



# EPI WORKING PAPER

ECONOMIC POLICY INSTITUTE | DECEMBER 2009 | #288

## **ADDRESSING BALANCE-OF-PAYMENTS DIFFICULTIES UNDER WORLD TRADE ORGANIZATION RULES**

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## Introduction

International trade rules commit the United States and other countries to maintain openness to imports in several respects. The General Agreement on Tariffs and Trade (GATT), administered since 1995 by the World Trade Organization (WTO), prohibits the WTO's 153 member countries from raising tariffs above bound levels and from imposing certain quantitative restrictions on imports. In addition, WTO members must provide non-discriminatory treatment to goods from other member countries. These same trade rules, however, recognize that countries may have to deviate from their commitments to openness under certain circumstances, and they provide some flexibility to do so.

One such circumstance that received early recognition under the GATT is when a country faces balance-of-payments difficulties. Article XII of the GATT permits a country to restrict the quantity or value of imports in order to safeguard its external financial position and its balance of payments. The Article has been invoked dozens of times in the GATT's history, including by the United States in 1971 in order to justify the imposition of a temporary import surcharge. The surcharge was imposed to address a decline in the current account, and, in particular, a shift in the U.S. balance of payments from surplus to deficit for the first time in the twentieth century.

There is a long line of precedent under Article XII for nations taking trade-restrictive measures to safeguard their balance of payments. However, there are limits on countries' abilities to justify trade measures under the Article, and the WTO Appellate Body has ruled that such measures can be challenged and reviewed under dispute settlement procedures. Warren Buffett's trade balancing proposal<sup>1</sup> contains a number of features that are harmonious with the goals and terms of Article XII, and there are further steps that could be taken to increase the chance that the proposal could be defended as consistent with WTO balance-of-payment rules.

## WTO rules on balance-of-payments measures

Article XII of the GATT 1994 provides that, notwithstanding the Agreement's prohibition on quantitative restrictions on imports and subject to the rest of the provisions of the Article, "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."<sup>2</sup> Such import restrictions must not exceed those necessary to either: 1) forestall the imminent threat of, or stop, a serious decline in monetary reserves; or 2) achieve a reasonable rate of increase in monetary reserves where they are already very low.<sup>3</sup> Such restrictions must be temporary and must be progressively relaxed as conditions improve.<sup>4</sup> A country applying such restrictions should try to avoid the

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<sup>1</sup> A more detailed description of the proposal is provided in Section IV, *infra*.

<sup>2</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XII:1 [hereinafter GATT].

<sup>3</sup> GATT art. XII:2(a).

<sup>4</sup> GATT art. XII:2(b).

uneconomic employment of productive resources, seek to avoid unnecessary damage to the interests of other parties, and may give priority to the importation of essential goods.<sup>5</sup>

### ***Development of the WTO balance-of-payments provisions***

Article XII was part of the original 1947 GATT, and the current language of Article XII was last re-drafted in 1954 and 1955, going into effect in 1957.<sup>6</sup> Negotiators did not make any significant changes to the substance of the Article at that time. Instead, they focused on strengthening the procedural aspects of the Article concerning consultations with regard to balance-of-payments measures.<sup>7</sup> The Working Party responsible for reviewing Article XII noted that more substantive changes which would have imposed a fixed time-limit on balance-of-payments measures or required approval for such measures from other parties were not agreed upon because negotiators concluded that “such proposals would not find general acceptance” among GATT parties.<sup>8</sup>

Article XII has been the subject of numerous working party reports and recommendations, but the two most significant substantive clarifications were in the 1979 Declaration on “Trade Measures Taken for Balance-of-Payments Purposes”<sup>9</sup> (1979 Declaration) and the 1994 Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade (1994 Understanding). The 1979 Declaration was developed out of discussions on balance-of-payments issues occurring before and during the Tokyo Round.<sup>10</sup> The 1994 Understanding emerged from the Uruguay Round of negotiations that established the WTO. The United States, in particular, was concerned about over-use of balance-of-payments provisions and sought to impose stricter limits on their use in the Uruguay Round negotiations.<sup>11</sup> Due to significant resistance from other parties to these efforts, the 1994 Understanding provides some substantive clarifications but focuses principally on procedural issues.

Key issues addressed in Article XII, the 1979 Understanding, the 1994 Declaration, and other relevant decisions are summarized below.

### **Application to non-quantitative restrictions**

While Article XII is framed as a limited exception to the GATT rule barring quantitative restrictions on imports, GATT parties for a number of years had invoked the article to justify non-quantitative restrictions on imports, such as import surcharges and import deposit schemes. For example, in 1975, the Committee on Balance-of-Payments Restrictions found 24 separate instances in which import surcharges had been taken for balance-of-payments purposes and 17 cases in which import deposit schemes had been

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<sup>5</sup> GATT art. XII:3.

<sup>6</sup> GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 361 (6th ed. 1994).

<sup>7</sup> GATT Contracting Parties, *Report of Review Working Party I on Quantitative Restrictions*, L/332/Rev.1 (Feb. 28, 1955), at para. 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, GATT Doc. No. L/4904 (adopted on Nov. 28, 1979) [hereinafter *1979 Declaration*].

<sup>10</sup> GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 366 (6th ed. 1994).

<sup>11</sup> THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1859-1875 (Terence P. Stewart ed., 1993).

imposed, from 1970 to 1974.<sup>12</sup> However, due to uncertainty regarding whether such measures might have been justified under Article XII, the treatment of such measures was inconsistent.<sup>13</sup> The 1979 Declaration thus clarified that Article XII procedures apply not only to quantitative restrictions but to all restrictive import measures taken for balance-of-payments purposes.<sup>14</sup>

The 1994 Declaration goes beyond merely recognizing that non-quantitative measures fall under Article XII. The Declaration also states that such price-based measures are preferred over quantitative measures as the means to address balance-of-payments difficulties. The 1994 Declaration states that WTO members should avoid imposing quantitative restrictions unless, “because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position.”<sup>15</sup> Members imposing quantitative restrictions must explain why price-based measures are inadequate to address the balance-of-payments difficulties they are experiencing.

#### Scope of balance-of-payments restrictions

Article XII states that import restrictions “shall not exceed those necessary” to address the balance-of-payments situation that the country is facing.<sup>16</sup> This principle was reiterated in the 1994 Understanding, which states that such measures “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.”<sup>17</sup> The 1994 Understanding further requires members to justify the criteria used to determine allowable import quantities or values.<sup>18</sup>

The question concerning the extent to which import restrictions may focus on particular products or countries has arisen frequently under Article XII. In a number of instances, GATT parties expressed concern that import restrictions limited to particular products (other than limits designed to permit the importation of essential goods) were inconsistent with Article XII, because such restrictions served to protect particular domestic industries rather than to address balance-of-payments problems.<sup>19</sup> For example, a GATT Working Party report adopted in 1951 recommended that members avoid restrictive definitions of the products subject to import measures and allocate import quotas on a non-discriminatory basis to as many countries as possible.<sup>20</sup> The 1994 Understanding also recognizes this principle, and it states that countries shall administer import restrictions in a transparent manner in order to “minimize any incidental protective effects” of the

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<sup>12</sup> GATT Balance-of-Payments Committee, *Note by the Committee*, GATT Doc. No. L/4200 (July 18, 1975), at paras. 31 -32.

<sup>13</sup> *Id.*

<sup>14</sup> *1979 Declaration* at para. 1.

<sup>15</sup> *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994* at para. 3 [hereinafter *1994 Understanding*].

<sup>16</sup> GATT art. XII(2)(a).

<sup>17</sup> *1994 Understanding* at para. 4.

<sup>18</sup> *Id.*

<sup>19</sup> GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 369-370 (6th ed. 1994).

<sup>20</sup> GATT Contracting Parties, *Report of Working Party “D” on Quantitative Restrictions*, GATT Doc. No. GATT/CP.4/33 (Mar. 28, 1950), at para. 19.

restrictions.<sup>21</sup> Similarly, the 1994 Understanding states that discretionary licensing of imports shall only be used “when unavoidable” and should be phased out progressively.<sup>22</sup>

Just as there exists an exception to the rule of non-discrimination among products that permits the importation of essential goods, there also exists an exception to non-discrimination among countries that allows for less-restrictive treatment of imports from less-developed countries. The 1979 Declaration states that developed countries taking measures under Article XII shall take the export interests of less-developed countries into account and may exempt products of export interest to those developing countries from import restrictions.<sup>23</sup>

#### Necessity of import restrictions relative to other policy measures

As noted above, countries may justify import restrictions under Article XII only to the extent that those restrictions are “necessary” to address a balance-of-payments problem. Countries are not, however, required to exhaust all other policy options before they can justify import restrictions as a necessary measure. For example, Article XII recognizes that countries may maintain expansionary domestic policies “directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources,” and that such policies may increase demand for imports.<sup>24</sup> However, a country is not required to abandon import restrictions that would otherwise be justified for balance-of-payments purposes merely because the country could achieve the same reduction in imports by changing its demand-stimulating domestic policies.<sup>25</sup> Countries do undertake, however, to pay due regard in carrying out their domestic policies “to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis.”<sup>26</sup>

It is worth noting that the scope of consultations that parties must engage in under Article XII includes a discussion of “alternative corrective measures which may be available” to help address a balance-of-payments problem.<sup>27</sup> Negotiators explained that the purpose of the provision was to “consider with the international organizations concerned other possible remedial measures such as exchange depreciation, exchange restrictions, special grants from the [International Monetary] Fund, special loans from the [World] Bank ...”<sup>28</sup> While such alternatives will be discussed at consultations, a country is not required to undertake any of these alternative methods if import restrictions would otherwise be justified under Article XII. In drafting Article XII, negotiators noted that the Article’s “necessity” requirement should not be interpreted to mean that import

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<sup>21</sup> *1994 Understanding* at para. 4.

<sup>22</sup> *Id.*

<sup>23</sup> *1979 Declaration* at para. 2.

<sup>24</sup> GATT art. XII(3)(d).

<sup>25</sup> *Id.*

<sup>26</sup> GATT art. XII(3)(a).

<sup>27</sup> GATT art. XII(4)(a).

<sup>28</sup> United Nations Economic and Social Council Preparatory Committee of the International Conference on Trade and Employment, *Verbatim Report of the Third Meeting of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Control*, GATT Doc. No. E/PC/T/C.II/QR/PV/3 (Nov. 13, 1946), at p. 26.

restrictions would not be permitted “until every other possible corrective measure (such as exchange controls, exchange depreciation, etc.) had been tried and found inadequate.”<sup>29</sup>

#### Seriousness of balance-of-payments difficulties

Another important issue under Article XII is how serious a balance-of-payments problem must be in order to justify the imposition of import restrictions. Article XII limits any restrictions to those necessary to “forestall the imminent threat of, or to stop, a serious decline in ... monetary reserves.”<sup>30</sup> The 1994 Understanding appears to impose a slightly higher threshold for quantitative restrictions, which are available only in a “critical” balance-of-payments situation where price-based measures cannot arrest a “sharp deterioration in the external payments position.”<sup>31</sup>

When drafting the original Article XII, countries noted the following with regard to this issue:

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.<sup>32</sup>

The GATT requires parties engaged in Article XII consultations to accept the determinations of the International Monetary Fund regarding what constitutes a serious decline in a country’s monetary reserves.<sup>33</sup> The process for seeking the Fund’s input is described in more detail in Section II.B, below.

In a recent case, India disputed the Fund’s findings that quantitative restrictions imposed by India were no longer justified for balance-of-payments purposes.<sup>34</sup> The dispute settlement panel in the case considered the views of the IMF and found India’s import measures to be unjustified and thus inconsistent with the GATT.<sup>35</sup> India argued on appeal that the panel’s acceptance of the IMF’s views constituted an improper delegation of its judicial authority.<sup>36</sup> The Appellate Body rejected India’s arguments on appeal, noting that the panel had taken into account information from other sources in addition to

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<sup>29</sup> United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Chapter V - Section C. (Quantitative Restrictions and Exchange Controls)*, GATT Doc. No. E/PC/T/W/223 (June 23, 1947), at p. 13.

<sup>30</sup> GATT art. XII(2)(a)(i) (emphasis added).

<sup>31</sup> *1994 Understanding* at para. 3.

<sup>32</sup> United Nations Conference on Trade and Employment, Third Committee: Commercial Policy, *Addendum to Summary Record Of the Thirty-Eighth Meeting*, GATT Doc. No. E/CONF.2/C.3/SR.38 (Feb. 19, 1948), at p. 3.

<sup>33</sup> GATT art. XV:2.

<sup>34</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (adopted Sept. 22, 1999).

<sup>35</sup> *Id.* at paras. 5.216-5.223.

<sup>36</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (adopted Sept. 22, 1999), at paras. 146-151.

the IMF and had assessed the views of the IMF critically (while still according them considerable weight).<sup>37</sup> Thus, the Appellate Body concluded that the panel had made an objective assessment after weighing all the evidence and arguments before it, and the Appellate Body upheld the panel determination.<sup>38</sup>

Developed country commitments to minimize import restrictions for balance-of-payments purposes

In the late 1970s and early 1980s, the United States joined other developed countries in pledging to minimize reliance on import restrictions to address balance-of-payments problems. For example, the 1979 Declaration recognizes in its preamble that “developed contracting parties should avoid the imposition of restrictive trade measures for balance-of-payments purposes to the maximum extent possible.”<sup>39</sup> Similarly, in 1980 the European Communities and the governments of OECD member countries issued a “Declaration on Trade Policy” that declares the countries’ determination to:

... avoid restrictive measures in the trade field and on other current account transactions which might create snowballing effects; have an adverse impact on inflation, productivity and growth potential; or inhibit the dynamic development of world trade and its financing, in particular as regards trade of developing countries ....<sup>40</sup>

These statements, while demonstrating an important political commitment to avoiding the imposition of import restrictions for balance-of-payments purposes, do not override the flexibility present in the GATT, nor do they prohibit the United States from taking advantage of that flexibility. If the United States were to invoke Article XII to justify import restrictions to address balance-of-payments problems, however, it is likely that trading partners would reference the commitments that have been made in objecting to such measures.

***Article XII procedures***

Article XII requires that a party imposing trade restrictions to safeguard its balance of payments must immediately notify and consult with other parties regarding the measures.<sup>41</sup> If, as a result of consultations, parties determine that there are minor inconsistencies between the import restriction and GATT rules, they will alert the imposing member of that fact and advise them to bring the measure into conformity.<sup>42</sup> If the inconsistency is serious, however, a party who is adversely affected by the import restrictions may be released by other parties to take appropriate measures.<sup>43</sup> Any such determinations regarding inconsistencies are to be reached expeditiously, ideally within

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<sup>37</sup> *Id.* at paras. 149-150.

<sup>38</sup> *Id.*

<sup>39</sup> 1979 Declaration at 1.

<sup>40</sup> Organization for Economic Cooperation and Development, *Declaration on Trade Policy*, Annex to C(80)104/Final (June 4, 1980).

<sup>41</sup> GATT art. XII(4)(a).

<sup>42</sup> GATT art. XII(4)(c)(i).

<sup>43</sup> GATT art. XII(4)(c)(ii) and (d).

sixty days of the initiation of consultations.<sup>44</sup> In addition, a country which believes it is being adversely affected by import restrictions may itself request consultations if the restricting member has not entered into them already.<sup>45</sup>

More detailed consultation procedures were issued in 1970, and these were further elaborated upon in the 1979 Declaration and the 1994 Understanding. These agreements require three background papers to be prepared for each consultation: 1) a “Basic Document” prepared by the restricting country that explains the measures taken and the reasons for them; 2) a “Background Paper” prepared by the GATT (now WTO) Secretariat; and 3) a “Recent Economic Developments” paper prepared by the IMF.<sup>46</sup> The 1994 Understanding specifies that the Balance-of-Payments Committee – which had conducted Article XII consultations under the GATT – is the competent body to conduct such consultations within the WTO.<sup>47</sup> The 1994 Understanding also sets firmer timelines for notifications and consultations, and it formalizes details regarding the background documents that must be prepared for such consultations.<sup>48</sup> The Committee reports the conclusions of its consultations to the General Council, which generally adopts those recommendations.<sup>49</sup> The Committee also performs surveillance of measures that are still in effect and issues annual reports.

Consultations among parties and under the auspices of the Balance-of-Payments Committee provided the primary means for reviewing balance-of-payments measures for fifty years. While adversely affected countries could potentially be authorized to take appropriate measures if any inconsistencies were not resolved through the process, the rules emphasized notice, consultations, and cooperative decision-making rather than confrontational or adjudicative procedures for resolving balance-of-payments disputes. The adoption of the Dispute Settlement Understanding (DSU) in the Uruguay Round of negotiations created a more formal process through which members could raise concerns about balance-of-payments measures. The 1994 Understanding provides in a footnote that DSU procedures “may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.”<sup>50</sup>

This footnote was tested for the first time in a case brought in response to quantitative restrictions imposed by India in the late 1990s.<sup>51</sup> While India justified its quantitative restrictions on the basis of the balance-of-payments provisions that apply exclusively to developing countries under Article XVIII:B, the findings in the dispute are relevant to Article XII as well. One of India’s primary defenses in the dispute was that balance-of-payments issues are reserved for resolution to the Balance-of-Payments Committee and

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<sup>44</sup> GATT art. XII(4)(f).

<sup>45</sup> GATT art. XII:4(d).

<sup>46</sup> GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 386 (6th ed. 1994).

<sup>47</sup> *1994 Understanding* at para. 5.

<sup>48</sup> *Id.* at paras. 6, 9, 11-12.

<sup>49</sup> *Id.* at para. 13; GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 392 (6th ed. 1994).

<sup>50</sup> *1994 Understanding* at n. 1.

<sup>51</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (*adopted* Sept. 22, 1999).



the General Council – India argued that dispute settlement panels thus did not have the authority to review such measures.<sup>52</sup>

The dispute settlement panel disagreed, citing, in part, the footnote to the 1994 Understanding referenced above.<sup>53</sup> The Appellate Body affirmed the panel’s findings on the matter, stating that dispute settlement procedures “are available for disputes relating to any matters concerning balance-of-payments restrictions.”<sup>54</sup> As noted above, the panel gave considerable weight to the findings of the IMF regarding India’s balance-of-payments situation, and this assessment was affirmed on appeal.

Thus, to the extent that a party’s invocation of Article XII proves controversial at the WTO in the future, it is likely that concerns will be raised not only in the consultations provided for under the Article but also perhaps in formal dispute settlement proceedings.

## History of Article XII usage

Article XII has been invoked dozens of times over the longer than fifty year history of the GATT and the WTO. From 1970 to 1974 alone the Balance-of-Payments Committee conducted forty-five consultations on measures imposed by 23 separate countries.<sup>55</sup> Import restrictions for balance-of-payments purposes have varied in form, duration, and scope, and they have been imposed by developed and developing countries alike.<sup>56</sup> Developed countries that have applied import restrictions for balance-of-payments reasons include Austria, Australia, Denmark, Finland, France, Greece, Iceland, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Sweden, Spain, the United Kingdom, and the United States.<sup>57</sup> Countries that have notified import restrictions to the WTO’s Balance-of-Payments Committee under Article XII since 1995 include the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic.<sup>58</sup>

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<sup>52</sup> *Id.* at para. 5.22.

<sup>53</sup> *Id.* at paras. 5.112-5.115.

<sup>54</sup> *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (adopted Sept. 22, 1999), at para. 88 (emphasis in original).

<sup>55</sup> GATT Balance-of-Payments Committee, *Note by the Committee*, GATT Doc. No. L/4200 (July 18, 1975), at para. 20. This figure includes consultations with developing countries invoking Article XVII:B of the GATT.

<sup>56</sup> Developing countries also have the option of invoking Article XVIII:B of the GATT to justify import restrictions on balance-of-payments grounds.

<sup>57</sup> See Contracting Parties, *Final Report of the Working Party on Balance-of-Payments Restrictions*, GATT Doc. No. L/931 (Nov. 20, 1958), at para. 8; GATT Balance-of-Payments Committee, *Note by the Committee*, GATT Doc. No. L/4200 (July 18, 1975), at Annex 1; Negotiating Group on GATT Articles, *Consultations Held in the Committee on Balance-of-Payments Restrictions Under Articles XII and XVIII:B Since 1975: Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG7/W/46 (June 24, 1988), at 9.

<sup>58</sup> See Committee on Balance-of-Payments Restrictions, *Notification Under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on tariffs and Trade 1994 (Slovak Republic)*, WT/BOP/N/1 (Jan. 20, 1995); Committee on Balance-of-Payments Restrictions, *Notification Under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on tariffs and Trade 1994 (Hungary)*, WT/BOP/N/2 (Mar. 29, 1995); Committee on Balance-of-Payments Restrictions, *Notification Under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on tariffs and Trade 1994 (Poland)*, WT/BOP/N/6 (Jan. 17, 1996); Committee on Balance-of-Payments Restrictions, *Notification Under Paragraph 9 of the*

While no country appears to have imposed a policy exactly like the Warren Buffett trade balancing program under Article XII, quantitative restrictions have been applied to imports in a broad manner. In 1971, for example, South Africa invoked Article XII to revise its system of import permits, which were provided under normal circumstances to facilitate the availability of foreign exchange for import purchases.<sup>59</sup> Under the Article XII program, South Africa capped the amount of permits that would be available to importers in 1972 based on a percentage of the firm's actual imports in 1969.<sup>60</sup>

Perhaps of greatest interest as a precedent for the Buffett trade balancing proposal is the prior case in which the United States imposed trade restrictions to safeguard its balance of payments. In 1971, the United States invoked Article XII to justify the imposition of a 10 percent import surcharge. President Nixon announced the temporary import surcharge on August 15, 1971, along with a package of domestic policies to address high inflation and unemployment as well as balance-of-payments difficulties.<sup>61</sup> The primary goal of the surcharge was to push trading partners to revalue undervalued currencies and thus remedy the emerging U.S. trade deficit.<sup>62</sup> The U.S. set two additional conditions for removal of the surcharge in a meeting of the Group of Ten: elimination of certain trade barriers by the European Community and Japan, and additional contributions to common defense projects from American allies.<sup>63</sup>

The U.S. notified the GATT of the surcharge on August 16, 1971, and entered into consultations with other GATT parties. In a statement to the GATT, the United States stated that "the reduction and then the disappearance of the traditional United States merchandise trade surplus" played a major role in the weakening of the country's balance of payments.<sup>64</sup> In particular, the U.S. noted that its trade surplus fell by nearly \$5 billion from 1964 to 1970, and that in 1971, before the surcharge was introduced, "the United States moved into net trade deficit and faced the prospect of incurring in 1971 the first annual United States trade deficit in the twentieth century."<sup>65</sup> The United States imposed

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*Understanding on the Balance-of-Payments Provisions of the General Agreement on tariffs and Trade 1994 (Czech Republic)*, WT/BOP/N/29 (Sept. 15, 1997); Committee on Balance-of-Payments Restrictions, *Notification Under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the General Agreement on tariffs and Trade 1994 (Romania)*, WT/BOP/N/41 (Nov. 16, 1998).

<sup>59</sup> *Import Restrictions of South Africa: Invocation of Article XII*, GATT Doc. No. L/3638 (Dec. 3, 1971); Committee on Balance-of-Payments Restrictions, *Consultation Under Article XII:4(a) with South Africa: Basic Document Supplied by the South African Government*, GATT Doc. No. BOP/121 (Dec. 29, 1971).

<sup>60</sup> Committee on Balance-of-Payments Restrictions, *Consultation Under Article XII:4(a) with South Africa: Basic Document Supplied by the South African Government*, GATT Doc. No. BOP/121 (Dec. 29, 1971).

<sup>61</sup> See Presidential Proclamation No. 4074, 3 C.F.R. 80 (1971). See also *Report of the Working Party on United States Temporary Import Surcharge*, GATT Doc. No. L/3573 (Sept. 13, 1971), at 15-19.

<sup>62</sup> Hal S. Scott, *The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge*, 39 U. CHI. L. REV. 177, 203 (1971-1972).

<sup>63</sup> *Id.*

<sup>64</sup> *Report of the Working Party on United States Temporary Import Surcharge*, GATT Doc. No. L/3573 (Sept. 13, 1971), at p. 14.

<sup>65</sup> *Id.*

the import surcharge based on its determination that restoration of its external financial position required “the renewed achievement of a substantial trade surplus.”<sup>66</sup>

The General Council convened a Working Party to examine the U.S. import surcharge, consult with the IMF, and submit a report to the Council. The IMF found as follows:

Persistent balance of payments pressures have brought the reserve assets of the United States to a low level and its reserve liabilities to a very high level .... Therefore, in the absence of other appropriate action and in the present circumstances, the import surcharge can be regarded as being within the bounds of what is necessary to stop a serious deterioration in the United States balance of payments position.<sup>67</sup>

However, the Fund noted that an exchange rate correction would be a preferable means of adjusting the balance of payments and argued that the import surcharge could be justified only until effective exchange rate adjustments could supplant the measure.<sup>68</sup>

The General Council’s Working Party considered the submissions of the U.S. and the IMF in their discussion of the import surcharge. They noted that some goods were exempt, such as goods already subject to quotas and duty-free goods, though developing countries expressed concern that their exports should also be exempt from the surcharge. The members of the Working Party, while agreeing that the U.S. was facing a serious balance-of-payments difficulty, disagreed that the deteriorating trade balance in goods was primarily to blame.<sup>69</sup> The Working Party members thus concluded that the import surcharge was “inappropriate,” because it placed an “undue burden” on the import account, and the members urged the U.S. to remove the surcharge within a short period of time.<sup>70</sup>

It is important to note that at the time the import surcharge was being considered, it was not settled whether Article XII applied to non-quantitative trade restrictions as well as quantitative measures. The U.S. noted that it did consider itself entitled to impose quantitative measures under Article XII under the circumstances, but it had opted to impose a price-based measure because it felt it was less damaging to trade.<sup>71</sup> Other members of the Working Party disagreed and felt that, to the extent that the surcharge exceeded U.S. bound tariff rates under Article II of the GATT, it was not compatible with the Agreement.<sup>72</sup>

The Working Party report on the U.S. import surcharge was submitted to the General Council on September 16, 1971, and the Council adopted the report and decided to keep the measure under close review. While some Council members reserved their right to

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at p. 2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at p. 11-12.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at p. 11.

<sup>72</sup> *Id.*

take retaliatory measures in response to the surcharge, none were imposed. In December of 1971, the Nixon Administration removed the surcharge after an agreement on currency realignment was reached among the United States and its major trading partners.<sup>73</sup>

## **Assessing the Buffett proposal under Article XII**

Warren Buffett's trade balancing proposal would bring the chronic U.S. trade deficit into balance by creating import certificates equal to the value of U.S. exports. These certificates could be granted to exporters and sold by them on the open market, or they could be auctioned by the government through a certificate market. While the first method would provide benefits to exporters, the second method would help reduce or eliminate potential inconsistencies with WTO prohibitions on export subsidies.<sup>74</sup> In addition, the second method could generate a stream of revenue for the government. Importers would be required to redeem a certificate equal to the value of the merchandise being imported for each entry.

The proposal has several advantages under the Article XII framework. First, the program is specifically designed to limit imports only to the extent needed to restore equilibrium to the trade balance. It is thus consistent with provisions in Article XII that require countries to limit import restrictions to those necessary to address balance-of-payments problems and that urge countries to take steps to restore equilibrium in their balance of payments on a sound and lasting basis.<sup>75</sup> Second, the program does not distinguish between products, and thus it is not designed to provide special protective benefits for certain domestic industries. The program is therefore consistent with Article XII provisions regarding the avoidance of "uneconomic employment of productive resources," as well as with provisions in the 1994 Understanding that require import restrictions to control the general level of imports, to minimize incidental protective effects, and to be transparent.<sup>76</sup> Third, the program does not distinguish between countries, and thus it does not unduly disadvantage some countries to the benefit of others. This approach is consistent with Article XII provisions regarding the avoidance of unnecessary damage to trading partners.<sup>77</sup> While the proposal does not exempt imports from less-developed countries as suggested in the 1979 Declaration, this is not a mandatory requirement, and the advantages of universal application may outweigh the benefits of special and differential treatment in this regard.

There are several respects in which the proposal could be strengthened to improve consistency with WTO rules. First, application of the import certificate requirement

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<sup>73</sup> Hal S. Scott, *The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge*, 39 U. CHI. L. REV. 177, 203 (1971-1972). See also Presidential Proclamation No. 4098, 36 Fed. Reg. 24,201 (1971).

<sup>74</sup> While it is beyond the scope of this paper to analyze all WTO-consistency issues raised by the proposal, concerns that the program may constitute an export subsidy could be addressed through the method under which import certificates are distributed.

<sup>75</sup> GATT art. XII:2(a), 3(a). The 1994 Understanding reaffirms that import restrictions may not exceed what is necessary to address a balance-of-payments situation. *1994 Understanding* at para. 4.

<sup>76</sup> GATT art. XII:3(a); *1994 Understanding* at para. 4.

<sup>77</sup> GATT art. XII:3(c)(i).

could be time-bound or have a built-in phase out. This would put into effect the Article XII requirements that such import restrictions be temporary in nature.<sup>78</sup> Second, given the fact that price-based mechanisms are now preferred over quantitative restrictions under the 1994 Understanding,<sup>79</sup> an explanation of why price-based mechanisms are inadequate given the critical balance-of-payments situation and the sharp deterioration in the external payments position should accompany any implementation of this measure.

Finally, the fact that Article XII focuses on the decline in a country's monetary reserves should not prevent the United States from invoking Article XII merely because the dollar is now the international reserve currency. As **Table 1** demonstrates, in 2007 the amount of international reserves held by the United States was small in absolute terms compared to other countries and extremely low relative to the value of U.S. imports. In fact, U.S. reserves were not sufficient to cover even eleven days worth of imports. When the U.S. invoked Article XII in 1971, and the IMF and GATT parties agreed the country was facing a balance-of-payments crisis, U.S. reserves equaled the value of about three months worth of imports.<sup>80</sup>

While other countries may argue that the United States does not need large reserves due to the status of the dollar as the dominant global reserve currency, the IMF has repeatedly stated its concerns regarding the unsustainability of the U.S. trade deficit. Starting in 2006, for example, the Fund deemed the situation to be so serious that it convened representatives of China, the Euro Area, Japan, Saudi Arabia, and the United States in a series of Multilateral Consultations on Global Imbalances.<sup>81</sup> A stated goal of the Consultations was to increase net U.S. exports.<sup>82</sup> However, these voluntary efforts have so far been unsuccessful in improving the U.S. current account deficit.<sup>83</sup> While the U.S. deficit has declined recently due to the economic recession, the fundamental imbalance persists. Absent more progress on measures such as the IMF consultations, a trade balancing program may provide the most effective means of addressing the stark imbalances identified as a concern by the Fund. The fact that the reserves and exchange system has evolved since Article XII was drafted should not undermine the ability of countries to take action under the Article to keep the global trade system functioning in a sustainable manner.

In any case, imposition of a trade balancing program under Article XII will precipitate consultations at the WTO and may lead to a challenge under WTO dispute settlement procedures. Given the deference the WTO accords to IMF determinations regarding balance-of-payments issues in such proceedings, implementation should also be accompanied by U.S. efforts to explain the policy to Fund officials. In this regard, it may

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<sup>78</sup> GATT art. XII:2(b). See also *1994 Understanding* at para. 1.

<sup>79</sup> *1994 Understanding* at para. 3.

<sup>80</sup> *Report of the Working Party on United States Temporary Import Surcharge*, GATT Doc. No. L/3573 (Sept. 13, 1971), at p. 14.

<sup>81</sup> See "IMF's International Monetary and Financial Committee Reviews Multilateral Consultation," IMF Press Release No. 07/72 (Apr. 14, 2007).

<sup>82</sup> *Id.*

<sup>83</sup> See also, e.g., John Lipsky, First Deputy Managing Director, International Monetary Fund, "Perspectives on the Global Economic Landscape and the Role of the Dollar" (July 22, 2008).

be useful to cite prior IMF determinations regarding the U.S. balance-of-payments situation in Article IV reviews and other fora.

## **Conclusion**

International trade rules provide countries with the flexibility to impose import restrictions in order to address balance-of-payments difficulties. These flexibilities have formed an integral part of GATT and WTO rules for more than fifty years, and they have been repeatedly invoked by developed and developing countries alike. The United States invoked Article XII when it imposed a temporary import surcharge to address the deterioration of its trade surplus into a deficit in 1971. While some WTO members, including the United States, have since sought to impose stricter limits on the availability of such import restrictions, trading partners have strongly defended the right to have access to such flexibilities when needed. Article XII of GATT 1994 thus remains a critical component of the WTO architecture, and it could provide an important basis for justifying the imposition of a trade balancing program to address the chronic U.S. trade deficit.