ARTICLE XII

RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

I. TEXT OF ARTICLE XII, RELEVANT INTERPRETATIVE NOTES AND UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF GATT 1994

Article XII*

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (*a*) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

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

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(*b*) Contracting parties applying restrictions under sub-paragraph (*a*) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (*a*) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(*b*) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(*c*) Contracting parties applying restrictions under this Article undertake:

(i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*

(ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

(iii) not to apply restrictions which would prevent the importation of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(*d*) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (*a*) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (*a*) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(*b*) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (*a*) of this paragraph with the CONTRACTING PARTIES annually.

(*c*) (i) If, in the course of consultations with a contracting party under sub-paragraph (*a*) or (*b*) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*d*) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the

contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*e*) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(*f*) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balances of payments of which are under pressure or by those the balances of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

Interpretative Notes from Annex I

Ad Article XII

The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3 (c)(*i*)

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this sub-paragraph at the time envisaged, they may determine a later date; *Provided* that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 (*e*) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

UNDERSTANDING ON THE BALANCE-OF-PAYMENTS PROVISIONS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions[1];

Hereby *agree* as follows:

Application of Measures

1. 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.

2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.

3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.

4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph l0 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the "Committee") shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.

6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.

7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.

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[1]Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as "simplified consultation procedures") in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.

11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.

12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusions of Balance-of-Payments Consultations

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

II. INTERPRETATION AND APPLICATION OF ARTICLE XII

A. SCOPE AND APPLICATION OF ARTICLE XII

1. General

The present text of Articles XII and XVIII was agreed in the 1954-55 Review Session, and entered into effect in October 1957. The principal source concerning the drafting of these provisions is the Report of the Review Working Party on "Quantitative Restrictions"[2]. This Report notes generally concerning Article XII:

> "After a detailed consideration of the various proposals put forward with a view to establishing stricter rules for the introduction and maintenance of quantitative restrictions through the institution of fixed time-limits and approval by the CONTRACTING PARTIES, the Working Party came to the conclusion that such proposals would not find general acceptance among the contracting parties, but that, on the other hand, the general opinion was in favour of strengthening and widening the scope of consultations under Article XII, as well as under Article XIV. Consequently, the new text of the first three paragraphs of Article XII does not involve any change of substance. Their provisions have been rearranged in order to improve the language and to set them out in a better logical sequence …".[3]

Articles XII and XVIII:B have been amplified by detailed consultation procedures introduced in 1970, by "simplified" consultation procedures for developing countries introduced in 1972, and by provisions on the application of the Articles and consultation procedures laid down in the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which extend GATT examination under the balance-of-payments provisions from quantitative restrictions alone to all trade measures taken for balance-of-payments purposes. Section II(C) of this chapter discusses the consultation procedures applicable to such measures generally under Articles XII and XVIII.

2. Paragraph 1

(1) "any contracting party": member States of the EEC

At the Twelfth Session in 1957, four sub-groups were appointed to examine the relevant provisions of the Treaty of Rome in the light of the provisions of the General Agreement. The Report of Sub-Group B, which examined those provisions of the Treaty relating to quantitative restrictions notes as follows:

> "Members of the Sub-Group expressed concern that under the Rome Treaty provisions a Member State would be permitted to use quantitative restrictions not justified by its own balance-of-payments position. They recognized that this cause for concern would be removed if at some future stage the integration of the economies of the Six proceeded to the point that they held their foreign exchange reserves in common.
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> "The Six [EEC member States] considered that the opening phrase of paragraph 5 of Article XXIV provided a general exception under which they were entitled to deviate from the other provisions of the General Agreement, including Articles XI to XIV, insofar as the application of these provisions would constitute obstacles to the formation of the customs union and to the achievement of its objectives …"
>
> "Most members of the Sub-Group had a different interpretation of Article XXIV. In their view countries entering a customs union would continue to be governed by the provisions of Article XI prohibiting the use of quantitative restrictions as well as by the other provisions of the Agreement which provided certain exceptions permitting the use of quantitative restrictions where necessary to deal with balance-of-payments difficulties … Since paragraph 8(a)(i) permitted where necessary the use of quantitative restrictions for balance-of-payments reasons, it followed that the use of quantitative restrictions by individual countries within the union for these reasons could not be regarded as preventing the formation of a customs union as defined in Article XXIV.

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[2] L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170-185.
[3] *Ibid.*, 3S/171, para. 4.

"Most members of the Sub-Group could not accept the interpretation of the Six of paragraph 5(a). In their view the use of the term 'regulations' in this paragraph and in paragraph 8(a)(ii) does not include quantitative restrictions imposed for balance-of-payments reasons ... the term 'regulation' does not occur in the balance-of-payments Articles of the General Agreement. The General Agreement prohibits the use of quantitative restrictions for protective purposes and permits their use only in exceptional circumstances and mainly to deal with balance-of-payments difficulties. Accordingly, the notion that paragraph 5(a) would require that temporary quantitative restrictions should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provisions of the Agreement which preclude the use of quantitative restrictions as an acceptable protective instrument.

...

"Most members of the Sub-Group believed that the imposition of common quotas by the Six, quite apart from being contrary to Article XII of the GATT, would be contrary to fundamental economic reasoning unless they held their reserves in common. Common quotas could mean that a member of the customs union in balance-of-payments difficulties would be unable to apply restrictions appropriate to its particular difficulties while other members would be applying restrictions not required or justified by their payments position. ...

"Most members of the Sub-Group emphasized that if the Six were individually no longer to be bound by the balance-of-payments provisions of the Agreement permitting the use of quantitative restrictions only in carefully defined circumstances, then the balance of rights and obligations under the Agreement would be impaired.

...

"The Sub-Group took the view that Member States of the Six as regards their individual use of quantitative restrictions should be subject to the consultation procedures applicable to other contracting parties in like circumstances, and agreed that it would not be proper to envisage special consultation procedures. If in the application of the provisions of the Treaty any Member country found it necessary to take action which would bring into play the consultation provisions of the General Agreement, then the country concerned would fulfil its obligations under GATT."[4]

(2) "in order to safeguard its external financial position and its balance of payments"

When this wording was proposed during the Geneva session of the Preparatory Committee, it was indicated that it would eliminate the risk that the provision "could be interpreted to mean that import restrictions were not 'necessary' (and therefore were not permitted) until every other possible corrective measure (such as exchange controls, exchange depreciation, etc.) had been tried and found inadequate"[5]. It was also stated that it remained clear, of course, that the Organization had the right during the course of consultation with the Members fully to discuss and recommend alternative action which a Member might take to meet its difficulties.[6]

(3) "may restrict the quantity or value of merchandise permitted to be imported": Quantitative and other trade measures for balance-of-payments purposes, including import surcharges and import deposit schemes

Import surcharges and import deposit schemes for balance-of-payments purposes are governed by the 1979 Declaration on "Trade Measures taken for Balance-of-Payments Purposes"[7] which specifies that "The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes". The history of the treatment of such schemes in the GATT 1947 divides into two

[4]L/778, adopted on 29 November 1957, 6S/70, 76-80, paras. 2-5, 7-8, 11.
[5]EPCT/W/223, p. 13.
[6]*Ibid.,* p. 15.
[7]L/4904, adopted on 28 November 1979, 26S/205.

periods, before and after the adoption of the Declaration. In this connection see also the provisions of the Understanding on the Balance-of-Payment Provisions of the GATT 1994.

(a) *Treatment of import surcharges prior to 1979*

The 1979 Declaration reflected the use of import surcharges and import deposit schemes for balance-of-payments purposes in the fifteen years preceding, as well as the practice developed by the Committee on Balance-of-Payments Restrictions and discussed below. In 1964, the Committee on Legal and Institutional Framework, which prepared the text of Part IV of the General Agreement, had also recommended an amendment to Section B of Article XVIII to permit a less-developed contracting party to use temporary import surcharges, in place of quantitative restrictions, to safeguard its balance of payments.[8] This Recommendation had been referred to the Committee on Trade and Development which debated the question in an Ad Hoc Group on Legal Amendments during 1965-1966, and agreed to defer consideration of the issue indefinitely.[9]

In a review of its work in the 1970-74 period, the Committee on Balance-of-Payments Restrictions reported to the Council in 1975 that:

> "Surcharges appear to have been applied in twenty-four cases, involving twenty-three contracting parties. The Balance-of-Payments Committee discussed, examined or generally dealt with ten of these cases. In two cases only did it recommend a waiver - Uruguay and Turkey. Both these cases involved extensions of waivers granted originally in 1961 and 1963, making it difficult for the Committee to depart from established practice. In two other cases - Israel and Yugoslavia - the Committee adopted a new approach by assimilating the surcharge to quantitative restrictions applied for balance-of-payments reasons, thus dispensing with the formalities of a waiver. In the other six cases, the surcharges were discussed, not always in detail, in the course of the consultations. It is not within the Committee's terms of reference to recommend a waiver unless it has been assigned the task by the Council. There seems to be a trend on the part of Committee members towards adopting gradually a more flexible approach, rather than emphasize the legal requirements of GATT.
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> "Of the twenty-four different surcharges, five cases were dealt with in other GATT bodies (Denmark, India, Indonesia, Pakistan and United States); three of which resulting in waivers. Further, nine cases were not brought to the attention of contracting parties."[10]
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> "In the case of import surcharges on bound items, the decision to be taken, according to the General Agreement, is whether or not to grant a waiver (Article XXV:5). In examining import surcharges, the Committee's main concern has never been the question of whether or not it should recommend to the CONTRACTING PARTIES the validation of the measure through a waiver. The Committee's conclusions have focused instead on the question of whether the surcharges meet the criteria set forth in the General Agreement for import restrictions. A typical example is the 1970 consultation on the Yugoslav special import charge. Here the Committee decided to recommend to the Council to take note of the surcharge on the understanding 'that all the conditions and criteria embodied in the appropriate provisions of the General Agreement concerning the use of quantitative restrictions for balance-of-payments reasons should be deemed applicable in respect of this import charge'. A similar approach was adopted in three other cases (1971 Israel; 1974 Israel; 1974 Yugoslavia). The Committee's decisions assimilating surcharges to the procedures and criteria for import restrictions were adopted unanimously. In the 1971 Israel consultation, however, the representative of Japan asked to have his view recorded in the conclusions that the case should not be regarded as a precedent.
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> "The Committee's approach towards import surcharges during the past five years contrasts with a more formal approach of the CONTRACTING PARTIES in the early 1960s when waivers for surcharges, at least when imposed by developing countries, were frequently granted. ...

[8] L/2281, para. 7 and Annex II; L/2297, para. 6.

[9] 13S/76; 14S/141. See also COM.TD/F/W/3, Note by the Secretariat done for the Ad-Hoc Group on "The Use of Import Surcharges by Contracting Parties", dated 25 May 1965.

[10] L/4200, paras. 31-32.

> "The procedural assimilation of surcharges to import restrictions by the Committee does not, of course, change the rights of contracting parties affected by surcharges. The Committee, in some of its conclusions on surcharges re-affirmed the rights of affected countries by stating that the decision to take note by the Council would in no way preclude recourse to the appropriate provisions of the General Agreement by any contracting party which considered that any benefits accruing to it under Article II of the Agreement in respect of any bound item were nullified or impaired as a consequence of the surcharge."[11]

In 1964 the United Kingdom gave notice of its decision to impose a temporary import surcharge in order to safeguard the external financial position of the United Kingdom and its balance of payments; the United Kingdom invoked the provisions of Article XII as justification while recognizing that "the type of restriction on imports there envisaged was the use of quantitative restrictions". The Council, while "bearing in mind that Article XII envisaged that any necessary restraint on imports would be by way of quantitative restrictions", appointed a Working Party of which the terms of reference were identical to those stated in Article XII:4(a), with the addition: "as to the nature of the measures taken".[12]

In 1971, the United States introduced a temporary import surcharge in conjunction with changes in exchange rate policy and a domestic wage and price freeze. The Report of the Working Party on "United States Temporary Import Surcharge" examined the surcharge and noted that "The United States, taking into account the findings of the IMF, considered itself entitled under Article XII to apply quantitative restrictions to safeguard its external financial position and balance of payments but had chosen instead to apply surcharges which were less damaging to world trade. ... The other members of the Working Party ... noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement".[13]

The Report in 1972 of the Working Party on the "Danish Temporary Import Surcharge" notes that "Denmark, taking into account the findings of the International Monetary Fund, considered that, although the implementation of an import surcharge was not explicitly covered by any provision of the GATT, such action had been taken in the spirit of Article XII:2(a). Quantitative restrictions provided for in Article XII would have had a more serious effect on the interests of its trading partners ... The Working Party noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement".[14]

(b) Treatment of import deposit schemes prior to 1979

In 1978, an import deposit scheme was examined by the Panel on "EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables". The measure in dispute provided that importation of certain products would be conditional on production of a certificate; the issue of the certificate would be conditional on the lodging of a security to guarantee that the imports in question would be made, and an additional security to guarantee that the imports would be made at a minimum price. The United States argued that the minimum import price system operated as a charge on imports, and that charges in excess of bound duties were levied through lost interest, debt servicing, and clerical and administrative costs associated with the provision of security deposits, and through the forfeiture of security deposits if the importation did not occur within the 75-day validity of the licence or if the minimum import price was not respected.[15] The Report of the Panel notes:

> "... The Panel considered that these interest charges and costs were 'other duties or charges of any kind imposed on or in connection with importation' in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connection with the

[11] L/4200, paras. 40-42. See also BOP Committee Reports referred to on Yugoslavia in 1970 (BOP/R/48, p. 10); Israel 1971 (BOP/R/54, page 8 with Japanese reservation at p. 8); Israel 1974 (BOP/R/78, page 6); Yugoslavia 1974 (BOP/R/74 p. 7).

[12] L/2676, adopted on 17 November 1966, 15S/113, 113-114, paras. 2-4.

[13] L/3573, adopted on 16 September 1971, 18S/212, 222-223, para. 41.

[14] L/3648, adopted on 12 January 1972, 19S/120, 129, paras. 36-37.

[15] L/4687, adopted on 18 October 1978, 25S/68, 87-88, para. 3.56.

lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b)".[16]

On the relevance of this Panel finding for the consideration in the Committee on Balance-of-Payments Restrictions of whether import deposit requirements are "charges" in terms of Article II:1(b), see, for example, the 1980 consultations with Israel[17] and the 1981 consultation with Italy on the Italian deposit requirement for purchases of foreign currency.[18]

Concerning the treatment of import deposit schemes prior to 1978, the Balance-of-Payments Committee reported to the Council in its review of its work in 1970-74 that:

"Seventeen different import deposit requirements appear to have been applied involving sixteen contracting parties. The Balance-of-Payments Committee discussed or examined seven different cases. The Committee has generally referred to the measures in its conclusions, though without giving much emphasis; it has either noted or welcomed reduction of rates, or hoped or called for early phase-out or removal. In three cases the import deposits were discussed in the course of the consultations but not mentioned in the conclusions (Argentina, Korea and Uruguay).

"Three cases of import deposits were examined in other GATT bodies - United Kingdom, Italy and Iceland, none of which were invoking Article XII at the time, but all of which invoked balance-of-payments reasons.

"Seven cases were not notified to GATT and were not discussed in GATT bodies".[19]

"… the CONTRACTING PARTIES have not decided whether a deposit requirement in respect of bound items is a 'charge … imposed on or in connection with importation' or, more generally, a 'treatment … less favourable than that provided for in the appropriate … Schedule', and therefore contrary to Article II.

"Possibly as a result of this, the conclusions on import deposits have generally been vague and have avoided any connotation of approval or disapproval. A typical example is the 1974 consultation with Greece in which the Committee merely 'noted the intention of Greece to continue reducing the rates of the prior import deposit scheme'. There was no case where an import deposit scheme was found to be violating the General Agreement's financial or commercial criteria for import restrictions".[20]

In 1968, the United Kingdom introduced an import deposit scheme "as a measure necessary to accelerate progress in bringing the United Kingdom balance of payments into surplus". This measure was examined in the Working Party on "United Kingdom Import Deposits" which consulted with the International Monetary Fund and concluded that "the deposits were not more restrictive than measures that an application of the provisions of Article XII permits".[21] The scheme was terminated on 4 December 1970.[22] The 1974 Report of the Working Party on "Italian Import Deposit" notes that "there was a wide measure of support for the conclusion that the Italian import deposit scheme was not more restrictive than measures that an application of the provisions of Article XII of the GATT permits".[23] In the Report in 1976 of the Working Party on the "New Zealand Import Deposit Scheme" it is noted: "The Working Party agreed that the New Zealand import deposit scheme applied on a temporary basis was not more restrictive than an application of the provisions of Article XII of the General Agreement. Noting that New Zealand was not invoking the provisions of Article XII or any other provision of the General Agreement, the Working Party agreed that this conclusion was without prejudice to the rights and obligations of contracting parties under the General Agreement".[24]

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[16] *Ibid.*, 25S/103, para. 4.15.
[17] BOP/W/37, para. 8.
[18] BOP/R/119; BOP/W/51, para. 8.
[19] L/4200, p. 11, paras. 34-36.
[20] *Ibid.,* p. 13, paras. 43-44.
[21] L/3193, adopted on 15 April 1969, 17S/144, 149, para. 17.
[22] 18S/212.
[23] L/4082, adopted on 21 October 1974, 21S/121, 125, para. 13.
[24] L/4363, adopted on 15 July 1976, 23S/84, 91, para. 24.

(c) Practice since 1979

On 28 November 1979 the CONTRACTING PARTIES adopted the Declaration on "Trade Measures taken for Balance-of-Payments Purposes"[25] which notes in its preamble that "restrictive import measures other than quantitative restrictions have been used for balance-of-payments purposes", and provides:

> "1. The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. The application of restrictive import measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Articles XII, XIII, XV and XVIII without prejudice to other provisions of the General Agreement:
>
> "(a) In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade[26];
>
> "(b) The simultaneous application of more than one type of trade measure for this purpose should be avoided; ...
>
> "The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement. ...
>
> "4. All restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions".

Thus, since 1979, in principle, all restrictive import measures, including but not limited to quantitative restrictions, surcharges and import deposit requirements, have been subject to examination in the Committee and not to examination by special working parties. The 1979 Declaration followed on discussions prior to and during the Tokyo Round of multilateral trade negotiations.[27]

The 1981 Report of the Committee on Balance-of-Payments Restrictions on the "Italian Deposit Requirement for Purchases of Foreign Currency" notes the view of the Italian Government "that the GATT rules on trade measures taken for balance-of-payments purposes did not apply to the deposit scheme because it was of a monetary nature and its main and primary effects were financial and monetary". The Committee concluded, *inter alia*, "that the deposit scheme, though monetary in form, had some effect on trade and that, in so far as these trade effects were concerned, the scheme could be considered in the spirit of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes".[28] The deposit scheme was terminated on 7 February 1982.[29]

Surcharges for balance-of-payments reasons were notified under Article XII by the Czech and Slovak Republic in January 1991, by Poland in December 1992, and by the Slovak Republic in March 1994.[30] Surcharges for balance-of-payments reasons were notified under Article XVIII:B by Israel in September 1982 and by South Africa without reference to either Article XVIII:B or Article XII in September 1988.[31]

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[25]L/4904, adopted on 28 November 1979, 26S/205.

[26]A footnote to paragraph 1(a) of the Declaration states: "It is understood that the less developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied."

[27]See, e.g., CG.18/W/5, 19 February 1976, at p. 3; CG.18/W/7; CG.18/W/8; CG.18/W/9 and Rev.1; 1976-1978 Report of the Consultative Group of Eighteen: L/4429, 23S/38, 43-45, paras. 19-25; L/4585, 24S/58, 59-60, paras. 7-9; L/4715, 25S/37, 38-39, paras. 6-7. See also Tokyo Round negotiating documents including MTN/FR/W/1, MTN/FR/W/2, MTN/FR/W/10, MTN/FR/W/12, MTN/FR/W/13, MTN/INF/16, MTN/INF/25 and Rev.1, MTN/FR/4.

[28]BOP/R/119, adopted on 3 November 1981, C/M/152.

[29]L/5162/Add.3.

[30]Czech and Slovak Republic: see L/6812 and Adds.1-2; see also BOP/R/193, C/W/693, C/M/254. The Czech and Slovak Republic ceased to exist on 31 December 1992 and the surcharge was abolished at that time. Poland: see L/7164, C/RM/G/31, BOP/R/206, notification in L/7461 of extension of surcharge to 17 December 1997, BOP/W/154, BOP/317 and BOP/R/216. Slovak Republic: see L/7428, BOP/W/156, BOP/319, BOP/R/218.

[31]Israel: see L/5361 (notification), BOP/R/195, BOP/307, C/M/254 p. 3-4, L/7092, BOP/R/210, BOP/R/213, BOP/R/215. South Africa: see L/5898 (imposition), L/5898/Add.1-3 (changes); see also L/7084, C/M/259 p. 62-63, C/M/260 p. 12, BOP/R/211. Both Israel and South Africa consulted in the Committee on Balance-of-Payments Restrictions without reference to either Article XII or XVIII; see at page 378

Paragraphs 2 and 3 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

> "Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as 'price-based measures') shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.
>
> "Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. … It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product."

Concerning import surcharges and import deposit schemes, see also Article II.

3. Paragraph 2

(1) "Import restrictions … shall not exceed those necessary"

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that "Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation."

(2) "a serious decline in its monetary reserves"

Article XV:2 provides that "The CONTRACTING PARTIES, in reaching their final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII … 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".

During discussions at the Havana Conference, it was stated that

> "The seriousness of a decline in reserves depended on a number of factors such as the size of a country, its need for reserves, the variability of its trade and the size of the reserves. Neither the absolute amount of the decline nor the proportionate amount would be valid in all cases as the criterion of the seriousness of the decline".[32]

(3) "special factors which may be affecting the reserves of such contracting party or its need for reserves"

The report of discussions at the London session of the Preparatory Committee notes that

> "There are, however, many factors to which due regard must be paid … There may be special non-recurrent movements of funds affecting a country's reserves, a country may have special credits outside its monetary reserves which it might be expected to use to a proper extent and at a proper rate to meet a strain on its external position, a country which has high reserves may, nevertheless, have high future commitments or

below.

[32] E/CONF.2/C.3/SR.38, p. 3.

probable drains upon its resources to meet in the near future. All such factors will have to be taken into account in interpreting movements in a country's reserves".[33]

Also, the report of discussions at the Havana Conference notes that

"It was the view of the Sub-Committee that the present text of Article 21 [XII] made adequate provisions for many of the considerations put forward by the delegates of Venezuela and Uruguay. ... It was pointed out that a country exporting principally a small number of products would, in like conditions, probably be considered to have need for greater reserves than a country exporting a large variety of products, particularly if the exports were exhaustible or subject to considerable fluctuations of supply or price. A country actively embarked on a programme of economic development which is raising levels of production and foreign trade would probably then be considered to have need for greater reserves than when its economic activity was at a lower level".[34]

See also the discussion below under sub-paragraph 4(e) and at page 389 concerning consideration of external factors in balance-of-payments consultations.

(4) Disinvocation of Article XII

Contracting parties having disinvoked Article XII since 1979 are indicated in Table 2 at the end of this chapter. See also the Secretariat Note of 24 June 1988 on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".[35]

4. Paragraph 3

(1) Paragraph 3(a): adjustment

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes"[36] notes that

"In discussing the application of the Agreement to import restrictions applied for protective, promotional or other commercial purposes, the Working Party devoted its main attention to two points:

"(a) The fact that balance-of-payment restrictions almost inevitably have the incidental effect of protecting those domestic industries which produce the types of goods subject to restriction and of stimulating the development of those industries. Any consequent development of uneconomic production could interfere with the process of removing balance-of-payment restrictions as and when the justification for such restrictions under the Agreement disappears ...".

The report recommended a number of "methods whereby the undesirable incidental protective effects of balance-of-payment restrictions can be minimised": see below under paragraph 3(c).

The 1955 Report of the Review Working Party on "Quantitative Restrictions" notes that

"The Working Party considered a proposal to the effect that a provision be included in paragraph 3(c) requiring contracting parties to minimize the incidental protective effects of the restrictions. The Working Party, while in general agreement with the intent of the proposal, considered such a provision unnecessary; it was of the view that this had been adequately addressed by other provisions in the revised Article, including paragraph 3(a), which requires contracting parties to pay due regard to the desirability of avoiding uneconomic employment of productive resources, and paragraph 3(c)(i) under which contracting parties

[33]London Report, p. 13, para. (c).
[34]Havana Reports, p. 105, para. 11; see also E/CONF.2/C.3/SR.38, pp. 2-3.
[35]MTN.GNG/NG7/W/46, para. 30.
[36]GATT/CP.4/33 (Sales No. GATT/1950-3).

undertake to avoid unnecessary damage to the commercial and economic interests of any other contracting party".[37]

In the "Uruguayan Recourse to Article XXIII" in 1962, the complaint of Uruguay included, *inter alia*, balance-of-payments measures maintained by Denmark, Finland, and Japan. In each instance, the Panel Report noted that "the Panel would recall the view of contracting parties, as expressed in the consultations under Article XII:4, that the Government of [Denmark/Finland/Japan] should endeavour to ensure that the quantitative restrictions maintained under Article XII did not have incidental protective effects which would render their removal difficult when [Denmark/Finland/Japan] no longer had need to have recourse to Article XII".[38]

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that "In order to minimize any incidental protective effects, a Member shall administer restrictions in a transparent manner."

(2) Paragraph 3(b): "to give priority to the importation of those products which are more essential"

The report of discussions at the London session of the Preparatory Committee notes that permission to give priority for the importation of certain more-essential products was expressly laid down "so that a Member can, if necessary, restrict the importation of consumer goods without restricting the importation of capital goods".[39]

Paragraph 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia* that:

> "Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports ... . The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term 'essential products' shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. ...

(3) Paragraph 3(c): application of restrictions under Article XII

(a) Conditions applicable to balance-of-payments measures

The Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes",[40] adopted at the Fourth Session in 1951, recommended the following "methods by which countries applying balance-of-payment restrictions can seek to minimise the undesirable incidental protective effects resulting from such restrictions ... which countries might where possible employ in their own interests and in the spirit of the Agreement in order to stimulate efficiency on the part of their domestic industries and to prepare them for the time when import restrictions can be relaxed or removed":

"(a) avoiding encouragement of investment in enterprises which could not survive without this type of protection beyond the period in which quantitative restrictions may be legitimately maintained;

"(b) finding frequent opportunities to impress upon producers who are protected by balance-of-payment restrictions the fact that these restrictions are not permanent and will not be maintained beyond the period of balance-of-payment difficulties;

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[37]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 5.
[38]L/1923, adopted on 16 November 1962, 11S/95, Annexes E, F and J, at 11S/116 para. 4, 11S/119 para. 4, and 11S/133 para. 4.
[39]London Report, p. 14, para. (r); see also EPCT/C.II/PV/13 p. 10.
[40]GATT/CP.4/33 (Sales No. GATT/1950-3).

"(c) administering balance-of-payment restrictions on a flexible basis and adjusting them to changing circumstances, thereby impressing upon the protected industries the impermanent character of the protection afforded by the restrictions;

"(d) allowing the importation of 'token' amounts of products, which otherwise would be excluded on balance-of-payment grounds, in order to expose domestic producers of like commodities to at least some foreign competition and to keep such producers constantly aware of the need ultimately to be prepared to meet foreign competition;

"(e) avoiding, as far as balance-of-payment and technical considerations permit, the allocation of quotas among supplying countries in favour of general licences unrestricted in amount or unallocated quotas applying non-discriminatorily to as many countries as possible; and

"(f) avoiding as far as possible narrow classifications and restrictive definitions of products eligible to enter under any given quota."[41]

"... the Working Party noted that there was evidence of a number of types of misuse of import restrictions, in particular:

"(i) The maintenance by a country of balance-of-payment restrictions, which give priority to imports of particular products upon the basis of the competitiveness or non-competitiveness of such imports with a domestic industry, or which favour particular sources of supply upon a similar basis, in a manner inconsistent with the provisions of Articles XII to XIV. ... Such type of misuse, for example, might take the form of total prohibitions on the import of products competing with domestic products, or of quotas which are unreasonably small having regard to the exchange availability of the country concerned and to other relevant factors.

"(ii) The imposition by a country of administrative obstacles to the full utilization of balance-of-payment import quotas, e.g., by delaying the issuance of licences against such quotas or by establishing licence priorities for certain imports on the basis of the competitiveness or non-competitiveness of such imports with the products of domestic industry, in a manner inconsistent with the provisions of Articles XII to XIV ...".[42]

See also the discussion of the relationship between Article XXIII and Articles XII and XVIII, under Article XXIII.

In late 1950, at the Torquay Session the CONTRACTING PARTIES adopted a Working Party Report on a proposal for a Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls,[43] including the recommendations therein that the CONTRACTING PARTIES "approve the draft standards set out in the Annex to this Report [and] recommend these practices to the individual contracting parties as a code which they should endeavour to adopt to the maximum practicable extent". The Report further provides:

"The Working Party considered that the proposed standards ... should be regarded as a code for the guidance of contracting parties and not as additional obligations imposed upon them under the General Agreement ... it was recognised that, where there are clear and overriding considerations, or in individual cases where there is good reason to suspect the bona fides of transactions in question, it may be necessary for contracting parties to depart from the precise terms of these recommendations".

[41] *Ibid.*, para. 19.
[42] *Ibid.*, para. 21.
[43] GATT/CP.5/30/Rev.1; adopted on 30 November 1950, GATT/CP.5/SR.16 p. 2-4; preliminary draft at GATT/CP.5/8, discussion also at GATT/CP.5/SR.8, SR.9.

The provisions of this Code appear *in extenso* under Article XIII:3.

See also the provisions of the 1979 Declaration on "Trade Measures Taken for Balance-of-Payments Purposes" above at page 366 and paragraphs 1-4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994.

(b) "to avoid unnecessary damage to the commercial or economic interests of any other contracting party"

See the Interpretative Note to paragraph 3(c)(i).

The 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes also provides that "If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties".[44]

In the Fifth Session in 1950, Belgium reported that it had carried out consultations under Article XXIII, and had reached a satisfactory resolution, concerning quantitative restrictions applied by the United Kingdom and France for protectionist purposes and which, in the view of the Belgian Government, were unnecessarily causing damage to the Belgian economy.[45]

c) "description of goods"

During discussions at the Geneva session of the Preparatory Committee, it was stated that "whether you mean fountain pens as a class or each brand of fountain pen … you certainly do not mean the importation of one particular kind".[46]

(d) "minimum commercial quantities"

During discussions at the Geneva session of the Preparatory Committee, it was stated that "the object … is to keep open the channels of trade, to make it just worthwhile for the exporter to keep his sales organization together in the overseas market".[47] Although it was recognized that the phrase was open to a wide interpretation, it was stressed as being a matter of common sense on which Members in good faith ought not to disagree very seriously. It was agreed in these discussions to record the statement that "there should be an understood priority for the importation of spare parts, because in prohibiting the importation of spare parts into a country, you are making it impossible for other countries to export machinery".[48]

See also the reference above to "token" imports.

(4) Paragraph 3(d): causes of balance-of-payments problems and their relationship with full employment

(a) Relationship to paragraph 3(a)

The Report of the Review Working Party on "Quantitative Restrictions" notes:

> "… As regards the redraft of paragraph 3(d), the Working Party wishes to place on record that the provisions of that sub-paragraph should be interpreted, *inter alia*, in the light of the undertaking set forth in sub-paragraph 3(a)."[49]

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[44]L/4904, adopted on 28 November 1979, 26S/205, 206, para. 2.
[45]GATT/CP.5/SR.25 p. 3.
[46]EPCT/A/PV/28, p. 19.
[47]EPCT/A/PV/28, p. 10.
[48]EPCT/A/PV/41, p. 28.
[49]L/332/Rev.I and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 5.

During the Fifth Session it was proposed to amend the General Agreement to add Articles 3, 4, and 6 of the Havana Charter Chapter II on employment and economic activity; however, this suggestion did not gain general support.[50] At the 1954-55 Review Session it was proposed to include in the General Agreement an article on full employment. However, the Report of the Review Working Party on "Organizational and Functional Questions" notes that the Working Party considered such an insertion unnecessary since the objectives sought through the proposed amendment were already covered in existing or proposed new Articles of the Agreement.[51]

(b) "a contracting party may experience a high level of demand for imports"

The meaning of this provision was discussed thoroughly at Havana. As a result the provision was amplified in the Havana Charter as follows (paragraph 4(b)): "Such a Member may find that demands for foreign exchange on account of imports and other current payments are absorbing the foreign exchange resources currently available to it in such a manner as to exercise pressure on its monetary reserves which would justify the institution or maintenance of restrictions under paragraph 3 in this Article".[52] The Interpretative Note *Ad* Article 21 of the Havana Charter provided:

> "With regard to the special problems that might be created for Members which, as a result of their programmes of full employment, maintenance of high and rising levels of demand and economic development, find themselves faced with a high level of demand for imports, and in consequence maintain quantitative regulation of their foreign trade, it was considered that the text of Article 21 [XII], together with the provision for export controls in certain parts of this Charter, for example, in Article 45 [XX], fully meet the position of these economies".

However, these provisions were not taken into Article XII, either in 1948 or in the Review Session.

(c) "shall not be required to withdraw or modify restrictions"

In the course of the discussion at the Geneva session of the Preparatory Committee in 1947 it was suggested that paragraphs 3(b)(i) and 4(d) of Article 26 of the Draft Charter (corresponding to the present GATT Article XII:3(d) and XII:4(d)) were contradictory. The following statement was made in reply:

> "If [the restrictions] are necessary in the sense of meeting the criteria in paragraph 2 [XII:2], if they are administered in a way which is in accord with the undertakings in paragraph 3(c), [XII:3(a) and (c)] then you cannot be required to withdraw them on the grounds that if you adopted a policy of deflation or ceased reconstruction, you would no longer be in difficulties, but if you undertake restrictions which do not meet the criteria of paragraph 2, or if you break the undertakings given in paragraph 3(c), then you may be required to withdraw the restrictions".[53]

5. Paragraph 4

(1) Paragraph 4(a): obligation to consult

The Report of the Review Working Party on "Quantitative Restrictions" notes:

> "… Paragraph 4(a) … has been redrafted for the sake of brevity, but the intent remains unchanged. The reference to 'new restrictions' covers the case described in paragraph 4(a) of the present Article, that of a contracting party which was not applying restrictions under the Article but finds it necessary to introduce restrictions on imports. On the other hand, the phrase: 'raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall …' corresponds to the second part of the first sentence of paragraph 4(b) of the present Article. The language adopted, and in particular the use of the word 'measures' is meant to convey the idea that the intensification referred to in this

[50]Proposal at GATT/CP.5/23, discussion at GATT/CP.5/SR.10 p. 2-4.
[51]L/327, adopted on 28 February, 5 and 7 March 1955, 3S/231, 240-242, paras. 27-32.
[52]E/CONF.2/C.3/82.
[53]EPCT/A/PV/41, p. 20.

paragraph may be achieved either by increasing the restrictive effect of the restrictions applied to products the import of which is already limited, or by the institution of new restrictions on products the import of which was not yet subject to limitations."[54]

Paragraph 6 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

"A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. …"

(a) "alternative corrective measures which may be available"

In discussions during the London session of the Preparatory Committee in 1946, it was stated that "the purpose of this paragraph as we see it is to make sure that before a member puts on import restrictions it should also adequately consider with the international organisations concerned other possible remedial measures such as exchange depreciation, exchange restrictions, special grants from the Fund, special loans from the Bank, and all this kind of thing".[55]

(2) Paragraph 4(b): Review of restrictions applied under Article XII

The text of paragraph 4(b) in the 30 October 1947 text of the General Agreement required that a review of all restrictions under Article XII be conducted not later than 1 January 1951. This review was carried out in connection with the second review of discriminatory application of import restrictions under Article XIV:1(g).[56] Article XII:4(b) was then revised in the Review Session of 1954-55, to call for an additional review of restrictions applied under Article XII. The review required by the provisions of paragraph 4(b) as revised, the timing of which is the subject of an Interpretative Note, was carried out by the CONTRACTING PARTIES in 1958-59. Part I of the resulting document discusses the financial background of the restrictions and discriminations, recent changes in the use of restrictions and the then-current level of restrictions and discrimination in the use of restrictions. Part II contains separate notes describing the restrictions in force as at the end of 1958 or early in 1959, in the twenty-five contracting parties resorting to Article XII or Article XVIII:B at that time.[57]

See also section C below on balance-of-payments consultations in the GATT.

(3) Paragraph 4(c)

The Report of the Review Working Party on "Quantitative Restrictions" notes that

"… Sub-paragraph (c)(i) is meant to apply to inconsistencies [with Articles XII-XIV] of a minor or technical nature. It is expected that if, during the course of consultations, the CONTRACTING PARTIES should find that such inconsistencies exist in the restrictions maintained by a particular contracting party, they would draw the attention of the contracting party to them, and, in their discretion, advise how they might be suitably modified; no other action is envisaged. It is envisaged that the provisions of (c)(i) will cover the majority of cases in which the consultations may bring to light inconsistencies with the relevant provisions of the Agreement.

[54]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 171, para. 6.
[55]EPCT/C.II/QR/PV/3 p. 26.
[56]See GATT/CP.6/12/Rev.2 and GATT/CP.6/48, published as *Use of Quantitative Restrictions to Safeguard Balances of Payments* (Sales No. GATT/1951-2, out of print).
[57]MGT(59)76, dated 30 July 1959; see also material on the background of this review at 6S/39-40, paras. 13-16.

"Sub-paragraph (c)(ii) deals with cases where the CONTRACTING PARTIES find serious inconsistencies in the application of the restrictions, and moreover, that those inconsistencies are of such a nature as to cause or threaten damage to other parties. In those cases, the CONTRACTING PARTIES would be required to make recommendations to remove the inconsistencies and to set up a time-limit for the removal or modification of the restrictions. If their recommendations are not complied with, the CONTRACTING PARTIES may then release a contracting party affected from certain obligations according to a procedure similar to that of Article XXIII".[58]

(4) Paragraph 4(d)

(a) "Consultations"

The Report of the Review Working Party on "Quantitative Restrictions" notes:

"… Although the changes are more of emphasis than of substance, the new text brings out clearly that the action of the contracting parties adversely affected by an application of restrictions which would not conform to the provisions of the Article, takes the form of a request for consultations rather than of a challenge".[59]

(b) "prima facie case"

The records of discussions of this provision during the London session of the Preparatory Committee indicate that these words were inserted to exclude frivolous complaints and to oblige countries to document to some extent any case presented.[60] As to the relation between sub-paragraph 4(d) and the balance-of-payments consultation process, the rapporteur in those discussions explained that "the Organization … would have approved a certain restriction of total imports, and a country which was hurt under 3(b) [XII:4(a)] could therefore say 'You are unnecessarily damaging my interests by choosing [to restrict] combs rather than toothbrushes'".[61]

The Report of the Working Party in 1956 on "Accession of Switzerland" notes that:

"it would be appropriate for the CONTRACTING PARTIES to receive a complaint on the part of Switzerland under the provisions of paragraph 4(d) of Article XII if a contracting party which was otherwise entitled to resort to the provisions of Article XII imposed restrictions on Swiss exports which were of such a character as to cause damage to the commercial and economic interests of Switzerland, and in considering such a complaint to pay special attention to the question whether these particular restrictions were necessary. The Working Party in this connexion had particularly in mind the provisions of paragraph 3(c)(iii) of Article XII".[62]

(5) Paragraph 4(e): "due regard to … external factors"

The Report of the Review Working Party on "Quantitative Restrictions" notes with respect to the drafting of this sub-paragraph:

"It was agreed that the scope of consultations under Articles XII and XIV should include external as well as internal causes of balance-of-payments difficulties, with a view to finding ways and means of eliminating them. In order to make that clear the Working Party agreed to insert a new paragraph … This insertion was agreed on the understanding that it would not introduce any new criteria for the resort to restrictions under this Article. The intent of the sub-paragraph is clarified by an interpretative note".[63]

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[58]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 173, paras. 9-10.
[59]*Ibid.,* 3S/173, para. 11.
[60]EPCT/C.II/QR/PV/5, p. 21. Concerning paragraph 4(d) see generally *ibid*. pp. 16-27.
[61]EPCT/C.II/QR/PV/3 p. 35.
[62]L/598, adopted on 17 November 1956, 5S/40, 42-43, para. 10. See also *inter alia* Havana Reports p. 102-105, GATT/TN.2/3/Add.1, GATT/CP.4/40 and GATT/CP/67 on concerns raised previously by Switzerland in this connection.
[63]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 173, para. 12.

The Resolution of 17 November 1956 on "Particular Difficulties Connected with Trade in Primary Commodities" provides, *inter alia*, that:

> "the [CONTRACTING PARTIES] shall in the course of consultations undertaken under Article XII and ... under Article XVIII:B, take account of problems relating to international commodity trade among other difficulties which may be contributing to the disequilibrium of the balance of payments and compelling certain contracting parties to maintain import restrictions".[64]

See also the material on "expanded" consultations at page 389 below. See also the discussion under Article XVIII:5.

6. Paragraph 5: "persistent and widespread application of import restrictions ... indicating the existence of a general disequilibrium"

Paragraph 5 was incorporated into the text during the London session of the Preparatory Committee; its source was a United Kingdom proposal.[65] The Report of the 1949 Working Party on "Consultation Procedures under Articles XII, XIII and XIV - other than Article XII:4(a)" notes regarding procedures for the use of Article XII:5: "Because of the broad nature of such discussions the working party considered that generally these issues would be dealt with in regular or special sessions of the CONTRACTING PARTIES".[66]

Discussions under paragraph 5 have been proposed only once, in July 1949 in connection with an agreement by Commonwealth countries to endeavour to reduce dollar-area imports by 25 per cent from 1948 levels in order to halt a severe drain on their central reserves. Action was deferred in view of pending discussions in the International Monetary Fund; these discussions led to the September 1949 round of devaluations of sterling and other currencies against the dollar.[67]

The Report of the Review Working Party on "Quantitative Restrictions" notes that during the Review Session, various proposals were made to amend the General Agreement to provide for joint action to restore equilibrium in the system of world trade and payments in the event that that system became seriously unbalanced, and to avoid the imposition of unnecessarily severe restrictions on international trade. In relation to two "scarce currency" proposals, designed for a situation where some large and commercially important country might develop a persistent surplus in its balance of payments with the rest of the world, place a strain on other countries' reserves, and cause a general scarcity of its currency:

> "There was general agreement in the Working Party that such a situation might arise from a variety of different circumstances and that the prime responsibility for the state of unbalance might rest either with the surplus or the deficit countries.
>
> "It was noted that provisions are already contained in the General Agreement and also in the Articles of Agreement of the International Monetary Fund to enable consultation to take place on the measures that might appropriately be adopted to meet such situations.
>
> "In particular it was noted that Article XII:5 of the GATT lays an obligation on the CONTRACTING PARTIES to initiate discussions ...

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[64] 5S/26, 27, para. 2.

[65] Proposal at EPCT/C.II/W.22; discussion at EPCT/C.II/QR/PV/3 p. 41-42.

[66] GATT/CP.3/50/Rev.1, adopted on 4 July 1949, II/95, 99, para. 21.

[67] GATT/CP.3/SR.42, p. 19-21; see UK notification of agreement at GATT/CP.3/68, and reference in paragraph 10 of Working Party Report on "Balance-of-Payments Questions", GATT/CP.4/38, adopted on 1 April 1950, II/103, 106-107; see also ICITO/1/14, ICITO/1/17 (referring also to Articles 4 and 21(b) of the Havana Charter) and Annecy Press Release No. 59.

"In the discussion of this matter in the Working Party a number of contracting parties stressed the desirability of providing for continuous co-operation and consultation between the GATT and the International Monetary Fund with a view to keeping the world economic situation under constant review and to enabling action to be concerted in good time to prevent any serious disequilibrium in world trade and payments from developing ... ".[68]

See also the material under Article XIV:5(a).

A. RELATIONSHIP BETWEEN ARTICLE XII AND OTHER ARTICLES

1. Articles I and XIII

The Reports of the Working Parties on "United Kingdom Temporary Import Charges"[69] and "United States Temporary Import Surcharge"[70] each note the arguments of developing countries in favour of exempting from the surcharge products of developing countries or products of which developing countries were the principal supplier. These Reports also note the arguments in response that special exemption of imports by origin would produce trade diversion and, to the extent that it encouraged imports, delay removal of the surcharge.[71] The Report in 1971 of the Group of Three (constituted of the Chairmen of the CONTRACTING PARTIES, the Council and the Committee on Trade and Development) recommended that if the United States surcharge were maintained beyond 1 January 1972, "the United States Government should take steps to exempt imports from developing countries from the charge", and that the Danish temporary surcharge should exempt products covered by the Danish preference scheme for imports from developing countries.[72] In the Working Party Report on the "Danish Temporary Import Surcharge", "Without prejudice to the legal issues involved, the Working Party noted that as from the introduction of the Danish general preference scheme on 1 January 1972, products included in that scheme would be exempted from the surcharge when imported from members of the Group of Seventy-Seven. Several members of the Working Party welcomed this decision of the Danish Government noting that this had been one of the recommendations of the Group of Three. Other members expressed concern that the exemption did not extend to all developing countries. Some other members said that the discrimination created by these exemptions gave their delegations cause for concern".[73]

Paragraph 2 of the 1979 Declaration on "Trade Measures Taken for Balance-of-Payments Purposes" provides that:

> "If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties".[74]

A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, summarizing the result of discussions in 1982-83 concerning the work of the Committee and the role therein of balance-of-payments problems confronting heavily-indebted developing countries, notes *inter alia* that these discussions had endorsed the view that "any action taken in the balance-of-payments field should be consistent with the multilateral principles embodied in the General Agreement"[75] and adds:

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[68] L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 174-176, paras. 16-18, 23.

Comparison of the provisions of Article XII and Article XVIII:B

[69] L/2676, adopted on 17 November 1966, 15S/113, 115, para. 10.

[70] L/3573, adopted on 16 September 1971, 18S/212, 220-222, paras. 34-38.

[71] 15S/115-116, para. 10; 18S/218, para. 25.

[72] L/3610, 18S/70, 74, para. 17(ii) (US surcharge); 75, para. 20 (Danish surcharge).

[73] L/3648, adopted on 12 January 1972, 19S/120, 126, 129 (identical text in paras. 22 and 41).

[74] 26S/206, 207; for background to this provision see, *e.g.,* Report of the Working Party on "United States Temporary Import Surcharge", L/3573, adopted on 16 September 1971, 18S/212, 220-223, paras. 34-38, 40.

[75] C/125, dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 60, para. 13.

Comparison of the provisions of Article XII and Article XVIII:B

	Art. XII	Art. XVIII:B	Significant differences
Special considerations for developing contracting parties	---	2(b) and 8	For developed countries see Article XII:3(d).
General statement on the use of restrictions	1	9	
Limits of application of the provisions	2(a)	9 proviso	Criteria in Article XII relate to "imminent threat" and "very low reserves", and in Article XVIII:B to "threat" and "inadequate reserves".
Relaxation and elimination of restrictions	2(b)	11 second sentence	See precautionary clause in interpretative note *ad* Article XVIII:11.
Right to choose goods to restrict	3(b)	10	
Conditions and undertakings	3(c)	10 provisos	
Domestic policy considerations	3(a) and 3(d)	11 first sentence and proviso	Different arrangements of clauses reflect differences in emphasis
Review and consultation procedures	4(a) to (d)	12(a) to (d)	Interval between regular consultations under (b) is one year in Article XII, two years in Article XVIII:B: also note proviso to Article XVIII:12(b).
Consideration of special factors in consultations	4(e)	12(f) first sentence	Consideration in Article XII relates to external factors (see note *ad* Article XII:4(e)) and in Article XVIII to factors in Article XVIII:2
Expeditiousness in making determinations	4(f)	12(f) second sentence	
Right to withdraw on shorter notice, upon unfavourable determination	---	12(e)	When GATT is definitively applied under Art. XXVI, withdrawal is governed by Article XXXI and requires six months' notice
Non-discriminatory application	Article XIII		
Deviation from rule of non-discrimination	Article XIV		

"In clear language this means that actions should be taken on a most-favoured-nation basis or, pursuant to the provisions of Part IV of the General Agreement (particularly Article XXXVII) and the 1979 Decision on Differential and More Favourable, Treatment, Reciprocity and Fuller Participation of Developing Countries, in a manner consistent with that decision, including special treatment for the least-developed among the developing countries. It was noted that Paragraph 2(c) of the Decision allows for the possibility of more favourable treatment to be accorded among developing contracting parties. …

"In view of the consensus to respect multilateral principles in responding to the needs of countries experiencing severe balance-of-payments difficulties, the possibility of focusing trade actions on such countries would depend on the choice of products for which a particular country is a principal or substantial supplier to a particular market, or on the choice of specific measures which would particularly benefit that

country, it being understood that the implementation of each particular measure would be consistent with the multilateral principles referred to".[76]

2. Article XVIII

The table above presents a simplified comparison of the provisions of Article XII and Article XVIII:B.

In a few instances consultations have been conducted concerning balance-of-payments measures without reference to either Article XII or Article XVIII.[77] In another instance a contracting party has consulted concerning the same measures under Article XVIII:B and subsequently under Article XII.[78]

In the 1958 Working Party Report on "Consultations and Review Regarding Balance-of-Payments Restrictions", the Working Party "noted the recommendation of the Chairman of the CONTRACTING PARTIES that it be placed on record that twelve of the contracting parties applying balance-of-payments import restrictions at present fulfil the requirements of Article XVIII:4 and that their restrictions be considered as being applied under Article XVIII:B rather than Article XII; consequently, the other fourteen contracting parties applying restrictions are considered as acting under Article XII, and are therefore required to consult under Article XII:4(b) in 1959".[79]

3. Article XXIII

See Article XXIII.

4. Article XXIV

See Article XXIV.

C. BALANCE-OF-PAYMENTS CONSULTATIONS IN THE GATT

1. Committee on Balance-of-Payments Restrictions

Prior to 1958, consultations under the balance-of-payments Articles of the General Agreement were conducted in a series of working parties established by the CONTRACTING PARTIES for that purpose. When the balance-of-payments Articles were revised during the Review Session, it was agreed to study improvement of the arrangements for consultations.[80] The Committee on Balance-of-Payments Restrictions was established on 22 November 1958. Its present terms of reference are as follows:

> "To conduct the consultations under Article XII:4(b) and Article XVIII:12(b) as well as any such consultations as may be initiated under Article XII:4(a) or Article XVIII:12(a).
>
> "Pursuant to paragraph 4 of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes, adopted by the CONTRACTING PARTIES on 28 November 1979, 'all restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions'".[81]

In April 1978, one contracting party raised the question of the balance of representation in the Balance-of-Payments Committee, and suggested that the membership should reflect a suitable balance between developed and

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[76] *Ibid.*, 31S/60-61, paras. 14, 16.

[77] Israel (BOP/R/90, BOP/R/101, BOP/R/113, BOP/R/129, BOP/R/142, BOP/R/155, BOP/R/170, BOP/R/187, BOP/R/195, BOP/R/210); Portugal (BOP/R/62, BOP/R/93, BOP/R/106, BOP/R/111, BOP/R/118, BOP/R/125, BOP/R/134, BOP/R/145, BOP/R/152); South Africa (BOP/R/92, BOP/R/211).

[78] Greece (consultations under Article XVIII:B in BOP/R/89, BOP/R/100, BOP/R/114, BOP/R/123; Article XVIII:B disinvoked, 1984; consultation under Article XII, BOP/R/160; Article XII disinvoked 1987).

[79] L/931, adopted on 22 November 1958, 7S/90, 92, para. 8. The twelve contracting parties referred to are: Brazil, Chile, Ghana, Greece, India, Indonesia, Malaysia, Myanmar, Pakistan, Sri Lanka, Turkey and Uruguay.

[80] 3S/179, para. 34.

[81] L/6526/Rev.4, dated 22 April 1993 (also listing the members of the Committee as of that date).

developing contracting parties. In response the Director-General pointed out that members of the Committee were designated by the Council, which had never refused an application for membership.[82]

The 1979 "Declaration on Trade Measures Taken for Balance-of-Payments Purposes" (referred to below as the "1979 Declaration") also provides: "The membership of the Committee is open to all contracting parties indicating their wish to serve on it. Efforts shall be made to ensure that the composition of the Committee reflects as far as possible the characteristics of the contracting parties in general in terms of their geographical location, external financial position and stage of economic development."[83]

A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council, summarizing the result of discussions in 1982-83 concerning the work of the Committee and the role therein of balance-of-payments problems confronting heavily-indebted developing countries, notes *inter alia* that: "The need for more active participation in the Balance-of-Payments Committee by both developed and developing countries was recognized. In this connection, it may be recalled that the Committee is open-ended and that any contracting party may become a member of the Committee simply by informing the Director-General of its wish to do so. The level of representation in the Committee was considered as a matter for individual governments' decision".[84]

Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides *inter alia:* "The Committee on Balance-of-Payments Restrictions ... shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. ... "

2. Procedures for examination of balance-of-payments measures

(1) General

The Report of the Review Working Party on "Quantitative Restrictions" notes that the main difference between the provisions of Article XVIII:12 and the corresponding provisions of Article XII:4 "relates to the periodicity of the consultations under sub-paragraph (b)" and further notes that "The remarks and agreed statements referring to consultations under Article XII and which are reproduced in paragraphs 6 to 11 of this report apply also to consultations under paragraph 12 of Article XVIII".[85]

(2) Scope of consultations

The 1979 Declaration provides that "The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes."[86] Thus, the scope of consultations includes both quantitative restrictions for balance-of-payments purposes and other restrictive import measures, such as import surcharges and import deposits, taken for balance-of-payments purposes. See the discussion above at page 366 on the treatment of import surcharges and import deposit measures in balance-of-payments consultations since the 1979 Declaration. Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 also provides that the Committee "... shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. ..."

In the period before 1979, the Committee did not routinely examine non-quantitative balance-of-payments measures. However, in certain instances the Council requested that the Committee examine non-quantitative measures when the Council viewed such measures as appropriately considered in conjunction with existing balance-of-payments quantitative restrictions: these included import surcharges and/or deposits applied by

[82]C/M/124, p. 4-5.
[83]L/4904, adopted on 28 November 1979, 26S/205, 207, para. 5.
[84]C/125, dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 59, para. 10.
[85]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 183-84, para. 46.
[86]L/4904, adopted on 28 November 1979, 26S/205, para. 1.

Brazil, Finland, Israel, Portugal, South Africa and Yugoslavia. The Committee also examined the extension of the waiver decisions for the stamp duty applied by Turkey as a balance-of-payments measure.[87]

(3) Procedures

The 1979 Declaration states, with regard to examination of balance-of-payments measures in the Committee on Balance-of-Payments Restrictions, that "The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved by the Council on 28 April 1970 (18S/48-53, hereinafter referred to as 'full consultations procedures') or the procedures for regular consultations on balance-of-payments restrictions with developing countries approved by the Council on 19 December 1972 (20S/47-49, hereinafter referred to as 'simplified consultation procedures') subject to the provisions set out below."[88] Paragraph 5 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 also provides that "... The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as 'full consultation procedures'), subject to the provisions set out below".

The 1970 "full consultations procedures" referred to in the 1979 Declaration describe the arrangements and procedures originally agreed in 1958 for consultations under Article XII:4(b) and Article XVIII:12(b) as revised in the Review Session, as they had evolved to 1970. The 1970 procedures deal with the contents of the consultations, the documentation for the consultations, the time schedule for the consultations, arrangements for consultation with the International Monetary Fund, the composition of the Committee on Balance-of-Payments Restrictions, and the reports to be prepared on the consultations. Attached to the 1970 procedures are a plan of discussion for balance-of-payments consultations, and a list of points to be covered in the basic document for the consultations.[89]

See also the "Procedures for dealing with new import restrictions applied for balance-of-payments reasons" adopted by the CONTRACTING PARTIES on 16 November 1960,[90] and earlier procedural decisions on examination of balance-of-payments measures.[91]

The first and second reports of the CG-18 to the Council note the discussions in the Group during 1975 through 1977 on procedural improvements concerning examination of balance-of-payments measures.[92]

3. Notification of balance-of-payments measures

In 1952 the Working Party on "Procedures for Report and Consultations in 1953 on the Discriminatory Application of Import Restrictions" examined intersessional procedures for initiation of consultations under Article XII. The Report of the Working Party notes that "It was ... agreed to amend the procedure for consultations so as to require a contracting party modifying its import restrictions to furnish detailed information promptly to the Executive Secretary for immediate circulation to other contracting parties ... the Working Party recommends that the Executive Secretary be authorized to communicate with any contracting

[87]See L/2824, adopted on 6 November 1967, 15S/195; L/3229, adopted on 23 July 1969, 17S/151; L/3787, adopted on 19 December 1972, 20S/229.

[88]26S/207, para. 6.

[89]L/3388, presented to the Council on 28 April 1970, 18S/48.

[90]9S/18, paras.1-6.

[91]Concerning consultations under the pre-Review Session provisions of Articles XII and XIV, see Working Party Reports on "Consultation Procedure under Article XII:4(a)", GATT/CP.3/30/Rev.1, adopted on 20 June 1949, II/89; "Procedures for Action on Matters Arising Under Articles XII to XIV between Sessions of the CONTRACTING PARTIES", adopted on 26 October 1952, II/101; "Procedures for Report and Consultations in 1953 on the Discriminatory Application of Import Restrictions", L/55, adopted on 7 November 1952, 1S/43, section on Article XII at 1S/45-46; "Consultations at the Tenth Session", L/465, adopted on 2 December 1955, 4S/43-46; "Plans for Consultations in 1957", L/597, adopted on 17 November 1956, 5S/48-56; and "Consultations under Article XII:4(b); Etc; Implementation of Revised Provisions of Articles XII and XVIII:B", L/769, adopted on 30 November 1957, 6S/36. On the implementation of the Review Session revision of Articles XII and XVIII, see the last of these reports and the Working Party Report on "Consultations and Review regarding Balance-of-Payments Restrictions", L/931, adopted on 22 November 1958, 7S/90.

[92]L/4429, 23S/38, 43-45, paras. 21-25; L/4585, 24S/58, 60, para. 9. The Mandate of the Consultative Group of Eighteen (CG-18), as adopted in 1975 and confirmed in 1979, provides that "The task of the Group is to facilitate the carrying out, by the CONTRACTING PARTIES, of their responsibilities, particularly with respect to ... the international adjustment process ..." L/4204, Decision of the Council of 11 July 1975, 22S/15.

party which he has reason to believe may have significantly modified its restrictions so as to obtain all the information which he and the Chairman require to carry out their responsibilities".[93]

The "Procedures for dealing with new import restrictions applied for balance-of-payments reasons" adopted in 1960 provide that "any contracting party modifying its import restrictions is required to furnish detailed information promptly to the Executive Secretary, for circulation to the contracting parties." A footnote to this paragraph notes: "Under established procedures, contracting parties should furnish such information not only when they wish to initiate a consultation pursuant to Articles XII:4(a) or XVIII:12(a) but whenever any significant changes are made in their restrictive systems".[94]

The 1972 Decision on simplified procedures for balance-of-payments consultations under Article XVIII:12(b) (cited below *in extenso*) noted that "There are a number of developing contracting parties, mostly the newly independent countries, which maintain import restrictions. ... the adoption of the 'streamlined' procedures set forth in paragraph 3 above should contribute substantially to easing the way for all developing countries to define their position regarding their restrictions in relation to the GATT provisions. It is therefore proposed that, upon approval of the new procedures, the secretariat be instructed to enquire and discuss with each of these developing countries with a view to establishing a complete list of the contracting parties invoking Section B of Article XVIII of the Agreement".[95]

Paragraph 3 of the 1979 Declaration provides: "Contracting parties shall promptly notify to the GATT the introduction or intensification of all restrictive import measures taken for balance-of-payments purposes. Contracting parties which have reason to believe that a restrictive import measure applied by another contracting party was taken for balance-of-payments purposes may notify the measure to the GATT or may request the GATT secretariat to seek information on the measure and make it available to all contracting parties if appropriate".[96] In addition, paragraph 3 of the 1979 "Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance" provides that "Contracting parties ... undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting parties should endeavour to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly *ex post facto*. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned".[97]

In its Report on the simplified consultation held with Sri Lanka in 1994, the Committee came to the following "interim conclusion": "In the absence of precise information on import restrictions maintained for balance-of-payments purposes, the Committee was unable to conclude the simplified consultation with Sri Lanka. The Committee requested Sri Lanka to notify, by tariff line, import restrictions, if any, maintained for BOP purposes, or to disinvoke Article XVIII:B. ..." Sri Lanka made the requested notification in October 1994.[98]

Paragraphs 9 and 10 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

> "A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes

[93]L/55, adopted on 7 November 1952, 1S/43, 45-56, paras. 10, 11.
[94]Procedures approved on 16 November 1960, 9S/18, para. 2.
[95]L/3772/Rev.1, approved by the Council on 19 December 1972, 20S/47, 49, para. 5.
[96]L/4904, adopted on 28 November 1979, 26S/205, 207, para. 3. See also CG.18/W/9/Rev.1, 22 October 1976. Nigeria began consulting in the Committee on Balance-of-Payments Restrictions in 1984 following a "reverse notification" by another contracting party.
[97]L/4907, adopted on 28 November 1979, 26S/210, 210-211, para. 3.
[98]Report, BOP/R/219; notification, L/7542.

in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.

"At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member."

For instances of "reverse notification" of restrictions, or requests to the Secretariat to seek information on restrictions maintained by another contracting party, see the 1987 Note by the Secretariat on "Articles XII, XIV, XV and XVIII".[99]

In 1965, procedures were adopted relating to import restrictions maintained by newly-independent countries; it was suggested to such countries that "even if they were not yet in a position to determine whether they wished to invoke the provisions of Article XVIII as justification for some or all restrictions in force, they might submit descriptive material relative to their entire import control system, without prejudice to the consistency of the measures maintained with their obligations under GATT".[100]

[99]MTN.GNG/NG7/W/14, dated 11 August 1987, para. 36.
[100]14S/161.

4. Consultations

(1) Timing of balance-of-payments consultations

Sub-paragraph (a) of Articles XII:4 and XVIII:12 provides that "Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under [Article XII or Article XVIII:B respectively] shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance-of-payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties".

Article XII:4(b) provides that "contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually." Article XVIII:12(b) provides that "contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES".

Contracting parties consulting with the BOP Committee: Date of last consultation (Art. XII) or full consultation (Art. XVIII:B)

Bangladesh	none
Egypt	1992
India	1992
Israel*	1993
Nigeria	1993
Pakistan	1989
Philippines	1993
Poland (Art. XII)	1994
South Africa*	1993
Sri Lanka	1971
Tunisia	1992
Turkey	1993
Yugoslavia	1991

Status as of 1 September 1993.

* Israel and South Africa consult with the Committee on Balance-of-Payments Restrictions without specifying whether restrictions are under Article XII or under Article XVIII:B.

The 1972 statement on "Procedures for Regular Consultations on Balance-of-Payments Restrictions with Developing Countries", which introduced the concept of "simplified consultations" for certain consultations under Article XVIII:B, provides that "Consultations under Article XVIII:12(a) will continue to follow the existing rules. Consultations with developed countries acting under Article XII will be held annually in the usual manner."[101] Thus, the "full consultation procedures" agreed in 1970 apply to all consultations under Article XII or Article XVIII:12(a); in certain cases the "simplified consultation procedures" agreed in 1972 apply to periodic consultations under Article XVIII:12(b). See below.

The 1970 "full consultation procedures" provide that "Every January, the secretariat should circulate and submit to the Council a time schedule for the consultations to be held in that year. This should be drawn up in consultation with the contracting parties concerned, and in the light of the programme and progress of the consultations of the International Monetary Fund with the governments concerned, so as to ensure that the most up-to-date and meaningful possible data form part of the Fund's contribution to these consultations in GATT. The time schedule may be modified as necessary in the light of changing circumstances. Normally the consultations to be held in one year will be grouped so that they can be taken up at two to four continuous sessions of the Committee on Balance-of-Payments Restrictions".[102] The provisions establishing the Trade Policy Review Mechanism in the Decision of 12 April 1989 on "Functioning of the GATT System" provide that "the Chairman of the Council shall, in consultation with the contracting party or parties concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements which would harmonize the normal rhythm of the trade policy reviews with the time-table for balance-of-payments consultations but would

[101] L/3772/Rev.1, adopted on 19 December 1972, 20S/47, 49, para. 4.
[102] 18S/50-51, paras. 6-7.

not postpone the trade policy review by more than 12 months".[103] The schedule for balance-of-payments consultations is regularly circulated to the Council each January.[104]

At the March 1993 Council meeting, the Chairman of the Committee on Balance-of-Payments Restrictions announced that in view of the frequent postponements of balance-of-payments consultations experienced in recent years, the Committee had decided that this matter should be subject to greater discipline. Accordingly, the Committee had decided that if in future, a consulting country wished to request postponement of its consultation, the request should be submitted to the Committee and that the consultation could only be postponed with the consent of the Committee.[105]

Paragraphs 6 and 7 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

> "A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, *inter alia*, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.
>
> "All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council."

(2) Simplified consultations under Article XVIII:B

In December 1972 the Council approved modified "Procedures for Regular Consultations on Balance-of-Payments Restrictions with Developing Countries", and an accompanying statement, as follows:

> "At the Council meeting of 6 October 1971, the retiring Chairman of the Committee on Balance-of-Payments Restrictions referred to the difficulties in arranging Article XVIII:12(b) consultations in 1971 …
>
> "… Some delegations feel that detailed discussions of the external financial justification of the restrictions every two years may not be necessary in all cases and a consultation may become a formality for which adequate preparation may require an amount of energy and attention disproportionate to its value. On the other hand, the consultations are specifically provided for in the General Agreement for well-defined purposes and for sound reasons, and many contracting parties would have serious misgivings if these GATT provisions were to be ignored while there were no insurmountable obstacles to their implementation. …
>
> "In the light of these considerations, it is proposed that the following modified procedures be adopted for the implementation of Article XVIII:12(b) concerning *regular consultations* on balance-of-payments restrictions with *developing countries*:
>
> "(a) each year, the secretariat establishes a schedule showing the contracting parties acting under Article XVIII:B which are required to consult under paragraph 12(b) that year;
>
> "(b) each of these contracting parties should submit to the CONTRACTING PARTIES a concise written statement on the nature of the balance-of-payments difficulties, the system and methods of restriction

[103] L/6490, adopted on 12 April 1989, 36S/403, 404-405, para. I.C(ii).
[104] See, e.g., C/W/727, schedule of consultations for 1993 dated 29 January 1993.
[105] C/M/263, p. 7, BOP/R/208.

(with particular reference to any discriminatory features and changes in past two years), the effects of the restrictions and prospects of liberalization;

"(c) the statements received will be circulated to all contracting parties and presented to the Committee on Balance-of-Payments Restrictions for prior consideration, so that the Committee may determine whether a full consultation is desirable. If it decides that such a consultation is not desirable, the Committee will recommend to the Council that the contracting party be deemed to have consulted with the CONTRACTING PARTIES and to have fulfilled its obligations under Article XVIII:12(b) for that year. Otherwise, the CONTRACTING PARTIES will consult the International Monetary Fund, and the Committee will follow the procedures applicable hitherto for a full consultation; and

"(d) arrangements will be made with the International Monetary Fund for the supply of balance-of-payments statistics for each country submitting a statement in accordance with paragraph (b) above."[106]

"It should be noted that this proposal relates only to the periodic consultations provided for in Article XVIII:12(b). Consultations under Article XVIII:12(a) will continue to follow the existing rules. Consultations with developed countries acting under Article XII will be held annually in the usual manner".[107]

The 1977 report of the Consultative Group of Eighteen notes that "The Group exchanged views on ... whether the simplified procedures adopted in 1972 were an exception to the full procedures adopted in 1970 in the sense that, while the simplified procedures would in practice normally apply to balance-of-payments consultations with a developing country, another contracting party might nevertheless require as of right that the full procedures be followed".[108] This question was also discussed in the Council in 1977 where the Chairman of the Committee on Balance-of-Payments Restrictions stated his view that "the simplified procedure was clearly an exception to the general rule, and could only apply if there was a consensus in the Committee. If there was no consensus, i.e. if one or several members requested that a full consultation be held, such consultation would take place automatically. The rule was clear and the practice had so far been in conformity with this rule". A number of contracting parties expressed their view "that the simplified procedures should be the general rule for consultations with developing countries. Consequently, an absolute consensus to decide that a full consultation was not desirable, should not be required. It did not appear reasonable if, on the basis of the opinion of a single member, the Committee would determine that a full consultation was to be held".[109]

The 1979 Declaration provides with respect to the choice of procedure:

"In the case of consultations under Article XVIII:12(b) the Committee shall base its decision on the type of procedure on such factors as the following:

"(a) the time elapsed since the last full consultations;

"(b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;

"(c) the changes in the overall level or nature of the trade measures taken for balance-of-payments purposes;

"(d) the changes in the balance-of-payments situation or prospects;

"(e) whether the balance-of-payments problems are structural or temporary in nature.

[106] 20S/47-49, paras. 1-3.
[107] *Ibid.*, para. 4.
[108] L/4585, 24S/58, 60, para. 9.
[109] C/M/122, p. 4.

"A less-developed contracting party may at any time request full consultations".[110]

A 1988 Note by the Secretariat on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975" states that in the period 1975 through June 1988, there had been 106 consultations under Article XVIII:B, of which 77 had taken the simplified form. In 17 of these, the Committee had, in its report on a simplified consultation, recommended full consultations. Before 1979, the reason for such a recommendation was not indicated; since that date it had always done so.[111]

Paragraph 8 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

"Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 20S/47-49, referred to in this Understanding as 'simplified consultation procedures') in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures."

(3) Documentation used in consultations

The 1979 Declaration includes the following provisions concerning documentation:

"The GATT secretariat, drawing on all appropriate sources of information, including the consulting contracting party, shall with a view to facilitating the consultations in the Committee prepare a factual background paper describing the trade aspects of the measures taken, including aspects of particular interest to less-developed contracting parties. The paper shall also cover such other matters as the Committee may determine. The GATT secretariat shall give the consulting contracting party the opportunity to comment on the paper before it is submitted to the Committee."

"The technical assistance services of the GATT secretariat shall, at the request of a less-developed consulting contracting party, assist it in preparing the documentation for the consultations."[112]

Since the entry into force of the 1979 Declaration the material prepared for each full consultation has consisted of three basic documents: (i) a "Basic Document" prepared by the consulting country in case of a full consultation, or a "Written Statement" prepared also by the consulting country in case of a simplified consultation; (ii) a "Background Paper" prepared by the GATT Secretariat; and (iii) a "Recent Economic Developments" document prepared by the IMF.

The 1970 "full consultation procedures" provide that the following points are to be covered in the Basic Document for a full consultation under Articles XII:4(b) or XVIII:12(b):

"(a) Legal and administrative basis of the import restriction.

"(b) Methods used in restricting imports.

"(c) Treatment of imports from different sources including information on the use of bilateral agreements.

"(d) Commodities, or groups of commodities, affected by the various forms of import restrictions.

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[110] L/4904, adopted on 28 November 1979, 26S/205, 207-208, paras. 8-9.
[111] MTN.GNG/NG7/W/46, dated 24 June 1988, pp. 11-12, paras. 32-33.
[112] L/4904, adopted on 28 November 1979, 26S/205, 207-208, paras. 7 and 10.

"(e) State trading, or government monopoly, used as a measure to restrict imports for balance-of-payments reasons.

"(f) Measures taken since the last consultation in relaxing or otherwise modifying import restrictions.

"(g) Effects of the import restriction on trade.

"(h) General policy in the use of restrictions for balance-of-payments reasons".[113]

In 1982-83 discussions took place concerning the treatment in the work of the Committee on Balance-of-Payments Restrictions of balance-of-payments problems confronting heavily-indebted developing countries. A 1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council summarized the result of these discussions, stating *inter alia*, that:

> "As regards the preparation of documents for balance-of-payments consultations, it would be advisable for consulting countries which wish to have particular attention paid to their external trading environment to indicate this to the secretariat in good time. In these cases, the consulting country should, in its basic document, provide the Committee with any information on external factors which it deems relevant and indicate specific measures and products, relative to any external market, on which it could consider action to be of particular importance. In this connection it was recalled that the technical assistance of the secretariat is available, under Paragraph 10 of the 1979 Declaration, to any developing country consulting under Article XVIII:B. The secretariat would also provide adequate information on the trading environment, including any relevant measures affecting the trade of a consulting country, as part of its background note. … While, as at present, background notes would be prepared on the basis of all relevant information available and in full consultation with the consulting country, the secretariat would retain full responsibility for the content of the note. …".[114]

Paragraphs 11 and 12 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provide as follows:

> "The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: *(a)* an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; *(b)* a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; *(c)* measures taken since the last consultation to liberalize import restrictions, in the light of the conclusions of the Committee; *(d)* a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.
>
> "The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations."

For further background on the format and contents of the Background Paper by the Secretariat for full and simplified consultations, and the IMF document on "Recent Economic Developments", see the 1988 Note by the

[113] L/3388, 18S/48, 53, Annex II.
[114] C/125 dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56, 59-60, para. 11.

Secretariat on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".[115]

(5) Secrecy

The Note *Ad* Article XII provides that "The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article." The Note Ad Article XVIII provides that "The CONTRACTING PARTIES and the parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article".

The text of Article XII:4(e) before the Review Session read: "It is recognized that premature disclosure of the prospective application, withdrawal or modification of any restriction under this Article might stimulate speculative trade and financial movements which would tend to defeat the purposes of this Article. Accordingly, the CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article". The 1949 Report of the Working Party on "Consultation Procedure under Article XII:4(a)" noted concerning this provision that "The working party ... has been impressed with the wisdom of this requirement and records its opinion that, in default of suitable provisions for secrecy, prior consultation with a country which was faced with a crisis would become virtually impossible".[116]

The same Report also notes with respect to the reports submitted on balance-of-payments consultations to the CONTRACTING PARTIES that "The report should be treated as a secret document. It is suggested, however, that the need for absolute secrecy may only be temporary. Without prejudice to the right of the CONTRACTING PARTIES to organize the distribution of their documents, it is recommended that the Chairman may authorize the distribution of the report or parts of the report as a restricted document, provided that the contracting party which requested the consultation has no objection to such a distribution. The facts and statements communicated by the International Monetary Fund will be kept secret as far and as long as the Fund so desires."[117] A General Arrangement for Co-ordination and Consultation concluded between the Chairman of the CONTRACTING PARTIES and the Fund in 1948 provides, *inter alia*, that "Any request for consultation by either the Fund or the CONTRACTING PARTIES shall be accompanied by available information which would contribute to the effectiveness of the consultation. In such cases, due regard shall be paid to the need to safeguard confidential information and to any special obligations of the Fund and the CONTRACTING PARTIES in this respect."[118]

(6) Matters discussed in consultations

As noted above, the 1970 "full consultation procedures" provide a detailed Plan of Consultations with four main headings: balance-of-payments position and prospects; alternative measures to restore equilibrium; system and methods of the restrictions; and effects of the restrictions.[119] The statement on these procedures provides:

> "Consultations under Article XII:4 and XVIII:12 cover the nature of the balance-of-payments difficulties of the contracting party in question, alternative measures that may be available and the possible effect of the restrictions on the economies of other contracting parties. They are intended to provide an opportunity for a free exchange of views contributing to a better understanding of the problems facing the consulting countries, of the various measures taken by them to deal with these problems, and of the possibilities of further progress in the direction of freer, multilateral trade. ... Having regard to the diversity of circumstances, the Plan should not be regarded as a rigid programme, but might require suitable adaptation in individual cases. The special problems of each consulting country relating to its balance of payments should perforce be given careful consideration. Account should be taken of all factors, both internal and external, which affect the balance-of-payments position of the consulting country".[120]

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[115]MTN.GNG/NG7/W/46, dated 24 June 1988, p. 6-7, paras. 24-25.

[116]GATT/CP.3/30/Rev.1, adopted on 20 June 1949, II/89, 90, para. 5. See also discussion of secrecy in the 1985 Report of the Chairman of the Balance-of-Payments Committee on the Chilean proposal noted above, C/132, 32S/46, 48, para. 6.

[117]*Ibid.*, II/94, para. 18.

[118]I/120, 121, para. (iv), proposed by the Chairman of the CONTRACTING PARTIES by letter dated September 9, 1948 and agreed to by the Fund by letter dated September 28, 1948.

[119]L/3388, 18S/48, 52, Annex I.

[120]*Ibid.*, 18S/49, para. 2.

Concerning Committee practice regarding the content of discussions, see the 1988 Note by the Secretariat on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975".[121]

(a) External trade factors relating to the balance of payments

Article XII:4(e) refers to "special external factors adversely affecting the export trade of the contracting party applying restrictions". The Report of the Review Working Party on "Quantitative Restrictions" notes that the Working Party agreed

> "that ... the scope of consultations under paragraph 12 of Article XVIII was the same as that of consultations under Article XII and that the clarification contained in paragraph 4(e) of Article XII and in the related interpretative note would apply equally to consultations undertaken under Section B of Article XVIII".[122]

The full consultation procedures agreed in 1970 provide in paragraph 3 that:

> "The CONTRACTING PARTIES have agreed that in the consultations on balance of payments and other trade and development problems of developing countries provided for in GATT, particular attention should be given to the possibilities for alleviating and correcting these problems through measures that contracting parties might take to facilitate an expansion of the export earnings of these countries. Such 'expanded consultations' are to be held with any developing contracting party normally consulting under Article XVIII:12(b) which desires that a particular consultation be held on this basis".[123]

In 1972 the Director-General confirmed that the procedure for "expanded consultations" with a developing contracting party was voluntary and would not take place if it was not requested by the country itself.[124]

The 1979 Declaration provides that

> "... If the Committee finds that the consulting contracting party's measures ... are in important respects related to restrictive trade measures maintained by another contracting party[2] ... it shall so report to the Council which shall take such further action as it may consider appropriate. ...
>
> "In the course of full consultations with a less-developed contracting party the Committee shall, if the consulting contracting party so desires, give particular attention to the possibilities for alleviating and correcting the balance-of-payments problem through measures that contracting parties might take to facilitate an expansion of the export earnings of the consulting contracting party, as provided for in paragraph 3 of the full consultation procedures".[125]

Footnote 2 to the Declaration provides: "It is noted that such a finding is more likely to be made in the case of recent measures than of measures in effect for some considerable time".

(b) External factors: general macroeconomic climate and external debt

In 1982-83 discussions took place concerning the treatment in the work of the Committee on Balance-of-Payments Restrictions of balance-of-payments problems confronting heavily-indebted developing countries. A

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[121]MTN.GNG/NG7/W/46, dated 24 June 1988, pp. 13-18, paras. 35-52.

[122]L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 184, para. 49.

[123]L/3388, 18S/48, 49, para. 3. See also Spec(68)102, Note by the Chairman of the Committee on "Expanded Balance-of-Payments Consultations under Article XVIII", dated 11 October 1968 (discussing initial experience with such consultations in 1968).

[124]C/M/83, p. 6.

[125]L/4904, adopted on 28 November 1979, 26S/205, 208-209, paras. 11-12.

1984 Statement by the Chairman of the Committee on Balance-of-Payments Restrictions to the Council summarized the result of these discussions.[126] The Chairman stated, *inter alia*, that:

> "In discussing the legal framework for consideration of external factors, there appeared to be no need for a new or extended mandate to enable the Balance-of-Payments Committee to take into account the trading environment facing consulting countries. The following provisions, which so far have been rarely invoked, do not only provide a legal basis but also make it clear that the Committee has a duty to fulfil in this respect:
>
> "(a) Article XII:4(e) of the General Agreement states that in undertaking consultations, the CONTRACTING PARTIES 'shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying restrictions'. This principle is also to be found in paragraph 2 of the 1970 consultation procedures, which applies to all consulting contracting parties, where it is stated, *inter alia*, that 'Account should be taken of all factors, both internal and external, which affect the balance of payments position of the consulting country'.
>
> "(b) Paragraph 12 of the 1979 Declaration drawing on paragraph 3 of the 1970 procedures, instructs the Committee, if a developing consulting country so desires, to give particular attention to possibilities for alleviating the balance-of-payments problems of that country through measures that other contracting parties might take to facilitate an expansion of the export earnings of the consulting country. These provisions are available to any developing country in full consultations, if it so desires.
>
> "(c) While preserving the special character of simplified consultations provided for in the procedures agreed in 1972, there is nothing which prevents countries, under these procedures, from drawing attention to any relevant external factors, and appealing to other contracting parties for remedial action. It would then be for the country concerned and the Committee to decide on the desirability of full consultations in such cases".[127]

The Statement provided further:

> "It was recognized that the basic rôle of the Committee remains the examination, in terms of the relevant provisions of the General Agreement, of measures taken for balance-of-payments purposes by a consulting country, and that the widely felt need for more symmetry in the Committee's discussions should not detract from this basic function".[128]
>
> "In the present consultations, the general view was taken that the Committee's task in relation to 'external factors' should be to identify, in its reports to the Council, possible areas in which action might be taken by contracting parties, with a view to alleviating the trade aspect of balance-of-payment problems. It would not be the Committee's intention to duplicate any work in other GATT fora or engage in a negotiating process, but rather, to highlight particular areas and encourage those contracting parties which are in a position to do so, to respond in a positive manner …".[129]

(c) Prior consultations on external factors

At the November 1984 Council meeting, Chile proposed that prior consultations under Article XVIII:12 and XII:4 be used to create opportunities for a country facing balance-of-payments difficulties, when trade barriers seemed to be an important factor, to request its trading partners to consider elimination of such barriers.[130] In March 1985 the Chairman of the Committee on Balance-of-Payments Restrictions reported on

[126] C/125 dated 13 March 1984, approved by the Council on 15/16 May 1984 (C/M/178, p. 26), 31S/56. See also discussion at C/M/174, 178, 179, 183, 186.
[127] *Ibid.*, 31S/58-59, para. 7.
[128] *Ibid.*, 31S/59, para. 8.
[129] *Ibid.*, 31S/60, para. 12.
[130] C/M/183.

consultations held on this proposal with members of the Committee and interested contracting parties. The report provides:

"After some discussion, it was recognized that in view of the text and drafting history of Article XII:4(a) and XVIII:12(a) (BISD 3S/171) there was nothing to prevent a contracting party in balance-of-payments difficulties from holding prior consultations with the Committee, under the normal procedures of these Articles. These procedures appeared adequate to accommodate the basic purpose of the Chilean proposal. Consultations in such cases would be full consultations by the Committee to examine the nature of the balance-of-payments difficulties of the consulting country and alternative corrective measures which may be available, and would take due account of all factors, including external factors, affecting the consulting country's balance-of-payments, as laid down in the relevant procedures established for the Committee's work, including Paragraphs 2 and 3 of the 1970 consultation procedures (BISD 18S/49) and Paragraph 12 of the 1979 Declaration (BISD 26S/208), also bearing in mind the considerations set out in document C/125 which was approved by the Council in May 1984 (C/M/178, pages 24-26). If, following such consultations, the consulting country found it necessary to introduce import restrictive measures for balance-of-payments purposes, further full consultations should be held. Depending on the time elapsed since the prior consultations these might focus more particularly on the scope and effect of the measures. However, this would be up to the Committee to judge depending on the circumstances of individual cases".[131]

5. Conclusions and recommendations of the Committee

The 1979 Declaration provides that:

"The Committee shall report on its consultations to the Council. The reports on full consultations shall indicate:

"(a) the Committee's conclusions as well as the facts and reasons on which they are based;

"(b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;

"(c) in the case of less-developed contracting parties, the facts and reasons on which the Committee based its decision on the procedure followed; and

"(d) in the case of developed contracting parties, whether alternative economic policy measures are available.

"If the Committee finds that the consulting contracting party's measures

"(a) are in important respects related to restrictive trade measures maintained by another contracting party[132] or

"(b) have a significant adverse impact on the export interests of a less-developed contracting party,

"it shall so report to the Council which shall take such further action as it may consider appropriate.

…

"If the Committee finds that a restrictive import measure taken by the consulting contracting party for balance-of-payments purposes is inconsistent with the provisions of Articles XII, XVIII:B or this Declaration, 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 Articles XII and XVIII:B and this

[131] C/132, 32S/46, 47-48, para. 5.

[132] Footnote 2 to the Decision provides: "It is noted that such a finding is more likely to be made in the case of recent measures than of measures in effect for some considerable time."

Declaration. The Council shall keep under surveillance any matter on which it has made recommendations".[133]

Paragraph 13 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides as follows:

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

See also the Secretariat Note of 24 June 1988 on "Consultations Held in the Committee on Balance-of-Payments Restrictions under Articles XII and XVIII:B since 1975", which reproduces in full all of the paragraphs of the Balance-of-Payments Committee's reports containing the Conclusions and Recommendations of the Committee from 1975 through 1988.[134]

See also the reference at page 381 above to the "interim conclusion" reached by the Committee in its Report on the simplified consultation held with Sri Lanka in 1994.

6. Discussion and adoption by the GATT Council of reports by the Committee

Reports on all consultations in the Balance-of-Payments Committee are submitted to the Council for discussion and adoption. The Council's adoption of the reports, which are introduced by the Chairman of the Committee, gives effect to the recommendations of the Committee. All reports by the Committee have been adopted by the Council.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

The corresponding provision in the US/UK *Proposals* appears in Chapter III C-2; in the US Draft in Article 20; in the London and New York Drafts in Article 26; in the Geneva Draft in Article 22; and in the Havana Charter in Article 21. The original US proposal was redrafted at London on the basis of a proposal by the United Kingdom, which largely formed the basis of Article 26 of the London Draft Charter.[135]

Article XII was extensively debated and amended at the Review Session in 1954-55; the 1947 provisions providing for prior consultation were deleted and emphasis was placed on the balance-of-payments consultation process. See the Review Session documents listed below.

[133] L/4904, adopted on 28 November 1979, 26S/205, 208, paras. 11 and 13.
[134] MTN.GNG/NG7/W/46, Annex I.
[135] See EPCT/C.II/W.22 (UK proposal), EPCT/C.II/QR/PV/1-5, EPCT/C.II/QR/PV/3 p.2ff (explanation of redraft).

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/PV/5, 6, 8, 13;
EPCT/C.II/QR/PV/1, 3, 5, 6;
EPCT/C.II/36, 45, 66
Reports: EPCT/C.II/59; EPCT/30
Other: EPCT/C.II/34, 44

New York

Discussion: EPCT/C.6/17+Corr.1-2,
20+Corr.1-2, 23, 27, 34, 105,
106
Reports: EPCT/C.6/15, 97/Rev.1 (p.62)
Other: EPCT/C.6/W/5, 11, 17+Corr.1,
30+Corr.1, 34, 43, 81

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.27, 28, 29
EPCT/A/PV/28, 41
EPCT/TAC/SR/13
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 163, 171, 180, 186,
189, 196, 212, 214/Rev.1/Add.1
EPCT/W/313
Other: EPCT/W/64, 73, 136, 194, 209,
211, 213, 215, 216, 217, 223, 231,
256, 272, 301, 318+Add.1

Havana

Discussion: E/CONF.2/C.3/SR.19, 21, 24,
38, 46
Reports: E/CONF.2/C.3/57, 82
Other: E/CONF.2/C.3/F/W.8, 11

CONTRACTING PARTIES

Reports: GATT/CP.4/10, 31+Corr.1
GATT/CP.5/24
L/24+Add.1, L/51
Other: Annecy press releases 18, 32, 44
Press release Torquay/19
GATT/96

Review Session:

Discussion: SR.9/14, 15, 25, 26, 40
Reports: W.9/106+Corr.2, 126, 130,
174+Add.1, 208, 219, 225,
236/Add.3
Other: L/189, L/246, L/261/Add.1,
L/271, L/272
W.9/18+Add.1, 22, 23, 25, 29,
31, 47, 52, 60, 73, 74, 77/Rev.1,
79, 80+Corr.1, 82, 106, 112,
115, 126, 130, 132, 136, 139,
179, 181, 226
Sec/137/54+Rev.1; Spec/23/55,
43/55, 45/55, 51/55,
53/55+Rev.1, 58/55, 68/55,
90/55, 148/55, 150/55, 172/55,
182/55
MGT/9/55

V. TABLES

Key:

F = Full consultation
F* = Last full consultation
S = Simplified consultation
P = Postponed
D = Disinvocation of Article XII or XVIII:B.

Numbers in parentheses are BOP/R/ report references.
Reference to last full consultation indicated in boldface.

Notes:

1. All countries listed were invoking balance-of-payments provisions as of 1979, unless otherwise noted. Invocations of Article XII or XVIII:B during the reference period are understood to mean either the first invocation by a particular country or a reinvocation after previous disinvocation of the relevant Article. Greece disinvoked Article XVIII in 1984; later consultations are under Article XII.

2. Italy, New Zealand (consultation on deposit requirement for purchases of foreign currency) and South Africa also consulted with the CONTRACTING PARTIES on an *ad hoc* basis in 1974-76, about their imposition of import deposits for balance of payments purposes, but in special Working Parties established for the purpose.

3. In the case of Israel and South Africa the Article under which the consultations are held is not specified.

4. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992.

5. There were no disinvocations of Article XII or XVIII in 1993-94.

A. COUNTRIES CURRENTLY INVOKING ARTICLE XII OR XVIII:B: BALANCE-OF-PAYMENTS CONSULTATIONS CONDUCTED SINCE 1979 DECLARATION

Country	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Bangladesh	S(116)		S(128)		S(147)		S(161)		S(175)		S(188)		S(200)		P
Egypt		S(117)		S(133)		S(157)			F(176)		S(188)		F(201)		P
India	S(112)		S(126)		S(143)		S(163)	F(168)		F(184)		P	F(197)		S(221)
Israel (3)	-113		-129		-142	-155		-170		-187		-195		-210.	-214
Nigeria					F(139)		S(163)		S(179)		P	S(190)		F(209)	
Pakistan	S(112)		S(126)			S(150)		S(169)		F(181)		P	S(198)		S(221)
Philippines	F(115)		S(128)		S(147)		F(164)		S(179)		P	S(190)		F(204)	
Poland (Art.XII)													Art.XII invoked 1992	-206.	-216
S.Africa (3)														-211.	P
Sri Lanka		S(117)		S(133)		S(153)		S(169)		S(186)		P	S(198)		S(219)
Tunisia		S(121)		S(137)		S(157)			S(179)		P	S(190)	F(202)		S(214)
Turkey		S(120)		S(137)		S(153)		S(166)	F(178)		P	S(191)		F(207)	
Yugoslavia		S(117) F(122)			S(143)		S(163)		S(179)		P	F(191)			

B. CONTRACTING PARTIES WHICH HAVE DISINVOKED ARTICLE XII OR XVIII:B SINCE 1979

Country	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Argentina							F(159)		S(179)			D	
Brazil	S(116)	F(124)		F(135)	S(157)		F(172)		S(186)		P	D	
Colombia	Art. XVIII:B invoked upon accession 1981					F(156)		S(166)		S(185)		P	D
Czech & Slovak Fed. Rep.											Art. XII invoked 12/90	-193	D
Ghana	S(116)		S(128)	F(136)		S(157)		S(169)		D(186)			
Greece	F(114)	F(123)			D		F(160)	D					
Hungary				F(131)	F(141)	D							
Italy		F(119)	D										
Korea		S(117)		S(133)	F(146)		S(163)	F(171)		D(183)			
Peru		S(120)		S(137)			S(161)	F(173)		S(186)		D	
Portugal	F(111)	F(118)	F(125)	F(134)	F(145)	F(152)	D						