The GATT Declaration on Trade Measures Taken for Balance-of-Payments Purposes--A Commentary

Frieder Roessler

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol12/iss2/6

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
The Gatt Declaration on Trade Measures Taken for Balance-of-Payments Purposes
A Commentary

by Frieder Roessler*

I. INTRODUCTION

U nder Articles XII and XVIII:B of the General Agreement on Tariffs and Trade (GATT), the contracting parties may impose quantitative import restrictions to safeguard their external financial position. Contracting parties making use of this right have to consult with the CONTRACTING PARTIES,1 which in turn consult with the International Monetary Fund. The consultations take place in GATT's Committee on Balance-of-Payments Restrictions, which reports to the GATT Council.

The attitude of governments towards these rules and procedures has evolved in recent years. In the 1960's, countries began to use surcharges and import deposits to safeguard their balance-of-payments instead of quantitative restrictions as provided for in the General Agreement,2 and the view spread that this should be taken into account by GATT.3 The introduction of flexible exchange rates in the early 1970's lessened the need to resort to trade measures to achieve payments equilibrium. This gave rise to the view that trade measures taken for balance-of-payments purposes should be imposed, if at all, only in highly exceptional circumstances.4 As a consequence, efforts were made since 1974 in the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD) to contain the use of such measures through political declarations of intent. Some governments that had to resort to trade measures in the recent past claimed that their payments difficulties did not stem primarily from their own policies but rather from restrictive trade measures taken by other countries. They thought that the GATT balance-of-payments consultations should in such cases not

---

* GATT secretariat. The views expressed in this paper are those of the author and should not be interpreted as representing those of the GATT secretariat.

1 In the General Agreement, the term CONTRACTING PARTIES written in capital letters designate the parties to the Agreement acting jointly (cf. Article XXV:1).


only cover the consulting country's measures, but also the related measures of other contracting parties. Many developing countries believed that the consultation procedures should be changed so that, for them, abbreviated and simplified consultations would become the rule, and that they should be exempted from any balance-of-payments restrictions imposed by developed countries.

It was against this background of ideas and concerns that a Declaration on Trade Measures Taken for Balance-of-Payments Purposes was drafted during the 1973-1979 GATT Multilateral Trade Negotiations. The Declaration, the text of which is reproduced in the Annex, was adopted by the CONTRACTING PARTIES at their Thirty-Fifth Session in November 1979 by consensus.

This paper first describes the efforts that have been made since 1974 in the IMF and the OECD to reform the international framework governing trade measures taken for balance-of-payments purposes and then presents a detailed commentary on the 1979 GATT Declaration. A summary concludes the paper.

II. RECENT EFFORTS IN THE IMF AND THE OECD TO REFORM THE INTERNATIONAL FRAMEWORK GOVERNING TRADE MEASURES TAKEN FOR BALANCE-OF-PAYMENTS PURPOSES

In a communiqué issued at the end of its final meeting in June 1974, the Committee on Reform of the International Monetary System and Related Issues (Committee of Twenty) stressed the importance of avoiding the escalation of current account restrictions for balance-of-payments purposes and invited members of the International Monetary Fund to subscribe on a voluntary basis to a declaration concerning trade and other current account measures for balance-of-payments purposes.

In subscribing to the declaration, Funds members would have represented that, in addition to observing their obligations with respect to payments restrictions under the Fund's Articles of Agreement, they would not, on their own discretionary authority, introduce or intensify trade or other current account measures for balance-of-payments purposes that are subject to the jurisdiction of the GATT, or recommend them to their legislature, without a prior finding by the Fund that there was balance-of-payments justification for such measures.

The declaration would have become effective if members with a com-

---

6 Declaration on Trade Measures Taken for Balance-of-Payments Purposes, GATT Doc. L/4904, adopted Nov. 28, 1979 [hereinafter cited as the Declaration].


7 INTERNATIONAL MONETARY FUND (IMF), ANNUAL REPORT 127 (1974).
bined voting power of sixty-five percent had accepted it. However, only members with a voting power of about forty percent in fact subscribed to the proposed declaration and it therefore never entered into force.8

In June 1974, after the breakdown of the par value system in 1971 and of the central rates regime in 1973, the Executive Directors adopted Guidelines for the Management of Floating Rates. The Guidelines contained, inter alia, the following principle:

A member with a floating rate, like other members, should refrain from introducing restrictions for balance-of-payments purposes on current account transactions or payments and should endeavour progressively to remove such restrictions of this kind as may exist.9

On April 1, 1978, the amended Articles of the Agreement of the Fund came into effect which give the IMF Executive Board broad powers to survey exchange rate policies. The new Article IV 3(b) declares that the Fund “shall adopt specific principles for the guidance of all members with respect to those policies.”

Anticipating the entry into force of this Article the Fund adopted in April 1977 “Principles of Fund Surveillance over Exchange Rate Policies.” These state, inter alia, that

... the Fund shall consider the following developments as among those which might indicate the need for discussion with a member: ... the introduction, substantial intensification, or prolonged maintenance, for balance-of-payments purposes, of restrictions on, or incentives for, current transactions or payments.10

The Fund makes a major part of its resources available through stand-by arrangements, which consist of a negotiated letter of intent by the members wishing to draw and a decision of the Fund that the member may draw, provided the declared policy targets are met. In many instances the members are asked to include in their letters of intent a reference to their trade policies.11 For example, the letter of intent by the United Kingdom of December 1976 contained the following clause:

The Government remains firmly opposed to generalised restrictions on trade and does not intend to introduce restrictions for balance-of-payments purposes.12

---

In early 1974, the fear was spreading that the financial consequences of the oil crisis might prompt countries to impose trade controls to safeguard their external financial position, and there was a general conviction that an exchange of firm commitments on the avoidance of trade controls could help prevent this. The OECD member states and the European Communities therefore agreed in May, 1974 on an informal joint undertaking in which they, inter alia, declared their determination not to restrict imports or artificially stimulate exports for a period of one year. This pledge has subsequently been renewed at yearly intervals.

III. THE 1979 GATT DECLARATION ON TRADE MEASURES TAKEN FOR BALANCE-OF-PAYMENTS PURPOSES

A. Negotiating History.

In 1975 the GATT Committee on Balance-of-Payments Restrictions asked the GATT secretariat to prepare a report on the work of the Committee over the past four years. In transmitting this report to the Council, the Committee noted, inter alia, that

(1) GATT was not notified of many trade restrictions imposed for balance-of-payments purposes;
(2) import surcharges and import deposits had sometimes been examined by the Committee, sometimes by ad hoc working parties, and had sometimes been the object of waivers while other cases had been dealt with through the adoption of agreed conclusions; and
(3) a number of contracting parties had ceased to invoke GATT’s balance-of-payments exceptions after the Committee had concluded that there was no longer any balance-of-payments justification for the import restrictions but the Committee had no means to ascertain whether its conclusions had in fact been implemented.

Although the report was meant to initiate a reassessment of the balance-of-payments consultations procedures, the Council took no action on it because it was generally felt that the issues raised by the Committee should be taken up in the context of the Tokyo Round of Multilateral Trade Negotiations.

When in 1976, in the context of these negotiations, a group was set up to consider improvements in the framework for the conduct of world

---

13 For the text and a legal analysis of this pledge see J. Gold, Recent International Decisions to Prevent Restrictions on Trade and Payments, J. WORLD TRADE L. 63-78 (1975).
trade (Framework Group), the topic "safeguard action for balance-of-payments purposes" was included in the group's work programme. The United States negotiators had a particular interest in this topic because the Trade Act of 1974, which gave the American administration authority to participate in the Tokyo Round, called for "steps to be taken toward GATT revision," including a "revision of the balance-of-payments provision in the GATT articles."16

B. Commentary.

1. Treatment of Surcharges and Import Deposits.

The treatment of surcharges and import deposits was the most difficult and debated issue in the drafting of the Declaration. Surcharges on items bound in a GATT schedule of tariff concessions are at variance with the General Agreement unless sanctioned by a waiver. According to Article II:1(b), bound items shall be exempt from ordinary customs duties in excess of those set forth in the schedule "and from all other duties or charges of any kind imposed on or in connexion with importation," (italic supplied.)

Whether an import deposit on a bound item is "a charge" within the meaning of Article II:1(b) was, until recently, an open question.17 A deposit requirement does not involve a charge in the form of a payment to the government; it merely entails an indirect pecuniary burden in the form of interest foregone or paid. It could therefore be argued that a deposit requirement is not a charge even though it increases the cost of imports.18

In October 1978 this question was resolved. In a case involving surety deposits applied by the EEC in respect of imports of certain processed fruits and vegetables, a GATT dispute settlement panel accepted the argument put forward by the United States that "the interest charges and costs associated with the lodging of the additional security were charges on or in connexion with importation in excess of those allowed by Article II:1(b)" and it concluded from this that the EEC deposit scheme was inconsistent with the obligations of the Community under Article II:1(b).19 The Panel findings were adopted by the CONTRACTING PARTIES20 and, for the purposes of the General Agreement, import deposit schemes affecting bound items can therefore now be regarded as one type of surcharge. In the paragraphs that follow the term surcharge will therefore also be used to describe deposit requirements affecting bound items.

---

16 Pub. L. No. 93-618, § 121.
Articles XII and XVIII:B of the General Agreement permit contracting parties to impose quantitative restrictions but not surcharges to safeguard their external financial position even though surcharges are generally less disruptive in commercial relations than quantitative restrictions. The limitation to quantitative restrictions was useful as long as the main function of the balance-of-payments exception was to sanction temporarily the quantitative restrictions that existed after the war. In the 1960's, when new trade measures were imposed in response to payments crises, the legal preference for quantitative restrictions made less sense because it then proved contrary to GATT's basic aim of promoting trade controls that operate through the price mechanism rather than through administrative fiat.

For this reason the General Agreement's legal preference for quantitative restrictions has gradually become ignored, first by contracting parties in payments difficulties and later also by the Committee on Balance-of-Payments Restrictions. In 1968, a close observer of GATT, John H. Jackson, wrote that "surcharges have become almost a de facto part of the General Agreement. [They] have been tolerated, at least for temporary periods, without significant retaliation in kind." In the 1975 secretariat report on the activities of the Committee on Balance-of-Payments Restrictions it is stated:

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."

. . . 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 1960's when waivers for surcharges, at least when imposed by developing countries, were frequently granted. [footnotes omitted.]

21 GATT Doc. COM.TD/F/W/3, supra note 2.
22 JACKSON, supra note 3.
It was against this background that the question of the legalization of surcharges was debated in a series of informal and formal meetings. The following paragraphs summarize some of the main arguments made for and against a recognition of surcharges.

— A legalization of the accepted practice of imposing surcharges rather than quantitative restrictions is necessary to preserve the integrity and credibility of the General Agreement.

— In the 1960's, this may have been a valid argument. Now we have floating, or at least easily adjustable, exchange rates; there is therefore no longer any need to impose surcharges to counter payments crises and therefore to legalize their use.

— But governments do not only introduce surcharges to maintain a fixed exchange rate. A major motive is to make the economic consequences of sudden payments crises politically acceptable. A depreciation makes all imports more expensive, a surcharge only some. By imposing a surcharge the government can for instance raise the cost of car imports, but leave the import prices of basic foodstuffs untouched. The economic rationale for imposing surcharges may have disappeared with the advent of floating, but not the political one. In any event, governments have resorted to surcharges also after the introduction of floating, and this cannot be simply ignored by GATT.

— Because of the political pressures to adjust the balance-of-payments through surcharges affecting some items rather than globally through a depreciation, it is important not to legalize them. To give a place to surcharges in the trade order would make it more difficult for governments to fend off the domestic sectional interests demanding relief from the burden of payments adjustment. A legalization would therefore stimulate the use of surcharges.

— If the accepted practice of resorting to surcharges rather than quantitative restrictions was not formally recognized, the authority of GATT law generally would suffer because it would be regarded as unrealistic law. This would no doubt stimulate protective measures generally. Moreover, if the formal recognition of surcharges was combined with a political commitment to use trade measures for balance-of-payments purposes only as a last resort, it would not encourage governments to resort to surcharges.

— The legalization would stimulate the use of surcharges all the same because it would reduce the rights of contracting parties adversely affected by surcharges.

— If the contracting party who imposes a surcharge observes the conditions and procedures applicable to quantitative restrictions, what rights do the affected contracting parties have? Not the right to demand a removal of all restrictive import measures, but only that the surcharge be replaced by quantitative restrictions. Who would wish to
make use of this right? A legalization would at last make it possible to exert normative pressure to use surcharges rather than quantitative restrictions and would in that sense help affected contracting parties.

— Such normative pressure is not needed. Most countries do not have the administrative apparatus to impose additional quantitative restrictions on a large scale. This will ensure that they will give preference to surcharges. A rule to that effect is not necessary.

— A legalization of surcharges is necessary so that one can attach conditions to their use. The CONTRACTING PARTIES cannot simultaneously declare: “You must not use surcharges” and “you must use surcharges only under certain conditions”; the behavioural signals of these two norms would cancel each other.

— The idea that one cannot disapprove of surcharges and impose conditions governing their use is based on the assumption that all actions are either legal or illegal. That may be an appropriate assumption if the law is enforced through courts which can only say yes or no. In world economic relations the law is enforced through political bodies whose normative pressure can be strong or weak; there, “legality” is a gradual concept. You can therefore very well have one rule signalling weak normative pressure against the use of surcharges coexisting with another rule signalling strong normative pressure against surcharges not meeting certain conditions.

— This may be true for the political bodies of the GATT. However, the GATT dispute settlement panels can only function properly if they can base themselves on rules that clearly distinguish between what is legal and what is not and that reflect the current practice and consensus.

Given this divergence of views, it is not surprising that the question of surcharges is treated only indirectly and vaguely in the Declaration. On the one hand, the Declaration states that it is not intended to modify the substantive provisions of the General Agreement,24 which clearly implies that surcharges imposed on bound items to counter payments difficulties and not validated by a waiver remain illegal. On the other hand, the CONTRACTING PARTIES note in the preamble to the Declaration “that restrictive import measures other than quantitative restrictions have been used for balance-of-payments purposes”25 and they commit themselves to give preference to the measure which has the least disruptive effect on trade.26 Since surcharges are generally less disruptive than quantitative restrictions, this clause can be interpreted to require contracting parties to give preference to surcharges when taking restrictive

24 Declaration, supra note 5, at para. 1, last sentence.
25 Id. at fourth sentence in the preamble.
26 Id. at para. 1(a).
import measures for balance-of-payments purposes. The Declaration thus
does not mention surcharges explicitly; indirectly, however, it both reaf-
firms their illegality and recognizes them as the lesser evil.


Under the General Agreement, contracting parties have a right to im-
pose quantitative restrictions if they experience monetary reserve difficul-
ties. They are not obliged to correct their economic policies so as to avoid
the need for import restrictions. "It is thus possible," as Clair Wilcox ex-
plained in his book *A Charter for World Trade*, that governments may
sometimes employ quantitative restrictions "even though they would be
able to correct the conditions that necessitate their use."\(^{27}\) Article
XII:3(d) of the General Agreement makes this clear by declaring that a
contracting party "shall not be required to withdraw or modify restric-
tions on the ground that a change in . . . domestic policies directed to-
wards . . . full . . . employment or towards the development of domestic
resources . . . would render unnecessary restrictions which it is applying
. . . ."

The Declaration also does not establish a legal duty to explore alter-
native means of solving the reserve problem before resorting to trade
measures. However, the Declaration contains a political commitment to
that effect. In its preamble, the CONTRACTING PARTIES express their
conviction "that restrictive trade measures are in general an inefficient
means to maintain or restore balance-of-payments equilibrium" and they
recognize "that developed contracting parties should avoid the imposition
of restrictive trade measures for balance-of-payments purposes to the
maximum extent possible." These phrases are political declarations of
principle and are therefore addressed primarily to the executive branches
of governments. If they had been cast into firm legal commitments, they
would have bound also the legislative and judiciary branches of govern-
ments.\(^{28}\) Little would have been gained thereby because temporary im-
port measures serving balance-of-payments purposes are, in general, im-
posed at the initiative and under the authority of the executive branches
of governments, and it is sufficient that these consider themselves bound.
A legally binding commitment would in many countries have required
legislative approval and would have complicated the adoption of the Dec-
laration.\(^{29}\) Presumably for the same reasons, the IMF Declaration and the
OECD Pledge were also drafted in the form of political declarations of

\(^{27}\) *Clair Wilcox, A Charter for World Trade* 87 (1949).


\(^{29}\) *Id.* at 50-53.
intent rather than legally binding commitments.\textsuperscript{30} A procedural requirement designed to promote the implementation of the political commitment is established in paragraph 11(d) of the Declaration, which obliges the Committee on Balance-of-Payments Restrictions to indicate in all its reports on consultations with developed contracting parties "whether alternative economic policy measures are available." This will require a change in the practice of the Committee on Balance-of-Payments Restrictions. In the past, as the 1975 report on the Committee's activities explains,

\begin{quote}
... recommendations on alternative adjustment measures, such as monetary and fiscal policies, devaluations or capital controls, have not been included in the Committee's conclusions. A recommendation on monetary and fiscal policies might have met the objection that Articles XXI:3(d) and XVIII:11 expressly provide that contracting parties shall not be required to withdraw or modify restrictions on the grounds that a change in domestic policies directed towards full employment or development would make the restrictions unnecessary. Recommendations on other alternatives to trade measures would have been difficult to make partly because of the need to treat such matters confidentially.\textsuperscript{1}
\end{quote}

The Declaration gives the Committee a normative basis and jurisdiction to make findings on the availability of alternative policies. The confidentiality problem militating against firm conclusions on the subject, however, remains. Depreciations or capital controls cannot be discussed in broader circles without provoking speculative transactions worsening the balance-of-payments deficit. It is therefore difficult, both for the IMF in its consultations with the GATT and for the GATT in its recommendations to the consulting contracting party, to be explicit about these alternative measures. Moreover, the choice between a depreciation and restrictive import measures is made generally in response to domestic political considerations. Hidden behind the question of the availability of alternative economic policy measures are therefore often delicate political issues on which international technical bodies cannot fruitfully make pronouncements in public. In commenting on the availability of alternative policies, the Committee is for these reasons likely to exercise restraint and circumspection.

3. Additional Conditions Governing the Use of Restrictive Import Measures.

Paragraph 1(b) of the Declaration states that the simultaneous application of more than one type of trade measure for balance-of-payments

\begin{itemize}
\item \textsuperscript{30} Cf. Gold, \textit{supra} note 13.
\item \textsuperscript{31} GATT Doc. L/4200, \textit{supra} note 15, at 14.
\end{itemize}
purposes should be avoided. This clause reflects the concern of negotiators about the fact that some countries had not merely intensified their existing trade controls in response to payments difficulties but had added new types of trade controls. In some cases considered in the Committee on Balance-of-Payments Restrictions, the consulting country had imposed on the import of certain products an ordinary customs tariff, a surcharge, a statistical fee, a deposit requirement and an import quota. Such an accumulation of measures is generally unnecessary to achieve the protective aim and administratively inefficient. The Declaration now gives the Committee on Balance-of-Payments Restrictions a legal basis for urging consulting countries to avoid an undue complication of their foreign trade regime through the accumulation of ad hoc measures.

In the preamble to the Declaration, the CONTRACTING PARTIES express their conviction that governments "should endeavour to avoid that restrictive import measures taken for balance-of-payments purposes stimulate new investments that would not be economically viable in the absence of the measures." Enterprises can to a large extent be prevented from making such investments by impressing upon them the temporary nature of the restrictive import measures taken. Paragraph 1(c) of the Declaration therefore obliges the contracting parties to announce publicly, whenever practicable, a time schedule for the removal of such measures. Abiding by this provision may help governments not only to prevent costly investment distortions in the economy but also, and perhaps more importantly, to avoid the creation of vested interests which later turn into pressure groups objecting against the removal of the restrictive import measures. Governments may in some circumstances find it useful to commit themselves vis-a-vis the Committee on Balance-of-Payments Restrictions to the announced schedule so as to make it more credible and therefore more effective.


An obligation to consult under GATT's balance-of-payments rules existed hitherto only for quantitative restrictions.³³ According to paragraph 1 of the Declaration, the GATT procedures for consultations on import restrictions shall now apply to all restrictive import measures. Under the General Agreement, only balance-of-payments measures taken in the form of quantitative restrictions have to be notified.³⁴ Paragraph 3 of the Declaration establishes the duty to notify all restrictive import

---

³² Declaration, supra note 5, at Sixth sentence in the preamble.
³³ Arts. XII:4 and XVIII:12 of the General Agreement.
³⁴ Id.
measures taken for balance-of-payments purposes. The terms-of-reference of the Committee on Balance-of-Payments Restrictions referred in the past only to quantitative restrictions; surcharges and import deposits were discussed in special working parties or referred to the Committee on an *ad hoc* basis.\(^3\) Paragraph 4 of the Declaration makes the Committee now responsible for the consultations on all types of restrictive import measures.

The uniform treatment applies only to measures that are "restrictive" and related to "imports". These qualifications were introduced to exclude subsidies (for which there is no balance-of-payments exception in GATT), domestic policy measures such as increases in value-added tax on products with a higher import content\(^3\) (which are subject to very few limitations in GATT\(^3\)7), and exchange restrictions (which are under the jurisdiction of the Fund).

5. Special Treatment of Developing Countries.

The developing countries entered the negotiations on the Declaration with the proposal that they be in principle exempted from all balance-of-payments measures taken by developed countries. They pointed out that the amount of their exports was generally so small that they would rarely have a significant impact on the balance-of-payments of developed countries. Denmark, when exempting exports under the Generalized System of Preferences by the Group of 77 countries from its surcharge in 1972,\(^3\)8 had set in their view an example which should generally be followed. Many developed countries were however opposed to this idea. Making exceptions for particular countries from balance-of-payments measures, they argued, would tend to prolong them by reducing their economic impact and would create vested interests in their maintenance. Particularly opposed to the idea were developed countries which export the same type of products as developing countries.

The compromise found between the two negotiating positions is contained in paragraph 2 of the Declaration. It does not permit the exemption of particular countries from balance-of-payments measures but it encourages the developed countries to exempt products of export interest to developing countries.

\(^3\)5 GATT Doc. L/4200, *supra* note 15 at 4.
\(^3\)6 In May 1974 Denmark attempted to adjust its balance of payments by imposing domestic surtaxes on a range of consumer goods with a high import content (*Cf. IMF Annual Report* 45 (1974)).
\(^3\)7 *Cf. Roessler, supra* note 18, at 626.
\(^3\)8 *GATT, Basic Instruments and Selected Documents, Nineteenth Supp.* 121 (1973).
6. Procedures for Balance-of-Payments Consultations of Developing Countries.

Developing countries' balance-of-payments problems are often of a basic, long-term nature. These countries have therefore traditionally taken the view in GATT that special criteria should be applied in evaluating their measures and that consultations on them should take place infrequently. In 1955, Article XVIII:B was introduced into GATT in response to these views. It establishes more lenient criteria for developing countries' measures and extends the period between consultations from one to two years.39 A further step in the direction of the developing countries' views was taken in 1972, when simplified procedures for consultations with developing countries were introduced. Under these procedures developing countries submit a concise written statement describing the nature of their balance-of-payments difficulties, the restrictive system used, its effects and the prospects of liberalization. On the basis of this statement the Committee on Balance-of-Payments Restrictions determines whether or not full consultations are desirable. If it decides that such consultations are not desirable, the Committee recommends to the Council that the contracting party be deemed to have consulted and to have fulfilled its obligations under Article XVIII:B for that year.40

During the Tokyo Round the developing countries strove for further procedural changes. In a world of floating exchange rates, they argued, industrialized countries had little reason to resort to trade measures to cope with payments deficits, but the developing countries with their basic structural problems continued to be forced to impose balance-of-payments restrictions. The emergency actions of the industrialized countries now related mainly to particular products and escaped multilateral surveillance under GATT while the more general measures the developing countries had to take entailed the close scrutiny of the Committee on Balance-of-Payments Restrictions. This imbalance was, in their view, exacerbated by the fact that the developing countries were in a minority in the Committee.

Several specific improvements were sought by these negotiators. First, the Committee should either have a more balanced membership or it should reach its conclusions on the basis of objective criteria and act as a committee of experts representing the CONTRACTING PARTIES as a whole. Second, the scope of the consultations should be broadened to cover also the restrictive actions of other countries that may have brought

39 The differences between Articles XII and XVIII:B are described in JACKSON, supra note 3, at 689-90.
about the consulting country's payments difficulties. The objective of the consultations should not merely be to scrutinize the actions taken by the consulting country but to bring about a concerted effort to help the consulting country to overcome its difficulties. Third, the consultation procedures for developing countries should as a rule be simplified and the decision on whether full consultations were to be held should be made on the basis of objective criteria.

These views were not fully shared by other participants in the negotiations. They thought that the consultations should be regarded as an opportunity to win international understanding and acceptance of the measures taken. Governments wishing to remove trade measures were often faced with formidable opposition by domestic sectional interests; the exposure to the export interests of other countries in the Committee could on occasion strengthen the hands of the government in containing such interests. The imbalance between the multilateral surveillance of emergency measures protecting particular industries and that of balance-of-payments measures should be corrected by improving the surveillance of emergency measures and not by loosening the procedures for balance-of-payments consultations. There was no policy or procedural restraint that kept contracting parties from joining the Committee or from participating fully in individual consultations. As long as all contracting parties were free to decide whether or not to join the Committee, binding criteria for its composition could not be established. The Committee could not examine the trade policy measures of other countries that may have brought about the consulting country's difficulties because the examination of such measures fell under the jurisdiction of other GATT bodies. Moreover, given the interdependence of the national economies, the scope of such broader consultations might prove limitless. They pointed out that, under the present procedures, measures by other contracting parties that might alleviate the consulting country's problems could be discussed at its request but in practice little use had been made of this possibility. Finally, they strongly believed that developing countries should be ready to hold consultations not only in exceptional cases but whenever this was considered necessary by the Committee.

The provisions on consultations with developing countries in the Declaration represent compromises between these two positions. Paragraph 5 reiterates the right of all contracting parties to serve on the Committee but declares that efforts to ensure a balanced membership shall be made. According to paragraphs 6 and 8 simplified procedures are neither the rule nor the exception; the decision on the type of procedure must however be based on objective factors, of which paragraph 8 contains a

---

41 Cf. GATT, Basic Instruments and Selected Documents, Eighteenth Supp. 51 (1972).
non-exhaustive list. The last sentence of paragraph 11 establishes the duty of the Committee to report to the Council if it finds that the consulting country's measures are in important respects related to restrictive trade measures maintained by another contracting party. It is the Council which can then take action on the matter. Paragraph 12 reiterates the existing duty of the Committee to give on request attention to measures that other contracting parties might take to alleviate the consulting country's payments problems.

7. The Conclusion of the Balance-of-Payments Committee.

Each report on balance-of-payments consultations ends with a section entitled conclusions, which contains the result of the Committee's review. The conclusions are not firmly worded decisions. They attempt to express the combined views of the Committee members and, if necessary, to encourage—in diplomatic language—compliance with GATT standards. The following conclusions, in which the consulting country's name has been replaced by A, may serve as an illustration for the type of language used:

The Committee welcomed the trend toward a progressive relaxation in the application of A's import restrictions. It noted the view of the International Monetary Fund that the overall restrictiveness of the import regime did not go beyond what was necessary to prevent a decline in A's international reserves. It also noted the relatively favourable prospects for A's balance-of-payments. The Committee noted with satisfaction the determination of A's authorities to continue relaxing remaining restrictions, and hoped that positive developments in A's balance-of-payments and international reserves would enable the authorities to accelerate this process.

It is noteworthy that these conclusions do not clearly indicate on which facts and reasons they are based. As to the basis of the findings, the Committee's conclusions have often been vague or even silent. The 1975 report on the work of the Committee gives the following explanations for this.

Some of the conclusions indicate the reasons that have led the Committee to adopt its decision, others merely "note" or "welcome" certain aspects of the case and suggest thereby that those aspects were the major determining factors for the Committee's finding, and many provide no reason at all.

Conclusions without reasons tend not to prejudice future cases. Conclusions with reasons, however, give the Committee's decisions more general applicability; they can elevate the case to a precedent and thus may serve as a guide in future cases. Where reasons were not indicated in the
conclusions, this may have resulted partly from the fear that criteria too firmly established would introduce an undesirable element of rigidity in the approach to a complex and changing problem facing many contracting parties and, moreover, could be taken by contracting parties as a carte blanche for imposing measures within the limits specified by the Committee. Where the reasons were explicitly stated, this may have been prompted by the realization that the decisions of the Committee have to be of a more general applicability if they are to have an effect on future decisions of governments facing payments difficulties and if the repeated reopening of a debate within the Committee on the same issue is to be avoided. Where the reasons were only vaguely suggested by “noting” or “welcoming” certain aspects of the case, this may reflect the search for a compromise between these opposing considerations.2

Many negotiators participating in the drafting of the Declaration thought that the Committee should in the future make greater efforts to substantiate its findings. They believed that the Committee’s task was to build up a body of commentary that would facilitate the development of guidelines governing future trade actions for balance-of-payments reasons. Representatives of developing countries in particular favoured this approach; they felt that the requirement to indicate reasons would ensure uniform treatment free from extraneous considerations. But voices critical of this approach were also heard. The Committee should, it was argued, exert pressure on governments prudently, pragmatically and without over-extending itself. The establishment of firm precedents would deprive the Committee of the flexibility it needed to take into account the domestic political implications of each case. However, in the end, the negotiators skeptical of precedents also accepted paragraph 11(a) in the Declaration which instructs the Committee to report to the Council not only its conclusions but also “the facts and reasons on which they are based.”

IV. SUMMARY AND CONCLUSIONS

The 1979 GATT Declaration on Trade Measures Taken for Balance-of-Payments Purposes represents an important reinforcement of the international surveillance of trade measures imposed for balance-of-payments purposes. The developed contracting parties are now committed to avoid the use of restrictive import measures for payments purposes to the maximum extent possible. Such measures are subjected to new conditions designed to speed up their removal and to reduce the trade damage caused by them, in particular to developing countries. The GATT procedures for notification, review and enforcement have been streamlined and the role of the GATT Committee on Balance-of-Payments Restrictions

has been strengthened. It is now responsible for consultations on all types of restrictive import measures and for gradually developing, through reasoned conclusions, a body of precedents to guide governments in their decisions on balance-of-payments restrictions. These improvements in the international legal framework governing financially motivated trade measures reflect the determination of the CONTRACTING PARTIES to ensure that crises in the sphere of finance do not lead to crises in the sphere of trade.
ANNEX

The CONTRACTING PARTIES,

Having regard to the provisions of Articles XII and XVIII:B of the General Agreement;

Recalling the procedures for consultations on balance-of-payments restrictions approved by the Council on 28 April 1970 (BISD, Eighteenth Supplement, pages 48-53) and the procedures for regular consultations on balance-of-payments restrictions with developing countries approved by the Council on 19 December 1972 (BISD, Twentieth Supplement, pages 47-49);

Convinced that restrictive trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium;

Noting that restrictive import measures other than quantitative restrictions have been used for balance-of-payments purposes;

Reaffirming that restrictive import measures taken for balance-of-payments purposes should not be taken for the purpose of protecting a particular industry or sector;

Convinced that the contracting parties should endeavour to avoid that restrictive import measures taken for balance-of-payments purposes stimulate new investments that would not be economically viable in the absence of the measures;

Recognizing that the less-developed contracting parties must take into account their individual development, financial and trade situation when implementing restrictive import measures taken for balance-of-payments purposes;

Recognizing that the impact of trade measures taken by developed countries on the economies of developing countries can be serious;

Recognizing that developed contracting parties should avoid the imposition of restrictive trade measures for balance-of-payments purposes to the maximum extent possible.

Agree as follows:

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;\(^43\)

(b) The simultaneous application of more than one type of trade measure for this purpose should be avoided;

\(^{43}\) 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.
(c) Whenever practicable, contracting parties shall publicly announce a time schedule for the removal of the measures. The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement.

2. 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.

3. 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.

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 (hereinafter referred to as “Committee”).

5. 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.

6. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved by the Council on 28 April 1970 and set out in BISD, Eighteenth Supplement, pages 48-53, (hereinafter referred to as “full consultation procedures”) or the procedures for regular consultations on balance-of-payments restrictions with developing countries approved by the Council on 19 December 1972 and set out in BISD, Twentieth Supplement, pages 47-49, (hereinafter referred to as “simplified consultation procedures”) subject to the provisions set out below.

7. 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 measure 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.
8. 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.

9. A less developed contracting party may at any time request full consultations.

10. 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.

11. 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 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.

12. 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.

13. If the Committee finds that a restrictive import measure taken by

---

44 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.
the consulting contracting party for balance-of-payments purposes is in-
consistent with the provisions of Articles XII, XVIII:B or this Declara-
tion, 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 Declaration.
The Council shall keep under surveillance any matter on which it has
made recommendations.