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Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order

Chantal Thomas
Cornell Law School, chantal-thomas@lawschool.cornell.edu

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BALANCE-OF-PAYMENTS CRISES IN THE DEVELOPING WORLD: BALANCING TRADE, FINANCE AND DEVELOPMENT IN THE NEW ECONOMIC ORDER

CHANTAL THOMAS*

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INTRODUCTION

In the last two decades, seismic shifts have transformed the international order underlying economic and political relations as well as the central regimes of international economic law. These shifts are quite visible in the posture of the international order on development issues. Substantively, the order has moved away from a relative acceptance of "special and differential treatment" for developing countries, and towards a relative intolerance of that principle. While institutionally, the order has moved away from "pragmatism" and towards "legalism," the West may well have gained leverage in its relationship with the South. Most recently and strikingly, there has been renewed effort to coordinate the central international trade and monetary regimes, the World Trade Organization ("WTO") and the International Monetary Fund ("IMF"). This renewal revives the early postwar vision of close cooperation between international trade and monetary organizations—a vision that had faded over the intervening decades.[1]

The international law governing balance-of-payments crises in developing countries reflects both the substantive and the institutional dynamics at play in this transformation. This has been nowhere more clearly demonstrated than by the World Trade Organization's recent resolution of a claim brought by the United States against India, in which the U.S. asserted that trade restrictions maintained by India for balance-of-payments purposes were inconsistent with India's WTO obligations.

Part I of this Article briefly describes the causes of balance-of-payments crises, drawing on the example of the 1997 Thai crisis and describing some of the relevant factors for India.[2] Part II discusses the substantive and institutional dimensions of international eco-

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* Associate Professor of Law, Fordham University School of Law. Thanks to Cynthia Lichtenstein and Tim Canova for their comments on earlier drafts.

1. *See generally* John H. Jackson, *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, *in* MANAGING THE WORLD ECONOMY: FIRST 50 YEARS AFTER BRETTON WOODS 131, 141-43 (Peter B. Kenan ed., 1994) (observing the "lack of coherence" between trade and monetary regimes to be an "important defect" of the international economic order prior to the establishment of the World Trade Organization).

2. *See infra* pp. 102-06.

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nomic law governing balance-of-payments crises.[3] Part III describes the backround and disposition of the *India – Quantitative Restrictions* case.[4] Part IV shows how the substantive and institutional trends described in Part II influenced the outcome of the case.[5] Finally, Part V concludes by voicing a few concerns about these trends.[6]

I. CAUSES OF BALANCE-OF-PAYMENTS CRISES

The balance-of-payments resides at the crux of development. It illustrates the intersection of trade and finance and reveals the relationship of a given economy to the international marketplace. The reasons for balance-of-payments crises among developing countries stem from the basic obstacles that they face in trying to become industrialized, and also illuminate why those difficulties are so entrenched.

A nation's balance-of-payments is where its trade and finance flows converge. The term "balance-of-payments" refers to a "statement showing all of a nation's transactions with the rest of the world for a given period. It includes purchases and sales of goods, services, gifts, government transactions, and capital movements."[7] This description of economic activity is often divided into the *current* account and the *capital* account. While *current* account flows consist primarily of goods and services,[8] *capital* account flows are flows in the ownership of foreign and domestic assets (i.e., in foreign-held domestic assets and domestic-held foreign assets).[9]

A "balance-of-payments" problem occurs when a drop in demand for a country's currency is so steep that it creates downward pressure

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3. *See infra* pp. 106-16.

4. *See infra* pp. 116-25.

5. *See infra* pp. 125-27.

6. *See infra* p. 127.

7. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, MACROECONOMICS 398 (14th ed. 1992).

8. *See id.* (defining current accounts as the part of balance-of-payments that includes merchandise and services as imports and exports).

9. *See* DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 453 (5th ed. 1995) (excluding financial reserve assets from the flow).

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on its currency value. The resulting depreciation destabilizes market transactions and renders citizens unable to purchase everyday necessities. Governments often take measures to counterbalance this downward pressure, especially if they have committed to maintaining a rigid exchange rate.

There are both traditional and more novel causes of balance-of-payments crises. A traditional cause of balance-of-payments crises is a sudden and severe increase in a country's trade deficit.[10] Such an increase might occur, for example, if bad weather drastically reduces production of key export crops and export earnings. Another classic case is one in which a steep rise in oil prices dramatically increases a country's import bill. An "oil shock" of this kind occurred in 1990 and 1991 as a result of the Gulf War.[11] The Gulf War oil shock was instrumental in the balance-of-payments crisis experienced by India in 1990 and 1991.[12] Whether the suddenly increased trade deficit is due to lower export earnings or a higher import bill, it creates the same effect: a sharp drop in demand for domestic currency relative to foreign currency.

In recent years, the capital account side has become an increasingly frequent source of balance-of-payments difficulties for developing countries. A sudden and sharp reduction of foreign investment— typically short-term portfolio investment—in domestic assets can also produce a sharp drop in demand for domestic currency relative to foreign currency, creating the same effect as a rapid rise in the trade deficit.

Capital and current accounts can work in tandem to create balance-of-payment difficulties, particularly under a rigid exchange rate regime. In Thailand during the 1990s, for example, large capital inflows created a booming investment sector. This investment sector

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10. *See* ROBERT J. GORDON, MACROECONOMICS 181-83 (8th ed. 2000) (defining "trade deficit" as "an excess of imports over exports . . .").

11. The recent rise in oil prices, although not as sudden, has also been significant. *See* Martha M. Hamilton, *Oil Price Passes $30 to Hit 9-year High*, WASH. POST, Feb. 15, 2000, at E1 (indicating that oil prices, over the last year, have risen to their highest since the Gulf War).

12. *See* The Economist Intelligence Unit, Country Profile: India, 1994-1995, at 25 (visited June 8, 2000) <http://store.eiu.com/all_countries.asp> [hereinafter EIU India] (discussing why India felt a crisis in 1990 and 1991).

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increased demand for imports, particularly capital goods.[13] At the same time, a government policy of maintaining a strong currency made exports less competitive and created trade deficits in the mid-1990s.[14] Finally, increasingly acute concerns about the domestic banking system caused investors in 1997 to exchange their Thai assets for non-Thai assets *en masse*.[15] The difficulties faced by an over-leveraged banking system created an investor exodus from Thai capital markets. While capital flows rushed out and the current account was in deficit, the government attempted to defend the baht, which was "essentially pegged to the dollar."[16] In short, a severe balance-of-payments crisis struck.

Balance-of-payments difficulties are especially vexing because they often involve mutually conflicting dynamics - that is, they often create "catch-22" situations.[17] The traditional balance-of-payments "catch-22" is the threat of the "downward spiral." Developing-country governments must maintain a fixed exchange rate in order to preserve the purchasing power of their citizenry and to prevent "consumption crises" in which sharply depreciated currency prevents people from purchasing basic necessities. Preserving such an exchange rate to prevent consumption crises, however, virtually guarantees crises of another sort—those that arise from recurrent demands on governments to maintain the currency value

More recently, the rise of "emerging markets" capital flows have created an "emerging markets catch-22." Here, the pressure to

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13. *See* Roman Terrill, *The Promises and Perils of Globalization: The Asian Financial Crisis*, *in* Enrique Carrasco, *E-Book on International Finance and Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 275, 284 (1999) (noting the economic expansion and current account surplus which Thailand previously experienced).

14. *See id.* at 285 (commenting on the current account deficits created by increased demand for imports and the dangerous ratio of current account deficits to Gross Domestic Product).

15. *See id.* at 286 (asserting that once the Thai economy began to falter, foreign investors halted and removed the flow of capital into Thailand).

16. *See* Terrill, *supra* note 13, at 282.

17. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 327 (2d ed. 1987) (defining a "catch-22" as "a frustrating situation in which one is trapped by contradictory regulations or conditions."). The term derives, of course, from Joseph Heller's eponymous satire of war.

maintain a stable currency comes not from concern about domestic purchasing power, but rather from concern about investor confidence. In order to attract the private investment crucial to economic growth, developing-country governments often feel compelled to prevent currency fluctuations that are more likely to spark investor concern in emerging markets. A commitment to maintaining such currency stability, however, forces the government to take considerable measures to prevent fluctuations in currency values.

To prevent downward pressure on the currency from causing such fluctuations, a government can use both monetary and trade policy. A government can use *monetary* policy to increase demand and reduce supply of domestic currency by exchanging foreign currency for domestic currency, ultimately relieving the downward pressure on currency value. A government can fund these exchanges with its foreign reserves, or with borrowed money.

In terms of borrowing, the IMF is a crucial source of short-term funds to correct balance-of-payments difficulties for many developing countries. In 1997, for example, Thailand borrowed $3.9 billion U.S. dollars to address its severe balance-of-payments crisis.[18] After its balance-of-payments crisis of 1990 and 1991, India approached the IMF and received approval for $2.3 billion U.S. dollars in new credits.[19]

Another possible solution is the use of *trade* policy to counterbalance the increased demand for imports by imposing import restrictions to force a reduction in the trade deficit. These "quantitative restrictions" can take any number of forms, from straightforward import quotas, to restrictive import licensing regimes, and even health and safety regulations. India first adopted quantitative restrictions for balance-of-payments purposes shortly after gaining its independence and continued to maintain most of them until the early 1990s. The United States, however, recently challenged its use of

18. *See IMF Approves $3.9 Billion Credit Line for Thailand*, WALL ST. J., Aug. 21, 1997, at A10 (indicating that other disbursements would follow the original disbursement of $1.6 billion if the Thai government met the strict requirements of the IMF).

19. *See* EIU India, *supra* note 12, at 56 (explaining India's use of IMF Funds to solve the balance-of-payments crisis).

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quantitative restrictions before the WTO. The next section will describe the rules of international economic law that were the subject of the dispute.

II. INTERNATIONAL ECONOMIC LAW ON BALANCE-OF-PAYMENTS CRISES

Following the Second World War, the great powers established a series of multilateral regimes to secure peace and prosperity.[20] Because many nations believed global economic liberalization was necessary to accomplish both of these goals, these efforts included the establishment of organizations governing international trade and monetary flows. Paramount in these respective categories were the General Agreement on Tariffs and Trade ("GATT") and the IMF. Both organizations established rules relating to balance-of-payments crises. This section describes those rules and their application.

A. THE TRADE SIDE: THE GATT/WTO

1. The Basic Legal Rules

Article XI of the GATT generally prohibits quantitative restrictions on trade.[21] Several exceptions, however, loosen this general prohibition by allowing quantitative restrictions on balance-of-payments grounds. For example, GATT Article XII allows a party to impose quantitative restrictions to "safeguard its external financial position and its balance-of-payments" where such quantitative restrictions are necessary either "to forestall the *imminent* threat of, or to stop, a serious decline in its monetary reserves" or if the party has "*very low* monetary reserves, to achieve a reasonable rate of increase

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20. *See generally* CLAIRE WILCOX, A CHARTER FOR WORLD TRADE (1949).

21. *See* General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, 224-25 [hereinafter GATT], *amended by* General Agreements on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 21, 33 I.L.M. 1125, 1154 (1994) (providing "[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . .").

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in its reserves."[22]

GATT Article XVIII establishes a broader balance-of-payments exception for developing countries, in recognition of the special difficulties they face in fending off balance-of-payments crises. Article XVIII:9 does not require an "imminent" threat, but only "a threat" of a serious decline in monetary reserves. Alternatively, it requires only that monetary reserves be "inadequate," as opposed to "very low." Moreover, whereas Article XII allows the implementation of quantitative restrictions only to "safeguard" the "external financial position," Article XVIII:9 recognizes in addition the need "to ensure a level of reserves adequate for the implementation" of a country's "programme of economic development."[23] Article XVIII:11 does require states to "progressively relax . . . restrictions . . . as conditions improve, maintaining them only to the extent necessary [under Article XVIII:9]." Finally, Article XVIII contains general language recognizing the tendency of developing countries "to experience balance-of-payments difficulties arising from efforts to expand their internal markets as well as from the instability in their terms of trade."[24] Thus, Article XVIII has traditionally been interpreted as granting developing-country governments a fair amount of latitude in imposing trade restrictions for balance-of-payments purposes.[25]

In addition to establishing a substantive exception to the rule against quantitative restrictions, Article XVIII establishes consultation procedures for supervising the exception. Under these procedures, a party imposing quantitative restrictions under Article XVIII has to consult with the GATT "as to the nature of its balance of payment difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties."[26] Article XVIII also authorizes the

22. *Id.* art. XII.

23. *Id.* art. XVIII, sec. B, para. 9.

24. *Id.* art. XVIII sec. B, para. 8.

25. *See* ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 27 (Gower, 1987) (asserting that "[s]ince developing countries have an almost infinite need for additional development resources, [Article XVIII] made it possible to justify almost any restrictions.").

26. GATT, *supra* note 21, art. XVIII, sec. B, para. 12(a).

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GATT to conduct periodic reviews of quantitative restrictions in place for balance-of-payments reasons, and to recommend modifications for restrictive regimes in order to improve compliance.[27] Finally, while Article XVIII requires an adversely affected party to seek consultations with the restricting party, it also authorizes the GATT to award adversely affected parties compensation by releasing them from their obligations, as "appropriate," toward the restricting party.[28]

Drafters have modified the original Article XVIII consultation procedures several times,[29] most importantly in the 1979 Declaration on Trade Measures Taken for Balance-of-Payment Purposes,[30] and the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994.[31] Under these documents, the Committee on Balance-of-Payments Restrictions is to conduct Article XVIII consultations. Further, these documents establish that the membership of the Committee is open to "all contracting parties indicating their wish to serve on it."[32] The Committee

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27. *See id.* art. XVIII, sec. B, para. 12(a)-(c) (setting forth an initial review of all restrictions, establishing an additional review section two years after the original session to determine if the restrictions are consistent with previous provisions in article XVIII or XIII, and advising how inconsistent provisions should be modified).

28. *See id.* art. XVIII, sec. B, para. 12(c)(ii) (declaring that the party in violation of the provisions has to "confor[m] with [the] provisions within a specific period of time.").

29. *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 351, 355-56 (6th ed. 1994) (indicating the changes made to the GATT consultation procedures, including a "detailed consultation procedure, a simplification of the procedures for developing countries, and the extension of GATT examination to all trade measures.").

30. *See* Declaration on Trade Measures Taken for Balance-of-Payments Purposes, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 205 (1980) (eliminating the previously established procedures for examination and establishing that the "[p]rocedures for examination stipulated in XVIII shall apply to all restrictive import measures taken for balance-of-payments.").

31. *See* Understanding on the Balance-of-Payments Provisions of the General Agreements on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, para. 5, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 21, 33 I.L.M. 1125, 1158 (1994) [hereinafter Understanding].

32. Declaration on Trade Measures Taken for Balance-of-Payments Purposes,

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must conduct a periodic review of members' balance-of-payments restrictions and must report its consultations to the General Council of the WTO.[33] This report should include the Committee's findings as to whether the balance-of-payments measures are consistent with Articles XII and XVIII, as well as recommendations aimed at promoting compliance with those provisions.[34] "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."[35]

2. The Operation of the Rules

The operation and impact of the rules described above has depended heavily on underlying economic and political norms and relationships. For the most part, developed countries had overcome their post-war balance-of-payments crises by the 1950s.[36] By the 1970s, developed countries had abandoned maintaining a fully fixed exchange rate, opting instead for a "managed float."[37] The abandonment of a fixed currency value system essentially removed the possibility of immediate balance-of-payments crises. Consequently, GATT law on balance-of- payments difficulties became largely moot for the developed world.

For developing countries, by contrast, "the years 1955-60 produced a growing volume of ever more dramatic studies showing that

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Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 207 (1980) [hereinafter Declaration] (establishing committee consultations to "review all restrictive measures taken for balance-of-payment purposes."); *see also* Understanding, *supra* note 31, at 1158 (directing members to discontinue any "restrictive import measures taken for balance-of-payment purposes.").

33. *See* Declaration, *supra* note 32, at 208; *see also* Understanding, *supra* note 31, para. 13 (proposing that the recommendations and decisions reached by the committee should promote the "implementation of Articles XII and XVIII: B.").

34. *See* Understanding, *supra* note 31, para. 13 (concluding that the recommendations should include the facts and reasoning used by the committee to reach their decision).

35. *Id.*

36. *See* HUDEC, *supra* note 25, at 29.

37. While currencies of the European Monetary Union are now fixed against each other, they float as a group against other currencies.

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developing countries were losing ground economically."[38] Further, even though the developing countries' relative economic weaknesses made them more subject to chronic balance-of-payments difficulties, they did not abandon fixed exchange rates. Part of the maintenance of fixed exchange rate regimes came from widely adopted import substitution policy. In addition, the danger of a "downward spiral," forced developing countries into maintaining a fixed exchange rate to prevent a crisis in purchasing power, even though maintaining such a rate would guarantee critical demands on foreign reserves.

The chronic nature of balance-of-payments difficulties for developing countries affected the GATT's administration of Article XVIII. "Developing countries continued to observe the formalities—especially in seeking formal waivers for actions not in conformity with the rules."[39] Developing countries in fact followed the procedures more strictly than developed countries.[40] The situation, however, was one of "form without substance."[41] The "developing-country review became increasingly *pro forma* as their balance-of-payments problems remained drearily the same."[42]

During the 1960s and the 1970s, balance-of-payments consultations occurred regularly, but rarely resulted in any real constraint on developing-country governments. This lack of constraint stemmed from dynamics that are both "substantive," in that they relate to the content of economic policy; and "institutional," in that they relate to the role of the GATT in supervising economic policy.

a. Substantive Dynamics

From an economic policy standpoint, the uncontested approval of the balance-of-payments exemption stemmed from a recognition of the genuine and chronic difficulties developing countries faced in

38. *Id.*

39. *Id.*

40. *See id.* at 31 (observing that the United States and the United Kingdom departed from the rules on balance of payments in the early 1970s without seeking formal authority from the GATT).

41. *See id.* at 30 (remarking that the process was only procedural and lacking in substance).

42. *Id.*

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this area. Those recognizing these difficulties also acknowledged the "special and differential" status of developing countries. During the 1960s and 1970s, developing-country governments attempted to reorganize the international economic order around this principle of preferential treatment for developing countries and sought to establish a "New International Economic Order."[43]

b. Institutional Dynamics

Political trends supporting a relatively lenient approach to the balance-of-payments exemption also characterized the 1960s and 1970s. First, developing countries exercised relatively extensive bargaining power during this period. This influence arose from, among other things, the leverage non-aligned countries gained from the Cold War;[44] and the relative weakness of the industrialized world suffering from shortages and stagflation. Additionally, sweeping independence movements and stark examples of collective action such as the oil price hike, caused by the Organization of Petroleum Exporting Countries ("OPEC"), created the promise of solidarity among "Third World" nations.[45] All of these factors, together with a desire by industrialized countries to maintain the long-term viability of the GATT, created an environment of relative receptiveness to the concept of preferential treatment for developing countries.[46]

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43. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 28th Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974) *reprinted in* 13 I.L.M. 715 (1974) (asserting that the "[t]he new international economic order should be founded on full respect for the following principles: . . . (n) Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic cooperation whenever possible."). The foundation for the NIEO movement was the theory of "structuralism," which called for a fundamental realignment of the international order to correct deep imbalances between developed and developing countries that would, if uncorrected, perpetuate underdevelopment.

44. *See* JOAN SPERO, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 160 (4th ed. 1990) (discussing the value the United States placed on using economic assistance to develop southern countries as an important Cold War tool).

45. *See id.* at 170 (discussing the ability of OPEC member countries to make demands on wealthier, northern countries).

46. *See* HUDEC, *supra* note 25, at 39-70 (observing the preferential treatment received by developing countries, such as improved market access, tariff preferences, and the emergence of a more pragmatic system).

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In addition to these factors specific to North-South relations, the GATT was also entering a phase of "pragmatism." The rise of the European Economic Community, among other things, supported the view that countries could apply GATT law in such a way as to become more sensitive to the political issues facing member states.[47] By the 1970s, many of those in the GATT community—including its Director General—expressed expressed distinct disfavor for a "by-the-book" approach.[48]

Finally, one could interpret the relatively loose application of Article XVIII as arising partially out of an institutional decision to leave scrutiny of balance-of-payments measures to the IMF. The IMF's structure and focus allowed it a more extensive role in regulating those aspects of policy that relate to a country's balance-of-payments situation.

B. THE MONETARY SIDE: THE IMF

During the same years that the GATT was essentially endorsing balance-of-payments-related import restrictions on developing countries, the GATT's sister institution in international monetary relations, the IMF, was crafting an increasingly extensive and authoritative role in supervising developing countries. Originally, the IMF exerted its regulatory power equally on all members, both industrialized and developing alike. The first version of the agreement establishing the IMF required all members to commit to a "par value" system to establish values for their currencies in terms of gold or the U.S. dollar, and maintain their currencies within fairly narrow margins of those values.[49] The agreement authorized deviation from those margins only "to correct a fundamental disequilibrium," and

47. *See id.*

48. *See* OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 94-98 (1985) (Director-General of the GATT from 1968-1980) (highlighting the practical enforcement of the GATT and the flexibility given to developing countries).

49. *See* Bretton-Woods Agreement, Dec. 27, 1945, art. 4, 60 Stat. 1401, 1403-04, 2 U.N.T.S. 39, 46 (indicating that specific prices would be set for the "par value" system and that the member countries were to promote "exchange stability" and "maintain orderly exchange arrangements . . . ").

only after consultation with the IMF.[50] While the IMF never perfectly enforced the par value system,[51] the exigencies of the international economy caused it to break down altogether in the early 1970s.[52] Consequently, the IMF did not regulate a government's adoption of a fixed, pegged, or floating exchange rate policy as long as that government complied with the IMF's notification requirements.

If a government sought IMF reserves to aid in addressing a balance-of-payments crisis, the IMF's policy of conditionality required that government to demonstrate a commitment to reforms. In the IMF's opinion, however, these reforms had to be capable of improving the country's "fundamentals"[53] and fostering orderly economic and financial institutions.

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50. *See id.* (developing a 10 percent window of alteration from the established "par value").

51. *See* JOSEPH GOLD, EXCHANGE RATES: IN INTERNATIONAL LAW AND ORGANIZATION 18-19 (1988) (disagreeing, partially, with one commentator's view that the par value system was ineffective because members at times permitted their currencies to fluctuate outside the par value margins, and further stating that, despite this fluctuation, the system operated relatively smoothly); *see also id.* at 19 (observing that "[b]reaches of obligation . . . were not frequent . . . [i]t was not a period of disorder."). Gold adds that the IMF tolerated many of these deviations. *See id.* at 51 (identifying the policy established in 1951 as allowing the "occasional and exceptional" deviation).

52. *See id.* at 62 (indicating how the termination of the par value system occurred after the United States withdrew from the system). On August 5, 1971, President Nixon "closed the gold window," by announcing that the United States would withdraw its undertaking to purchase and sell gold for United States dollars freely with other monetary authorities. *See id.* Nixon also stated that the United States "would not adopt other appropriate measures to ensure that exchange rates in exchange transactions involving United States dollars were confined to predetermined margins." *Id.* Despite two subsequent attempts to restructure the par value system, the system collapsed for good in March 1973, "because it [could] not withstand the onslaught of speculative movements of funds, which two devaluations of the U.S. dollar did not deter." *See* Gold, *supra* note 52, at 62. Schedule C of the IMF Agreement provides that the IMF can call a par value system into operation under Article IV, Section 4. However, "[n]othing in Schedule C or any other provision . . . suggests that this . . . system must be called into operation, [and] . . . [n]othing that has happened since . . . suggests that members contemplate calling Schedule C into operation." *Id.* at 195.

53. *See id.* at 14 (defining "fundamentals" as "established jargon for such basic economic factors as prices, incomes, gross national product, trade, investment, and current account balances, in contrast to purely speculative influences.").

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Thus, in the 1970s, the IMF's role shifted from its early postwar function as arbiter of the international monetary system, to functions as lender and adviser to developing countries. This identity shift arose from the abandonment by industrialized country governments of fixed exchange rates, and the widespread continuation of fixed or pegged exchange rate regimes by developing countries. The shift also arose because developing country governments experienced chronic balance-of-payments difficulties throughout the 1970s.

The balance-of-payments difficulties of the developing world came to a head in 1982, when Mexico announced that it would no longer be able to service its foreign-held debt. By the early 1980s, it became clear that many developing countries, saddled with debt burdens acquired from commercial and official sources, and plagued by a worldwide recession, could not pay their debt.

C. THE ERA OF DEEP INTEGRATION

The debt crisis caused commercial banks, governments and international financial institutions to work more closely in addressing the problem. Because re-schedulings of all external debt were often tied to approval by the IMF of a debtor government's economic reform package, the IMF acquired new influence over the monetary and financial polices of debtor governments. The expansion of IMF fund facilities into "structural adjustment" regimes also arose during this period.[54] Under these facilities, governments had access to funds over a longer period in exchange for demonstrated commitment to a host of reforms, including raising interest rates, increasing taxes, lifting price controls, and curbing public expenditures. Governments also had to commit to deeper, "structural" reforms with respect to the privatization of state-owned industries and the opening up of foreign trade and investment.

The debt crisis and the "strong incentives for policy change" that it

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54. *See generally International Monetary Fund, About the IMF* (visited June 15, 2000) <http://www.imf.org/external/about.htm> (presenting developments of the IMF as the following: 1986, established the Structured Adjustment Facility (SAF); 1987, established the Enhanced Structural Adjustment Facility (ESAF); and, 1993, established the Systematic Transformation Facility (STF)).

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produced ushered in the current era of liberalization.[55] The relative importance of international financial institutions and governments as donors increased, and the IMF's policy of conditionality "became a route to deeper integration."[56] While IMF conditionality exerted pressure on developing countries to liberalize their economic policies, the debt restructuring effort created the ground floor for modern "emerging markets" capital account flows by partially restructuring debt through securitization.[57]

These dynamics also affected the international order on the trade side. The GATT negotiations culminating in the establishment of the World Trade Organization began in 1986. During the Uruguay Round of negotiations, leading voices representing the industrialized and developing worlds moved away from an emphasis on special and differential treatment towards a stronger commitment to bringing developing countries fully within GATT discipline.[58] India was one of the developing-country governments that spearheaded this change in focus. Some commentators voiced concerns about the relinquishment of the hard-core fight for "special and differential" provisions in the Uruguay Round agreements.[59] Others, however, cautiously endorsed

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55. *See* STEPHEN HAGGARD, DEVELOPING NATIONS AND THE POLITICS OF GLOBAL INTEGRATION 2 (1995) (defining deep integration as a shift from domestic policies to international policy coordination). "[T]he willingness of developing countries to entertain the deep integration agenda can only be understood in light of the powerful external economic and political constraints that operated on them during the 1980s." *Id.* at 6-7.

56. *Id.* at 95 (noting policy reform as a requirement for bilateral assistance and lending).

57. *See Emerging Markets Traders Association Bulletin* (Emerging Mkt. Trade Ass'n, New York, N.Y.), Oct./Nov./Dec., 1994 (noting how the Brady Plan created guidelines for the securitization of debt, and how the resulting market in Brady bonds quickly became a significant aspect of international financial activity).

58. The policy of special and differential treatment has by no means disappeared from the system as revised by the Uruguay Round. In the vast majority of instances in which the principle is invoked in the Uruguay Round Agreements, however, it is either to acknowledge the principle broadly without establishing more specific mechanisms for preferential treatment. Where such mechanisms exist, they serve only to grant developing countries a relatively longer period to implement Uruguay Round rules, rather than to establish a differential standard to be used in perpetuity.

59. *See* B.S. Chimni, *Political Economy of the Uruguay Round Negotiations: A Perspective*, 29 INT'L STUD. 2, 135, 144 (1992) (suggesting the adoption of the

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the move, arguing that developing countries were better off spending their energy demanding that industrialized countries finally reform their own longstanding deviations from GATT discipline in areas of relative importance to developing countries, such as textiles and agriculture.[60]

III. INDIA AND ITS BALANCE-OF-PAYMENTS TRADE RESTRICTIONS

A. THE TRANSFORMATION OF INDIA

The "duality" that characterizes many developing economies also marks India's economy. On one hand, India ranks in the top ten of world economies in terms of aggregate output, and has "one of the world's largest pools of highly trained technical manpower."[61] On the other hand, India's stark socioeconomic disparities and its massive—and massively poor—population have led the United Nations to rank India in the bottom quarter of the world's nations in terms of human development.[62]

India's attempts to address this poverty have been paradigmatic of development policy in the international order in the postwar era. During the 1960s and 1970s, India pursued an inward-looking policy of development, in which the state played a substantial role in encouraging indigenous growth in target industries, both through regulation and direct involvement of state-owned or partially-state-owned enterprises.[63] Thus, India is a classic example of developing-country

"graduation" concept as a possible strategy for developing countries).

60. *See* David M. Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y.U. J. INT'L & POL. 345, 364-66 (1993).

61. EIU India, *supra* note 12, at 16 (examining some positive characteristics of India's economy).

62. *See United Nations Human Development Report 1999, Globalization with a Human Face*, U.N. Development Programme, 44th Sess., at 136 (1999) (ranking India's "human development index" 132nd out of 174 countries).

63. *See* EIU India, *supra* note 12, at 17 (explaining that state planning took the form of comprehensive "five-year plans" issued by the National Planning Commission); *see also id.* (observing that state investment as a total of gross domestic capital formation hovered between forty percent and sixty percent for the public sector and between fifty percent and sixty percent for the private sector from the

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movement during this period toward "self-reliance because the country has focused on economic and political objectives that are grounded in principles of self- determination and anti-imperialism.[64]

The Indian textile industry is an even more quintessential example of this movement. Prior to British rule, India had a thriving indigenous textile industry. In moving his country towards political independence, Mahatma Gandhi emphasized the ideals of self-reliance and small-scale production as a way both to wean India from economic dependence on the colonial metropole, and to provide a highly decentralized and accessible means of sustenance and basic poverty reduction. The handloom became a symbol of this philosophy of self-reliance. Today, as India's largest industry, the textile industry provides employment for nearly fifteen million people.[65]

After independence, India employed a strong import-substitution trade policy regime. Trade accounted for less than ten percent of Indian GDP, and Indian trade accounted for a fraction of a percent of world trade.[66] A strong advocate of inward-looking industrialization, India also acted as a leader in the developing-country government movement to establish a New International Economic Order.

Like many other developing countries, however, India began charting a new and quite different course for development in the early 1990s. In 1991, India embarked on an ambitious liberalization program. This reform initiative came about for a number of reasons, including a desire to participate in the "emerging markets" phenomenon and a belief that the limits of inward-looking industrialization had been reached. More immediately, however, was the need to resolve a balance-of-payments crisis. Following the spike in oil prices during the Gulf War, India experienced severe inflation and, consequently, a massive balance-of-payments crisis that propelled the Indian government to seek aid from the IMF. In return for emergency aid from the IMF, India entered into the IMF's structural adjustment program.[67] Reforms included a new, deregulatory industrial

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1960s to the 1990s).

64. *See, e.g., id.* at 17.

65. *See id.* at 38.

66. *See id.* at 52.

67. *See id.* at 17.

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policy designed to encourage private sector growth. This policy consisted of foreign investment and partial divestiture from state-owned enterprises,[68] devaluation of the rupee in 1991 and full-current-account convertibility of the rupee in 1994,[69] reductions in public spending,[70] and deregulation of price controls.[71]

Trade liberalization was also an important element of India's reform. In 1991, India began to liberalize its elaborate regime of quantitative restrictions on imports. By 1995, India had fully lifted quantitative restrictions on a little over half of its 11,587 tariff lines, and loosened restrictions on another 1500 lines. At that time, India declared to the WTO Committee on Balance-of-Payments Restrictions that "virtually all items of capital goods, raw materials, intermediaries, components . . . and other goods are freely importable."[72] Quantitative restrictions on consumer goods such as textiles, however, remained largely in place. India observed that "the import of consumer items has also been eased in a gradual manner and it is the Government['s] intention to steadily carry this process forward."[73]

The Committee on Balance-of-payments Restrictions was unable to reach a conclusion in 1995 as to whether India's quantitative restrictions were justified. Rather, the opinions of the members seemed to be divided into two camps. One camp supported India's view that the liberalization of remaining import restrictions required additional caution, and that the "timing and sequence of the phase-out of quantitative restrictions . . . should be left to the judgment of the Indian authorities."[74] These members "remarked that while India's external

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68. *See* EIU India, *supra* note 12, at 19 (noting that the new industrial policy encouraged foreign investment, for example, by raising the ceiling on foreign equity holdings in companies based in India to fifty-one percent).

69. *See id.* at 52.

70. *See id.* at 49.

71. *See id.* at 25.

72. WTO Committee on Balance-of-Payments Restrictions, Report on the Consultation with India, Annex 1, WT/BOP/R/11 (visited June 15, 2000) <http://www.wto.org/search97cgi/s97_cgi> [hereinafter WTO India].

73. *Id.* Annex 1 (discussing India's gradual increase in imports as being integral to the development of its economy).

74. *Id.* para. 7 (asserting that India is entitled to handle its economic reform internally, "at a pace suited to the country's conditions.").

position appeared to be stable, the overall balance-of-payments remained structurally weak."[75] Members cited India's widening trade deficit in 1995 as resulting from a combination of factors, including increased imports, declining exports, and the more general problems relating to financial liberalization and current capital market conditions. Further, these members concluded that it was not enough to assess the level of reserves based on trade performance alone. Instead, they asserted that the country should complete structural reforms "in a manner that was socially and politically sustainable in an economy the size of India, with a large population and wide income disparities .... Premature elimination of the remaining restrictive measures might reverse India's fragile balance-of-payments situation and disrupt the momentum of trade liberalization."[76]

Other members were much less sympathetic to India's claim that the country was implementing quantitative restrictions for balance-of-payments reasons. These members observed that the widening trade deficit was the result of "rapid, economic expansion [that] had triggered growth of imports of capital and intermediate goods. . . ." The growth of [these] imports should, in turn, generate expansion of India's export capacity."[77] These members also noted that India had attracted "large inflows of foreign direct and portfolio investment, leading to a substantial increase of India's foreign exchange reserves . . . ."[78] Finally, these members pointed out that, according to the IMF, India's medium-term balance of payments prospects appeared sound. Consequently, these members felt that India's continued use of quantitative restrictions was not justified under Article XVIII.[79]

By the time the Committee issued its next report on India in March of 1997, disagreement over India's maintenance of quantitative restrictions had intensified. India argued that their position required

75. *Id.* para. 6.

76. *Id.* para. 7 (suggesting that other countries recognize India's delicate position and allow it to move towards trade liberalization on its own terms).

77. *Id.* para. 8.

78. WTO India, *supra* note 72, para. 8.

79. *See id.* paras. 8, 11 (noting that India's current account deficit had decreased, imports of capital and intermediate goods had grown, and the current levels of reserves were sustainable).

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continued caution, especially given the volatility of the capital markets. The Committee consulted the IMF, which asserted that, based on its foreign reserves position, India could no longer justify quantitative restrictions on balance-of-payments grounds.[80] The Committee, however, remained undecided and chose not to make any recommendations to the General Council.

In May of 1997, India notified the Committee of its plan to remove its remaining quantitative restrictions in a three-step, nine-year phase-out. The Committee did not approve this plan, and in October of 1997, the United States requested a WTO panel to consider whether India's regime complied with GATT/WTO law.[81]

B. THE WTO BALANCE-OF-PAYMENTS CASE

In October of 1997, the United States requested that the WTO Dispute Settlement Body ("DSB") establish a panel to consider its claim that quantitative restrictions maintained by India were inconsistent with India's obligations under GATT/WTO law.[82] India did not dispute the claim that these restrictions violated Article XI. Rather, it put forth two defenses, one substantive and one institutional. Both defenses revolved around the GATT/WTO provision for quantitative restrictions imposed by developing countries for balance-of-payments reasons.

80. *See id.* para. 12 (suggesting tariff reductions and "macroeconomic" alternatives as a substitute for quantitative restrictions).

81. *See generally* India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Request for the Establishment of a Panel by the United States, WT/DS90/8 (visited June 15, 2000) <http://www.wto.org/wto/ddf/ep/search.html> [hereinafter Request for Panel] (discussing the U. S.' request to examine India's quantitative restrictions and its inconsistent practices).

82. *See* India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R, para. 5.122 (visited June 15, 2000) <http://www.wto.org/wto/ddf/ep/search.html> [hereinafter Panel Report] (identifying the quantitative restrictions as: "(a) discretionary import licensing; (b) canalization of imports through government agencies; (c) [India's] Special Import Licensing (SIL)." The Panel upheld the U.S.' claim with respect to all of these measures. *See id.* para. 5.144.

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1. The Substantive Arguments

a. India's Substantive Response

Substantively, India responded that GATT Article XVIII allowed quantitative restrictions as measures "necessary . . . to forestall" a decrease in the member's monetary reserves, or "to achieve a reasonable rate of increase in its reserves" where those reserves were inadequate.[83] India argued that its time schedule for the removal of import restrictions was consistent with Article XVIII:11, which states that members shall "progressively relax" quantitative restrictions "as conditions improve."[84] As further justification, India pointed to the fact that Article XVIII allows quantitative restrictions to "forestall the threat of, or to stop, a serious decline in monetary reserves,"[85] as opposed to "the *imminent* threat" required by Article XII. Moreover, India pointed to the interpretive note (the "Ad Note") to Article XVIII, which states that a member will not be "required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution" of quantitative restrictions.[86]

In India's view, the drafters intended Article XVIII:11 to ensure that a Member had a right to maintain import restrictions. If their relaxation or removal would produce conditions justifying their intensification or reintroduction under Article XVIII:9, this right existed even without an immediate balance-of-payments need.

Moreover, under the terms of Article XVIII:9, developing-country Members could introduce, maintain or intensify import restrictions in order to set their reserves at an adequate level for the implementation of economic development programs. Consequently, irrespective of whether import restrictions were currently necessary to address an existing crisis in its balance-of-payments, India felt entitled to remove them gradually within a time-schedule designed to avoid balance-of-payments difficulties. Otherwise, these difficulties would re-

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83. GATT, *supra* note 21, art. XVIII, sec. B, para. 9.

84. Panel Report, *supra* note 82, para. 3.168.

85. GATT, *supra* note 21, art. XVIII, sec. B, para. 9(a).

86. *See id.* art. XVIII, para. 11.

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sult in a serious decline in its monetary reserves, thereby jeopardizing its program of economic development.[87]

b. The United States' Argument

In responding to India's substantive defense, the United States asserted that the GATT/WTO intended the balance-of-payments exception to allow members to employ quantitative restrictions temporarily, in a "limited set of circumstances." The United States further asserted that the GATT/WTO "did not provide *carte blanche* for India to continue fifty years of protectionist import restrictions, particularly after the IMF had determined that India [did not face a] threat of serious decline in its monetary reserves."[88] The language of Article XVIII:11 required that members "progressively relax" quantitative restrictions "as conditions improve, maintaining them only to the extent necessary . . . and shall eliminate them when conditions no longer justify such maintenance."[89] According to the United States, this language required India to eliminate quantitative restrictions *immediately* when they no longer became necessary.

The United States observed that IMF clearly had stated that India was not experiencing a serious decline in its monetary reserves, that there was no threat of such a decline, and that India's monetary reserves were not inadequate. Thus, the United States argued that India's reserve position no longer satisfied the conditions laid out in Article XVIII:9(a) and (b) or the Ad Note, prohibiting the use of any balance-of-payments justifications for maintenance of the challenged measures. Therefore, India was obliged to eliminate immediately the restrictions in question.

2. The Institutional Arguments

India's institutional defense was twofold. First, India asserted that the authority to determine compliance with GATT/WTO balance-of-payments law rested with the Balance-of-Payments Committee and

87. *See* Panel Report, *supra* note 82, para. 3.171.

88. *Id.* para. 3.154 (citing Appellate Body Report on Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, AB-1988-1, WT/DS56/AB/R, para. 73).

89. GATT, *supra* note 21, art. XVIII, sec. B, para. 11.

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its consultation process. Second, India argued that the IMF's determinations were not dispositive of the empirical questions concerning India's monetary reserves situation.

India argued that the Panel did not have the authority to determine whether its "time-schedule for the removal of import restrictions" was consistent with Article XVIII.[90] India felt that authority on this question rested with the Balance-of-Payments Committee and the General Council, under the consultation proceedings provided for balance-of-payments issues. GATT/WTO assigned authority in such a manner because both the Committee and Council were—composed of only three panelists and with no requirement of political or geogrpahical representiveness—open to all member states, developed and developing alike.[91] Thus, if GATT/WTO allowed the Panel to decide such matters, authority would shift from its assigned designation under the GATT/WTO agreements, disrupting the GATT/WTO framework with "serious systemic implications [for] highly controversial matters."[92] India argued "it would not serve the WTO system well if balance-of-payments matters, which raised not only technical but also delicate political matters, were submitted to the rigidities of the adjudication process."[93] In India's view, then, a member invoking Article XVIII could "maintain its import restrictions until the General Council, based on a recommendation of the Committee on Balance-of-Payments Restrictions . . . reached [a] 'final decision' and advised the Member that its import restrictions" were inconsistent with Article XVIII.[94]

The United States felt that the WTO DSB had full authority to consider the question before it. Neither Article XVIII, nor the dispute settlement provisions of the GATT and WTO agreements prohibited recourse to dispute settlement. Moreover, there was no indication from the text or the negotiating history of the 1994 Dispute Settlement Understanding ("DSU") that balance-of-payments matters were

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90. *Id.* para. 3.69.

91. *See id.* para. 3.80.

92. *Id.* para. 3.72.

93. *See* Panel Report, *supra* note 82, para. 3.72.

94. *Id.* para. 3.88(ii).

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to be "carved out" of the DSU's jurisdiction.[95]

With respect to the Panel's consultations with the IMF, the United States had asserted that GATT/WTO rules required the Panel to consult with the International Monetary Fund, and to accept "as dispositive" the IMF's determinations as to "whether the facts of India's balance-of-payments and reserve situation placed India within the criteria listed in Article XVIII."[96] The United States based this argument on Article XV:2 of the GATT, which provides that in the context of balance of payments problems, contracting parties "shall consult fully with the International Monetary Fund [and] 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."[97]

In response, India argued that Article XV did not apply to panel proceedings but only to consultation proceedings. India also argued that the IMF's findings could not be accepted as dispositive, or the IMF would effectively be given the authority to determine "the legal status of a restriction" under Article XVIII.[98]

3. The Panel Decision

The Panel ultimately found for the U.S., deciding that Article XVIII did not justify India's quantitative restrictions. In doing so, the Panel followed the substantive argument of the U.S., and held that Article XVIII required India to eliminate its quantitative restrictions *immediately* upon a finding that they were no longer necessary. The Panel also followed the United States' institutional argument that the DSB had full authority to inquire into the balance-of-payments justifications proffered by member states for their quantitative restrictions. Further, the Panel opined that the DSB need not defer to the more politically representative Committee on Balance-of-Payments Restrictions and General Council.

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95. *See* Panel Report, *supra* note 82, para. 5.23; *see also id.* paras. 3.82-3.87.

96. *Id.* para. 5.11.

97. *Id.*

98. *See id.*

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On the institutional question of the proper relationship between the WTO and the IMF, the Panel declined 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."[99] In noting that it had the responsibility of "making an objective assessment of the facts" and their conformity with the GATT, however, the Panel accepted "certain assessments of the IMF."[100]

On appeal, India argued that the Panel did not make "an objective assessment of the facts," but rather "delegated" the responsibility of doing so to the IMF[101] and permitted the opinion of the IMF "to substitute for its own."[102] The Appellate Body rejected India's argument. Although the Appellate Body acknowledged that the Panel had given "considerable weight to the views expressed by the IMF," it concluded that a "careful reading . . . makes clear that the Panel did not simply accept the views of the IMF," but "critically assessed" the data and compared it with data provided by other sources, such as the report of the Reserve Bank of India.[103] The Appellate Body also upheld the Panel's other conclusions.

IV. THE SIGNIFICANCE OF THE *INDIA - QUANTITATIVE RESTRICTIONS* CASE

A. TRENDS THAT THE CASE EXEMPLIFIES

The *India - Quantitative Restrictions* case demonstrates both substantive and institutional trends in contemporary international economic law. The substantive approach to the balance-of-payments ex-

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99. *See* Panel Report, *supra* note 82, para. 5.13.

100. *Id.*

101. *See* India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R, para. 48 (visited June 15, 2000) <http://www.wto.org/wto/ddf/ep/search.html> [hereinafter Appellate Report] (arguing that the Panel must conduct an assessment of the facts itself, unless a specific Dispute Settlement Procedure indicates otherwise and permits delegation).

102. *Id.* para. 49 (explaining that the Panel can consult an expert, such as the IMF, to gather facts and opinion, but that the Panel must analyze the facts on its own).

103. *Id.* paras. 149-50.

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ception for developing countries has moved away *from* recognition of the genuine and chronic balance-of-payments difficulties facing developing countries. Instead, this approach has moved *to* an increasing belief that wayward government policies help create such problems and that more liberal economic discipline is necessary to help prevent such difficulties.

With respect to international political relations between industrialized and developing countries, the end of the Cold War, the debt crisis, and the death of the NIEO movement have decreased the relative bargaining influence of developing-country governments, at least insofar as they seek policies different from those preferred by industrialized countries. In terms of GATT culture, many have remarked on the way that the Uruguay Round created a movement away from pragmatism and towards a more adjudicatory, "legalistic" approach.[104] Finally, with respect to the international organizational division of labor, the WTO has recognized the importance of a renewed effort to coordinate international trade and monetary law and policy.[105] The close cooperation between the IMF and the WTO in the *India-Quantitative Restrictions* case attests to that effort.

B. CONCERNS ABOUT THESE TRENDS

1. Substantive Concerns

Concerns about the trends surrounding the *India - Quantitative Restrictions* case fall under both substantive and institutional headings. Substantively, the primary concern is that developing economies are not out of the woods yet with respect to chronic balance-of-payments difficulties. Further, international economic law on this subject should not forget the human costs these crises exact, and how difficult it can be for an economy to recover from them.[106]

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104. *See, e.g.* Kennith W. Abbott, *The Many Faces of International Legalization*, 92 AM. SOC'Y INT'L L. PROC. 57 (1998).

105. *See* Jackson, *supra* note 1, at 141-42 (discussing the possibility of greater interchange between the WTO and the IMF, and the importance of the "monetary-trade" link in international economic law).

106. *See* Nicholas D. Kristof & Edward Wyatt, *Who Sank, or Swam, in Choppy Currents of a World Cash Ocean*, N.Y. TIMES, Feb. 15, 1999; Peter Stein, *The Backlash: In Asia, Victims of Capitalism Are Questioning the Devotion to Free*

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India's argument for caution deserves some consideration on this ground. Although the Panel dismissed it as irrelevant to the time period under consideration, the onslaught of the Asian financial crisis immediately after establishment of the Panel seemed, at least partially, to support India's wariness of full trade and monetary liberalization. Due to the fact that the volatility of portfolio investment in emerging capital markets remains undisputed, there is a need to recognize the real challenge to any argument for full capital and current account liberalization.[107] The social and political costs of volatility warrant reexamination of the argument for caution.[108]

2. Institutional Concerns

India argued that it should be given substantial leeway in determining for itself what balance-of-payments measures were justified. This argument was based in part on the importance of maintaining goodwill among WTO members.

There is always a danger of exceptions swallowing the rule, and the GATT/WTO dispute settlement system has repeatedly stressed the importance of construing exceptions narrowly to prevent this from happening. The existence of such a danger, however, should not prevent careful contextual analysis. In the present case, a significant liberalization of India's trade regime, as well as a commitment to liberalize the remainder, would seem to support the view that India did not intend to evade WTO discipline, but rather wished for more autonomy in determining how best to comply with such discipline. The DSB arguably recently granted such autonomy to the United States in declining to find the controversial United States statute known as "Section 301," which authorizes the United States to impose unilateral trade sanctions on WTO members, inconsistent with the United States obligations under the WTO.[109]

Markets, WALL. ST. J., Setp. 17, 1999, at R22.

107. *See* Cynthia Lichtenstein, *The Mexican Crisis: Who Should Be a Country's Lender of Last Resort?*, 18 FORDHAM INT'L L.J. 1769, 1744 (1995) (observing that primary "hot money" danger lies in portfolio markets).

108. *See generally* Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1597-98 (1999) (describing the contagious effect of a Mexican financial collapse).

109. *See* WTO Panel Report on United States-Sections of 301-310 of Trade Act

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CONCLUSION

The *India - Quantitative Restrictions* case exemplifies both laudable and troubling developments in today's international order. On one hand, the order has gained considerable authority and coherence, as exemplified by both the WTO DSB's willingness to scrutinize India's quantitative restrictions regime, and by its close coordination with the IMF. On the other hand, the GATT/WTO should not employ these efforts to pursue an unduly narrow and rigid understanding of the goals of the international economic order. The rejection of India's balance-of-payments defense in this case exemplifies an arguably shortsighted dismissal, particularly in view of the crises that wracked Asia shortly after the case began, the continuing balance-of-payments difficulties faced by many developing countries, and the uncertainty with which developing countries are able to progress. In formulating a more cohesive policy on balance-of-payments measures, as the *India - Quantitative Restrictions* case seeks to do, the international trade and monetary regimes of the WTO and the IMF should more fully take into account the "special and differential" challenges developing countries face in conducting economic policy. A refusal to do so may exact both economic and political costs from the viability and legitimacy of the new international order.

of 1974, Dec. 22, 1999, WT/DS152/R, para. 8.1 (finding that the United States statute is not inconsistent with United States obligations under the WTO "based in full or part on the US Administration's undertakings" to comply with its WTO obligations). It is impossible that these two panel decisions can be distinguished on the grounds that the Panel found in the *Section 301* case that an otherwise WTO-inconsistent statute was rendered consistent through implementation, whereas in the *India-Quantitative Restrictions* case the Panel found that India's implementation was WTO-consistent. A full comparison of these two decisions is beyond the scope of this article.

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