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1 ARTICLE XV

1.1 Text of Article XV

Article XV

Exchange Arrangements

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

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

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund

shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (a) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.
 - (b) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.
8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.
9. Nothing in this Agreement shall preclude:
- (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or
 - (b) the use by a contracting party of restrictions or controls in imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

1.2 Text of note *ad* Article XV

Ad Article XV

Paragraph 4

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

1.3 Article XV:1: "cooperation with the International Monetary Fund"

1.3.1 Consultation with the Fund in the context of dispute settlement

1. In the dispute on *Argentina – Textiles and Footwear*, Argentina asserted that a 3 per cent *ad valorem* statistical tax on imports was imposed for fiscal performance purposes so as to obtain IMF financing to deal with a financial crisis. In response to Argentina's claim that the Panel had erred by failing to consult with the IMF, the Appellate Body found that while "it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case", the Panel did not abuse its discretion by not seeking information or an opinion from the IMF:

"The only provision of the *WTO Agreement* that *requires* consultations with the IMF is Article XV:2 of the GATT 1994. This provision *requires* the WTO to consult with the IMF when dealing with 'problems concerning monetary reserves, balances of payments or foreign exchange arrangements'. However, this case does not relate to these matters. ...

As in the *WTO Agreement*, there are no provisions in the *Agreement Between the IMF and the WTO* that *require* a panel to consult with the IMF in a case such as this. Under paragraph 8 of this latter Agreement, in a case involving 'exchange measures within the Fund's jurisdiction', the IMF 'shall inform in writing the relevant WTO body (including dispute settlement panels) ... whether such measures are consistent with the Articles of Agreement of the Fund.' This case does not, however, involve 'exchange measures within the Fund's jurisdiction'. Paragraph 8 also provides that the IMF 'may communicate its views in writing on matters of mutual interest to the [WTO] or any of its organs or bodies (*excluding the WTO's dispute settlement panels*) ...' (emphasis added). Evidently, the IMF has not been authorized to provide its views to a WTO dispute settlement panel on matters *not* relating to exchange measures within its jurisdiction, unless it is requested to do so by a panel under Article 13 of the DSU."¹

2. The Panel in *India – Quantitative Restrictions* submitted questions to the IMF by a letter, "having regard to Article 13 of the DSU and to Article XV:2 of the GATT 1994".² The Panel Report records that the Panel found 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." The Panel took this information into account in assessing the claims before it.³

3. The Panel Report on *India – Autos* discusses the issue of consultation with the IMF in that case:

"India has also indicated that it would expect the Panel to consult with the IMF in determining India's balance-of-payments situation as of the dates of each claimant's request for establishment of this Panel. The Panel does not rule on whether consultation with the IMF is compulsory or not before the final factual resolution by a panel of a balance-of-payments matter, where there is conflicting evidence presented. Whatever the proper view as to this question, such a consultation could not be used as a total substitute for asserting and providing a *prima facie* case as to a defense under Article XVIII:B, and in the absence of any indication of how the measures might fall within the terms foreseen in that provision. It is clear that a panel's fact finding mandate should not be utilised so as to make out a *prima facie* case where that is not achieved by the relevant party. At an appropriate stage in proceedings, consultation of appropriate international experts or authorities could be helpful in establishing whether one of the specific situations foreseen in Article XVIII:B applied to India's situation. As stated by the *India – Quantitative Restrictions* panel, such consultation could 'assist in assessing the claims submitted' to the Panel. However, the arguments presented did not even lead the Panel to that point."⁴

4. The Panel in *Dominican Republic – Import and Sale of Cigarettes* examined, *inter alia*, a "foreign exchange fee" of 10 per cent *ad valorem* on all imports. The Dominican Republic argued that this measure was an exchange restriction justified under Article XV:9(a), and that it had been approved by the IMF as part of a stand-by arrangement with the IMF, and therefore was in accordance with the IMF Articles of Agreement. The Panel requested information from the IMF on the following two issues: "(i) how the foreign exchange fee is being implemented by the Dominican Republic; (ii) whether the foreign exchange fee as currently applied by the Dominican Republic is an "exchange control" or "exchange restriction" under the Articles of Agreement of the IMF."⁵ The

¹ Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 84-85.

² Panel Report, *India – Quantitative Restrictions*, para. 5.12.

³ Panel Report, *India – Quantitative Restrictions*, para. 5.12.

⁴ Panel Report, *India – Autos*, para. 7.294.

⁵ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.139-7.142.

letter by the Panel to the IMF and the IMF's communication to the Panel are both attached to the Panel Report.⁶

1.3.2 "findings of statistical and other facts presented by the Fund"

5. The Panel Report on *India – Quantitative Restrictions* records that the parties to that dispute had divergent views on the role of the IMF. The United States argued that Article XV:2 required the WTO (including panels) to consult with the IMF, and to accept as dispositive the IMF's determinations of fact on the matters of fact specified in Article XV:2 including whether India factually met the criteria in Article XVIII:9 based on the facts of its balance-of-payments and reserve situation. India argued that Article XV:2 required the WTO to accept certain IMF determinations "in reaching their final decision", only the WTO could take final decisions on the status of restrictions in the WTO. The Panel refrained from deciding the extent to which panels must consult with the IMF or consider IMF determinations as dispositive, and noted:

"[W]hether 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."⁷

6. The Panel Report on *Dominican Republic – Import and Sale of Cigarettes* states that the Panel made its own factual finding regarding the nature of the 10 per cent fee imposed by the Dominican Republic, based on its examination of the measure as currently applied and its interpretation of Article XV:9(a) below at paragraph XX, and considering the IMF's communication to the Panel:

"The Panel fully agrees with the opinion of the IMF. For the reasons set out above by the Panel and considering the opinion expressed by the IMF, the Panel finds that the foreign exchange fee measure as it is currently applied by the Dominican Republic does not constitute an 'exchange restriction' within the meaning of Article XV: 9(a) of the GATT 1994."⁸

1.4 Article XV:9(a)

1.4.1 "exchange controls or exchange restrictions"

7. The Panel in *Dominican Republic – Import and Sale of Cigarettes* found that Article XV:9(a) is an exception or an affirmative defence, and therefore the party invoking this exception "bears the burden to establish bears the burden to establish: (i) that the foreign exchange fee measure is an "exchange control or exchange restriction" within the meaning of Article XV:9(a); and (ii) that the measure is "in accordance with "the Articles of Agreement of the International Monetary Fund", as required by Article XV:9(a).⁹

8. The same Panel took note of a 1960 Decision of the Executive Directors of the Fund on the criterion for determining whether a measure is an "exchange restriction" is "whether it involves a direct governmental limitation on the availability or use of exchange as such" and decided to apply this criterion to the measure before it.¹⁰ Interpreting this criterion, the Panel found:

"[T]he ordinary meaning of 'direct limitation on availability or use of exchange ... as such' means a limitation directly on the use of exchange itself, which means the use of exchange *for all purposes*. It cannot be interpreted in a way so as to permit the restriction on the use of exchanges that only affects importation. To conclude otherwise would logically lead to the situation whereby any WTO Member could easily circumvent obligations under Article II:1(b) by imposing a foreign currency fee or charge on imports at the customs and then conveniently characterize it as an 'exchange restriction'. Such types of measures would seriously discriminate against

⁶ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, Annexes C and D.

⁷ Panel Report, *India – Quantitative Restrictions*, paras. 5.11 and 5.13.

⁸ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.145.

⁹ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.131.

¹⁰ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.132.

imports while not necessarily being effective in achieving the legitimate goals under the Articles of Agreement of the IMF. ... because the fee as currently applied is imposed only on foreign exchange transactions that relate to the importation of goods, and not on other types of transactions, it is not 'a direct limitation on the availability or use of exchange as such'."¹¹

1.4.2 "in accordance with the Articles of Agreement of the International Monetary Fund"

9. The Panel Report on *Dominican Republic – Import and Sale of Cigarettes* notes the Panel's agreement with the IMF's statement that because the measure at issue did not constitute an exchange restriction, "the issue of its consistency or inconsistency with the Fund Articles ... does not arise". The Panel also found that an IMF decision cited by the Dominican Republic did not constitute a legal basis for the application of the foreign exchange fee measure, and that the Dominican Republic had not demonstrated that this fee was applied "in accordance with" the IMF Articles of Agreement.¹²

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¹¹ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.137.

¹² Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.150 and 7.154.