WORKING PARTY 2 ON ARTICLE XVIII - DRAFT FOURTH REPORT

Consideration of Procedures under Article XVIII in Relation to the Protocol of Provisional Application

At the fourth meeting of the CONTRACTING PARTIES the representative of Pakistan raised the question as to whether a contracting party need notify under Article XVIII any measure which, though contrary to the provisions of Part II of the Agreement, is permitted by the provisions of the Protocol of Provisional Application. At the fourteenth meeting of the CONTRACTING PARTIES, the representative of Pakistan again raised, in connection with the statement submitted by the Government of Ceylon, the question of procedure under Article XVIII, both with respect to notification and to action by the CONTRACTING PARTIES in these circumstances. The Working Party was required by its terms of reference to take account of the points raised in the discussions at these meetings and to report thereon to the CONTRACTING PARTIES.

In considering this subject, the Working Party had the advantage of the participation of the representative of Pakistan, who also submitted a written statement setting forth the views of his delegation.

The Working Party directed its attention to the question of whether a government is obliged to notify the CONTRACTING PARTIES in accordance with the provisions of paragraph 6 of Article XVIII, if the measure in question is permitted during the period of provisional application by virtue of sub-paragraph 1 (b) of the Protocol of Provisional Application. At first glance, a contracting party would not appear to be exempted from
the notification requirements of paragraph 6 or 11 of Article XVIII by virtue of sub-paragraph 1 (b) of the Protocol. However, the Working Party felt that procedures established for the purpose of obtaining a release by the CONTRACTING PARTIES should only be set in motion where such release is requested. They believed, therefore, there is no obligation on the part of a contracting party to notify a measure under the circumstances referred to by the representative of Pakistan. On the other hand, the Working Party recognised that the provisions of Article XVIII should not be denied to a contracting party simply because the measure in question is permitted under the Protocol, as such a contracting party should be allowed to ascertain whether it will be permitted to maintain a measure for economic development during a specified period even if that period extends beyond the time when the Agreement enters definitively into force. Furthermore, there may be advantage to the contracting party concerned to the CONTRACTING PARTIES if a measure is notified even where a release is not requested.

The Working Party therefore concluded that during the period of provisional application:

(1) a contracting party has the option of whether or not to notify a measure which is already exempted by virtue of sub-paragraph 1 (b) of the Protocol of Provisional Application;

(2) in case it chooses to notify, it should indicate whether notification is
(a) solely for the information of the CONTRACTING PARTIES, or
(b) for the purpose of obtaining a release under paragraph 7, 8 or 12, as the case may be; and
(3) In a case under 2 (b) above the full procedures and criteria of the relevant parts of Article XVIII would apply as if the Agreement were definitively in force.

The procedure recommended above covers both existing measures under paragraphs 11 and 12 and new measures under paragraphs 6, 7 and 8. However, the Working Party considered that while in practice there would be cases of existing measures which would be exempted by the Protocol of Provisional Application from the obligation to obtain a release under Article XVIII, this would be unlikely to arise in the case of a new measure, because existing legislation, in order to exempt a measure for which a release would otherwise be required, must have been mandatory; that is, the legislation existing on the pertinent date must have been such as to compel the executive authority to introduce a measure at some future date because it is improbable that the legislation requiring the measure existed on the pertinent day but not the measure itself.