India should implement. We agree with India that pursuant to the proviso to the second sentence of Article XVIII:11, India cannot be required to change its development policy so as to render balance-of-payments measures unnecessary. Initially, we note that our finding that India's balance-of-payments measures are unnecessary in terms of Article XVIII:9 does not assume that there will be any change in India's development policy. Rather, that conclusion is based on our consideration of the factors specified in Article XVIII:9 (e.g., the level of India's reserves). In considering India's comments on the IMF's reply to our questions, we address in the next section (paragraphs 5.216-5.223) India's objections to the IMF's statement that it could use macroeconomic policy instruments to avoid balance-of-payments problems. We address in this section India's arguments related to the IMF's reference in its reply to Question 3 to "structural measures". In that regard, we note that the IMF stated: "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." It is not clear that the IMF has linked the structural measures to the balance-of-payments situation.

5.210 We note that India made general claims that implementation of the IMF's views would require a change in its development policy at several points in this proceeding.³⁵⁶ Although invocation of the proviso is in the nature of an affirmative defence to be established by India, India's arguments on development policy have been expressed in very general terms. However, India addresses the issue in some more detail in its comments on the IMF's reply to Question 3.³⁵⁷ In those comments, India states that it "has been autonomously engaged in a programme of economic reform". Thus, it appears that India's development policy now envisages some changes and reforms. However, India does not explain how the IMF's suggestions are not consistent with its development policy, except to say that the "pace of change cannot be forced" and that "a period of transition is necessary for structural reforms of this nature".

5.211 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 reinstatement that could be avoided only by a change in India's development policy.

5.212 Finally, India points to several other factors that may lead to a worsening of its reserve position in the future. For example, it cites the South-East Asia currency crisis which it argues almost certainly will affect India's export competitiveness, as well as the legislatively mandated imposition of economic sanctions on India and the postponement of fresh approvals of bilateral and multilateral assistance as a result of its recent nuclear test which it argues will affect inflows of foreign capital. We note that the sanctions and assistance postponements had not occurred and were not foreseen as of the date of establishment of the Panel, which is the date at which we have assessed the consistency of India's measures with its GATT obligations. In addition, the magnitude and implications of the South-East Asia currency crisis were not fully developed or foreseen at that time. In this regard, we recall that we considered the evolution of India's reserve situation from November 1997 through June 1998

³⁵⁶ Section III.D.7 at paras. 3.232-3.235.

³⁵⁷ Section III.D.9(c)(iii) at paras. 3.398-3.401.

and concluded that it did not call into question our findings on Article XVIII:9 (see paragraphs 5.177-5.179).

5.213 We have weighed the foregoing evidence and considered the arguments of the parties. In determining whether the requirements of the Ad Note are met, we must bear in mind that it refers to prospective events, i.e., if a certain action is taken, will one of certain specified conditions occur. When dealing with the future, there can be no certainty. Instead, we must satisfy ourselves with probabilities. In order to meet the requirements of the Ad Note ("would produce"), the probability of occurrence of the conditions would have to be clear. We must also bear in mind our conclusion that the Ad Note requires the specified conditions (i.e., those specified in Article XVIII:9(a) and (b)) to manifest themselves immediately as a result of the removal.

5.214 In our view, on the basis of the evidence before the Panel, the immediate removal by India of the measures at issue may generate some potential decline of reserves and adjustment difficulties. In relation to such adjustment difficulties, we note that the IMF suggests a phase-out over a short period of time. However, with regard to the potential decline in reserves, there is no evidence that such a decline would be of the magnitude required by Article XVIII:9 to allow the imposition of balance-of-payments measures.

5.215 Consequently, we find that, while India could in principle invoke the Note Ad Article XVIII:11 even when the conditions contemplated in Article XVIII:9 are no longer met, the information available to the Panel leads to the conclusion that a removal of the measures at issue would not immediately produce conditions justifying the re-imposition of import restrictions for balance-of-payments reasons. We therefore find that the measures at issue maintained by India are not justified by reference to the Note Ad Article XVIII:11. However, we must now consider whether India is entitled under the proviso to Article XVIII:11 to maintain these measures.

4. Is India entitled to maintain its balance-of-payments measures on the basis of the proviso to Article XVIII:11?

5.216 Article XVIII:11 contains a proviso as follows: "[n]o Member shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under [Article XVIII:B]". India argues that some of the statements made by the IMF, in particular its response to Questions 3 and 5, suggest that the IMF position that there is no current justification for India's balance-of-payments measures is based on the assumption that India should change its development policy. We respond to certain aspects of this argument in paragraphs 5.209-5.211 *supra*. In this section, we address in particular India's arguments that the IMF's statement that its reserve levels can be managed through monetary policy instruments reflects the same assumption. India notes that while it is true that the Reserve Bank of India raised interest rates in 1997 in a successful defence of the value of the rupee, the increase had a negative impact on the Indian economy.

5.217 In analyzing India's argument, we note that we must consider the proviso to Article XVIII:11 in light of the first sentence of Article XVIII:11, which provides that "[i]n carrying out its domestic policies, the Member concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources."

5.218 We recall that our finding that India's balance-of-payments measures are unnecessary in terms of Article XVIII:9 does not assume that there will be any change in India's development policy. Rather, that conclusion is based on our consideration of the factors specified in Article XVIII:9 (e.g., the level of India's reserves). Here, we consider whether our conclusion in the preceding section that those measures are not justified either by reference to the Note Ad Article XVIII:11 is based on the

assumption that conditions justifying reinstatement of those measures can be avoided by policies that would require changes in India's development policy, contrary to the proviso to Article XVIII:11.

5.219 Since India's reference to the proviso to Article XVIII:11 is in the nature of an affirmative defence, we would have expected India to provide sufficient arguments and evidence to prove it. However, India did not supply convincing evidence that the removal of its balance-of-payments measures would generate balance-of-payments problems, within the meaning of Article XVIII:9, the avoidance or prevention of which would imply changes in its economic policy which, themselves, would require changes in its development policy in the sense of the proviso. India addresses the IMF replies and the impact of the removal of the measures only in general terms.

5.220 In our consideration of India's argument, we note that India has in the past used macroeconomic policy instruments to defend the rupee (see paragraph 5.172), suggesting that the use of macroeconomic policy instruments as mentioned by the IMF would not necessarily constitute a change in India's development policy. Moreover, India has not been precise in specifying what it considers to be its development policy in the terms of the proviso.

5.221 India argues in its reply of 6 July 1998 to Question 5 posed by the Panel that the removal of quantitative restrictions would cause decreased use of industrial capacity and increased unemployment. It argues that this result would be inconsistent with the "economic employment of productive resources" (Article XVIII:11, first sentence). This phrase in Article XVIII:11 refers to domestic policies: import restrictions cannot be regarded as domestic policies. Thus, Article XVIII:B does not allow the retention of balance-of-payments measures to support the use of industrial capacity or reduce unemployment. Furthermore, the Panel is not persuaded that the removal of import restrictions would, in fact, cause reduced use of industrial capacity in the economy as a whole, or cause increased unemployment. Reducing barriers to imports may lead to decreased activity in some domestic industries but to increased activity in others.

5.222 We therefore conclude that India is not entitled to maintain its balance-of-payments measures on the basis of the proviso to Article XVIII:11. We note, however, that our findings do not preclude the possibility that adjustments to domestic policies (other than development policies) embraced by the first sentence of Article XVIII:11 may be necessary or prudent from time to time.

5.223 Having determined that India's measures are not necessary under the terms of Article XVIII:9 and are not justified under the terms of the Note Ad Article XVIII:11, we must now examine the other potential justifications advanced by India for the maintenance of its measures.

5. Right to maintain balance-of-payments measures until they are found to be inconsistent by the General Council and the right to a phase-out of balance-of-payments measures

(a) Article XVIII:12(c)(i) and (ii)

5.224 India claims that a Member invoking a balance-of-payments justification is entitled to maintain the measures until the General Council, following a recommendation from the BOP Committee, requires it to modify or remove them under Article XVIII:12(c)(i) or (ii). India further claims that this provision confirms the existence of a "right to a phase-out" for measures which no longer meet the criteria set out in Article XVIII:9, by providing for a "specified period of time" to be granted to secure compliance with the relevant provisions when an inconsistency has been identified.

5.225 The United States claims that Article XVIII:12(c)(ii) does not provide a basis for a gradual reduction of measures that do not have a balance of payments justification and that this interpretation is consistent with the wording of the first sentence of Article XVIII:12(c)(ii) which uses the phrase "restrictions are being applied in a manner involving an inconsistency".

5.226 We have already considered India's argument that under Article XVIII:12 it is entitled to maintain its balance-of-payments measures until requested to remove them by the General Council, and for the reasons explained in Section D of these findings, we have not accepted it.³⁵⁸

5.227 India also argues that Article XVIII:12(c)(ii) confirms the existence of a right to a phase-out for measures no longer justified by current balance-of-payments difficulties. We note that Article XVIII:12(c)(ii), provides a specific mechanism in order for the BOP Committee to address possible violations of the provisions of, *inter alia*, Article XVIII:B and provides for a period of time to be granted to the Member in order to implement the requirement to remove or modify the inconsistent measures. In the situation envisaged by Article XVIII:12(c)(ii), a period of time is granted when an inconsistency with the provisions of either Article XVIII:B or Article XIII has been identified. The period of time which is allocated to the Member in order to bring its measures into conformity is thus comparable, but not identical, to an implementation period of the sort provided for in Article 21.3 of the DSU. However, this specific mode of determination of the "implementation" period applies to procedures initiated under Article XVIII:12(c), which is not the procedure under which this Panel is acting. We consider the issue of whether a phase-out would be appropriate in this case in our suggestions in respect of implementation, where we note this provision of Article XVIII:12(c)(ii).

5.228 We therefore conclude that Article XVIII:12(c) does not entitle India to maintain measures which no longer meet the criteria of Article XVIII:9 and are not covered by the Note Ad Article XVIII:11.

(b) Paragraphs 1 and 13 of the 1994 Understanding

5.229 Paragraph 1 of the 1994 Understanding provides:

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

5.230 Paragraph 13 of the 1994 Understanding further provides:

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

³⁵⁸ See *supra* in section V.D.4.(b)(ii) the discussion on the right to maintain balance-of-payments measures (paras. 5.76-5.80).

main elements discussed in the Committee and a decision on whether full consultation procedures are required."

5.231 During its 1997 consultations, India presented a time-schedule for the Committee to consider. This time-schedule was not approved, as consensus was not reached.³⁵⁹ The commitment to present a time-schedule to the Committee and, the possibility, if it is approved, of obtaining from the General Council a specific recommendation that the member applying the schedule should be deemed to be in conformity with its obligations under GATT 1994 in carrying out the schedule, are an integral element of BOP Committee procedures. In this sense, it is a specific feature of balance-of-payments consultations, expressly provided for by the Understanding. Had India's time-schedule been approved by the Committee, together with a recommendation that India be deemed in conformity with its obligations in carrying it out, we would then have assessed India's rights and obligations in light of this important factor, in accordance with paragraph 13 of the 1994 Understanding. In this instance, however, although a time-schedule was presented, it was not approved.

5.232 India argues that all members of the Committee, including the United States, accepted the principle of a progressive relaxation, and that all members, except the United States, consider the schedule of progressive relaxation followed by India to be satisfactory. In the view of India, this creates a presumption that India is in conformity with its obligations. We can agree with India that the absence of approval of its time schedule should not in itself adversely affect the status of its measures. However, in the absence of recommendations approving India's proposed time schedule, the Panel is not in a position to substitute its own assessment of the Committee's position for the Committee's absence of consensus. The rights and obligations of India must be assessed in the light of the relevant provisions of Article XVIII:B.³⁶⁰ We are therefore not in a position to give a specific weight to the fact that India presented a time-schedule to the Committee, when this schedule was not approved by the Committee or Council.

5.233 India further argues that paragraphs 1 and 13 of the Understanding provide an incentive for Members to present a time-schedule for removal even when there are no current balance-of-payments difficulties within the meaning of Article XVIII:9, thereby confirming the existence of a "right" to a phase out even in the absence of current balance-of-payments difficulties within the meaning of Article XVIII:9. The text of paragraph 13 of the Understanding itself does not specify whether the balance-of-payments difficulties which justified the imposition of the measures should still be in existence when a time schedule is presented for their elimination. However, the notion of presentation of a time-schedule, starting when the balance-of-payments difficulties still exist, is consistent with the temporary nature of balance-of-payments measures and with the requirement for their gradual elimination. Also, the time-schedules referred to in paragraphs 1 and 13 of the 1994 Understanding are the same and paragraph 1 specifies that "such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation." This suggests that a time-schedule would have to be presented before the balance-of-payments difficulties disappear, otherwise, the reference to "take into account changes in the balance-of-payments situation" would become redundant.

5.234 This does not mean that the General Council has no margin of discretion in deciding whether or not to accept or not a time-schedule that would provide protection to the Member concerned. We have seen that the Ad Note suggests also that measures could, under certain circumstances, be maintained for a time when balance-of-payments difficulties which initially justified their institution are no longer in existence. In addition, paragraph 13 of the 1994 Understanding provides that "the General Council may recommend that, in adhering to such a time-schedule, a Member *may be deemed*

³⁵⁹ In accordance with the established practice, no vote was requested in the General Council pursuant to Article IX of the Agreement Establishing the World Trade Organization.

³⁶⁰ See *supra* in section V.D.4. (b) (ii) the discussion on potential conflicts (paras. 5.92-5.97).

to be in compliance with its GATT 1994 obligations" (emphasis added). There is no clear evidence that this phrase has to be interpreted as covering only situations under which a phase-out period would exactly coincide with the gradual disappearance of balance-of-payments difficulties.

5.235 In light of the above, we conclude that the procedure for submission and approval of a time-schedule incorporated in the 1994 Understanding, which is specific to the Committee consultations, does not give WTO Members a "right" to a phase-out period which a panel would have to protect in the absence of balance-of-payments difficulties in the sense of Article XVIII:B.³⁶¹ Even assuming that such a "right" could be recognised under paragraph 13 of the 1994 Understanding, such a recognition would in any case require a prior decision of the General Council.

6. Conclusion

5.236 In conclusion, with regard to our examination of the United States' claim of violation by India of Article XVIII:11 and India's defence that its measures are justified under Article XVIII:B, we have found that India's balance-of-payments situation was not such as to allow the maintenance of measures for balance-of-payments purposes under the terms of Article XVIII:9, that India was not justified in maintaining its existing measures under the terms of Article XVIII:11, and that it does not have a right to maintain or phase-out these measures on the basis of other provisions of Article XVIII:B which it invoked in its defence. We therefore conclude that India's measures are not justified under the terms of Article XVIII:B.

5.237 It should be noted that our finding is without prejudice to any future developments in India's balance-of-payments situation which might justify India invoking the provisions Article XVIII:B and the Understanding, should one of the conditions contemplated in Article XVIII:9 be met. It is also without prejudice to the possible determination of a reasonable period of time under Article 21 of the DSU for India to bring its measures into conformity with its obligations under the WTO Agreement.³⁶²

H. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

5.238 The United States claims that, of the 2,714 HS lines listed as subject to quantitative restrictions in Annex II, Part B of India's 1997 notification of quantitative restrictions, 710 (26%) are products covered by the Agreement on Agriculture. Since processed food, fresh fruits and vegetables, coffee, poultry, and many other agricultural products are consumption goods which could directly satisfy human needs without further processing, India's ban on imports of consumer goods also serves as a form of agricultural protectionism. For the United States, since the IMF has conclusively found that there is no balance-of-payments necessity for India's import restrictions, with respect to these items, India is in violation of its obligations under Article 4.2 of the Agreement on Agriculture.

5.239 India considers that footnote 1 to Article 4.2 of the Agreement on Agriculture makes it clear that Article 4.2 does not extend to measures imposed under the balance-of-payments provisions of GATT 1994. The question of the consistency of India's measures with Article 4.2 depends on their consistency with Article XVIII:B of the GATT 1994. The legal status of India's import restrictions under the Agreement on Agriculture is consequently identical to that under GATT 1994.

5.240 Article 4.2 of the Agreement on Agriculture provides that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [...]". Footnote 1 to Article 4.2 clarifies that "These measures include quantitative import restrictions [...] discretionary import licensing, non-tariff measures maintained through state-

³⁶¹ As we note in our suggestions for implementation, a phase-out period typically has been negotiated (see text accompanying footnotes 366-368).

³⁶² See *infra* Section VII on "suggestions for implementation."

trading enterprises [...] and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

5.241 In paragraph 5.139 above, we found that the measures at issue violate Article XI:1 of the GATT 1994, which is equally applicable to industrialized and agricultural products. In paragraph 5.223 above, we also found that the measures at issue were not justified under Article XVIII:B and violated Article XVIII:11. India did not contest that Article 4.2 was applicable to the agricultural products subject to the measures at issue. We agree with India's claims that the question of the consistency of India's import restrictions with Article 4.2 depends on their consistency with Article XVIII:B. We therefore conclude that the Indian restrictions are not "measures maintained under balance-of-payments provisions" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.

5.242 Since India does not invoke any of the other exceptions contained in the footnote to Article 4.2, we find that the measures at issue violate Article 4.2 of the Agreement on Agriculture.

I. ARTICLE XIII OF GATT 1994

5.243 In view of our findings that the measures at issue violate Article XI:1 of GATT 1994 and are not justified under Article XVIII:B, the United States does not request findings under Article XIII of GATT 1994.

J. NULLIFICATION OR IMPAIRMENT

5.244 The United States claims that, since India is in violation of its WTO obligations and is not excused by the exception for balance-of-payments import restrictions in Article XVIII:B, nullification or impairment of benefits is presumed, as provided in Article 3.8 of the DSU. In the view of the United States, past GATT panels have regarded violation of Article XI:1 in a special light with regard to nullification or impairment, because of the fundamentally trade-distorting nature of quantitative restrictions.³⁶³

5.245 India considers that its measures are justified under Article XVIII:B and applied pursuant to its development policy as it conceives it.

5.246 We have found that India's measures at issue violate Articles XI:1 and XVIII:11 of GATT 1994 and Article 4.2 of the Agreement on Agriculture, and that they are not justified under Article XVIII:B of GATT 1994. Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", we conclude that India's measures have nullified or impaired benefits accruing to the United States under GATT 1994 and the Agreement on Agriculture.

VI. CONCLUSIONS AND RECOMMENDATIONS

6.1 We conclude that

³⁶³ The United States refer to the Panel Reports *on Japan – Restrictions on Imports of Certain Agricultural Products*, adopted on 2 February 1988, BISD 35S/163, para. 5.4.3, and on *Japanese Measures on Imports of Leather*, adopted on 15/16 May 1984, BISD 31S/94, para. 55.

- (i) the measures at issue³⁶⁴ 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.

6.2 We therefore *recommend* that the DSB request India to bring the measures at issue into conformity with its obligations under the WTO Agreement.

VII. SUGGESTIONS FOR IMPLEMENTATION

7.1 Article 19.1 of the DSU provides that in addition to its findings and recommendations, the Panel may suggest ways in which the Member concerned could implement the recommendations. In the light of this provision, we wish to highlight some factors which, in our considered opinion, are relevant to the manner in which India should bring its measures into conformity with its obligations under the WTO Agreement.

7.2 At the outset, we recall that the Preamble to the WTO Agreement recognizes both (i) the desirability of expanding international trade in goods and services and (ii) the need for positive efforts designed to ensure that developing countries secure a share in international trade commensurate with the needs of their economic development. In implementing these goals, WTO rules promote trade liberalization, but recognize the need for specific exceptions from the general rules to address special concerns, including those of developing countries.

7.3 The process of trade liberalisation is often fragile and can be interrupted by balance-of-payments problems, even when these problems are not attributable to trade liberalisation. Liberalisation is also fragile with respect to internal adjustment problems. This fragility suggests an implementation period which is attuned to sustaining support for liberalisation in the presence of external shocks, and to the internal adjustment process.

7.4 As reflected in our report, we have found that the balance-of-payments measures in question were inconsistent with India's obligations under Articles XI:1 and XVIII:11 of GATT 1994 and Article 4.2 of the Agreement on Agriculture, and therefore recommended that India bring those measures into conformity with its obligations under the WTO Agreement. India has claimed that it is entitled to a phase-out period in connection with the removal of those measures and that it should not be required to eliminate them immediately. We concluded that, under Article XVIII:B and in the circumstances of the case, India had no right to a phase-out of its balance-of-payments restrictions, which the dispute settlement system would have to "preserve" as provided by Article 3.2 of the DSU. However, we wish to stress that our findings and recommendations do not imply that the measures at issue must be removed instantly.

7.5 The DSU provides for "prompt compliance" with recommendations of the DSB, but it contemplates the possibility that it might be impractical for a Member to comply immediately, in which case "the Member shall have a reasonable period of time in which to do so" (Article 21.3). This panel suggests that a reasonable period of time be granted to India in order to remove the import restrictions which are not justified under Article XVIII:B. Normally, the reasonable period of time to implement a panel recommendation, when determined through arbitration, should not exceed fifteen months from the date of adoption of a panel or Appellate Body report. However, this 15-month period

³⁶⁴ The "measures at issue" are defined in paragraph 5.122 *supra*.

is "a "guideline for the arbitrator", not a rule",³⁶⁵ and as indicated in Article 21.3(c) of the DSU, "that time may be shorter or longer, depending upon the particular circumstances". In light of the factors mentioned above, the panel suggests that the "reasonable period" in this case could be longer than fifteen months. In this regard, the panel would also bring the following points to the attention of the DSB:

First, while no agreement was reached in the BOP Committee as to the period in which India should remove its measures, we note that India has concluded bilateral agreements with a number of Members providing for a gradual elimination of the measures on an MFN basis.³⁶⁶

Second, in a proceeding under Article XVIII:12(c)(ii) or (d), it is provided that in the event that an inconsistency, even of a serious nature, is found, recommendations shall be made requiring the measure to be brought into conformity within a specified period. While not directly applicable in a panel proceeding, it is significant that immediate removal of even seriously inconsistent measures is not required.

Third, the IMF has not recommended immediate removal, but rather a phase-out over a relatively short period of time. As an indication, in 1995, when the balance-of-payments situation of India was more uncertain, the IMF had suggested a transition period of two years.

Fourth, in practice – both prior to and since the entry into force of the WTO Agreement: (a) in the *Korea - Beef* case, in 1989, the panel, following the BOP Committee, recommended that a time schedule be established, this in fact being done at the same time as Korea disinvoked Article XVIII³⁶⁷; (b) in a number of later cases where Members have disinvoked Article XVIII, the balance-of-payments measures at issue were phased-out.³⁶⁸

7.6 The foregoing factors take an added importance in light of the principle of special and differential treatment. This principle should be highlighted, given that Article 21.2 of the DSU requires that "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement".³⁶⁹

7.7 Accordingly, we suggest that the parties negotiate an implementation/phase-out period. Should it be impossible for them to do so, we suggest that the reasonable period of time, whether

³⁶⁵ Award of the Arbitrator, Arbitration under Article 21.3 (c) of the DSU, *EC Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/15, WT/DS48/13, 28 May 1998, para. 25.

³⁶⁶ See *India – Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products*, notifications of mutually agreed solutions, circulated pursuant to Article 3.6 of the DSU, WT/DS92/8 and WT/DS92/8/Corr.1, WT/DS93/8, WT/DS94/9 and WT/DS94/9/Corr.1; WT/DS96/8 and WT/DS96/8/Corr.1 and WT/DS90/2/Add.1, WT/DS91/2/Add.1, WT/DS92/2/Add.1, WT/DS93/2/Add.1, WT/DS94/2/Add.1, WT/DS96/2/Add.1.

³⁶⁷ Op. Cit., BISD 36S/268, para. 131. See also BOP/R/171 paras. 22-23. A seven-year phase-out period was applied (see BOP/R/183/Add.1, paras. 12-13).

³⁶⁸ Under the GATT: Brazil (1991) - one year phase-out (See BOP/R/194, 24 July 1991). Under the WTO: Egypt (1995) - three to five year phase-out (See WT/BOP/R/2, 30 June 1995); The Philippines (1995) - two year phase-out (WT/BOP/R/9, 24 November 1994). Two of these cases were dealt with under both Committees: GATT and WTO. See also the case of Tunisia (1997), where the Committee recommended to the General Council that, in adhering to its three year phase-out plan, Tunisia be deemed to be in compliance with its GATT 1994 obligations (see WT/BOP/R/31).

³⁶⁹ See Award of the Arbitrator in the case on *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, para. 24.

determined by arbitration (Article 21.3(c) of the DSU) or other means, be set in light of the above-listed factors.
