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Jorge F. Perez-Lopez

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# GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries

*Jorge F. Perez-Lopez\**

## I. INTRODUCTION

**I**nternational trade agreements generally contain safeguard provisions which permit signatories to derogate from assumed obligations in the case of unexpected or unforeseen events. By providing domestic interests that may be disproportionately affected by increased foreign competition with a mechanism for begging off from concessions, safeguard provisions tend to make trade liberalization agreements more palatable to domestic interests and enhance their acceptance by national legislatures.

The central agreement regulating international trade among Western nations, the General Agreement on Tariffs and Trade (GATT), contains a number of safeguards. Several of these provisions (e.g., countervailing or antidumping duties) are narrow in scope, their application limited to specific products originating from a given country. Others, such as the one which permits withdrawal of concessions to alleviate balance of payments imbalances, have broader scope and are applicable to ranges of products and sources of imports.

One of the most significant safeguard provisions in the GATT is the one which permits emergency action against sharp increases in imports. Article XIX, commonly known as the "escape clause," authorizes a contracting party to withdraw concessions temporarily on specific products if, as a result of unforeseen developments, imports of those products are increasing rapidly and injuring the domestic industry.

It is fair to say that Article XIX, as it currently exists and is implemented, is the target of nearly-universal criticism. Some find flaws in what it is and what it is not, in who it affects and who it does not, and in what it does and what it does not do.

For example, some critics claim that Article XIX is merely a legal cover used by developed countries to erect protectionist measures against imports from developing nations; others argue that reluctance by govern-

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\* Bureau of International Labor Affairs, U.S. Department of Labor, Washington, D.C. 20210. This paper expresses only the views of the author. These views do not reflect the positions or opinions of the U.S. Department of Labor or of the U.S. Government. I am grateful to many colleagues for thoughtful comments and suggestions on an earlier draft of this paper. However, I am responsible for any errors of substance and interpretation that remain.

ments to take action under Article XIX has rendered it ineffectual in providing the relief promised to domestic interests as a *quid pro quo* for going along with trade liberalization. Other critics claim that because there is no multilateral surveillance, Article XIX is used indiscriminately by developed countries to erect protectionist barriers; yet others argue that Article XIX standards are so exacting that countries faced with a serious import problem resort to more pragmatic ways to limit imports which fall outside of the purview of the GATT (e.g., voluntary export restraints). Further, while some assert that Article XIX relief promotes, and accelerates, structural adjustment in developed countries, others argue that it retards it. Despite these differences, there seems to be broad consensus that an effective Article XIX safeguard provision is essential if greater trade liberalization is to be attained in the context of GATT.

In reading the vast literature on Article XIX safeguards, one is struck by the relative infrequency with which this provision has been used. Over the forty years that GATT has been in force (i.e., through the end of 1988), Article XIX has been invoked only 138 times or, on average, substantially less than four times per year. Meanwhile, over this same period, tens of thousands of concessions have been negotiated pursuant to several rounds of multilateral trade negotiations and severe changes in international trade patterns have occurred. Even more interesting, and discussed only tangentially in the literature, is the fact that three contracting parties have been responsible for nearly two-thirds of the total number of Article XIX actions taken.

Why have contracting parties been reluctant to invoke Article XIX to deal with import surges seemingly under its purview? How do contracting parties deal with import surges which result from trade liberalization if they do not resort to Article XIX? Why is it that a handful of contracting parties have relied on Article XIX to deal with increases in imports while others have not? Can the differences in the frequency of the application of Article XIX be explained in terms of differences in the trade policies pursued by contracting parties? Are frequent users of Article XIX more "protectionist" than others? Are the trade policies of the frequent users of Article XIX different from those of other contracting parties, and could these potential differences in trade policies account for the differences in the severity of import competition and the need to limit imports?

While a thorough analysis of Article XIX should aim to address each of the questions raised above, the objective of this article is much more modest. Part II briefly traces the historical development of Article XIX, describes the system of rights and obligations it creates, and analyzes the experience to date in the application of Article XIX, relying on an inventory of notifications submitted to the GATT Secretariat. Part III discusses the main criticisms which have been levelled at Article XIX

and some of the modifications which have been proposed in the context of the negotiations on a multilateral code on safeguards. Part IV addresses the issue of national application of Article XIX. For a selected group of nations or entities—the United States (U.S.), the European Economic Community (EEC), Canada, Australia, and Japan—domestic legislation to implement Article XIX is examined with the dual objective of determining: 1) whether such legislation appears to be consistent with Article XIX principles; and 2) if there are obvious differences in national legislation that might account for the differential frequency of use among countries.

## II. GATT ARTICLE XIX SAFEGUARDS

Safeguard provisions in international trade agreements arise from the need of governments to balance international obligations which ensue from trade liberalization policies with the concerns of domestic interests harmed by such policies. On the one hand, agreements that liberalize trade increase international competition and encourage a more efficient allocation of resources domestically and internationally. On the other, concessions granted as a result of these agreements can have an adverse impact on the interests of selected domestic groups. On occasion, after a trade agreement has been concluded, unexpected events can alter significantly the balance of costs and benefits such that the national economic interest might dictate a change in previously assumed obligations.

In addition to Article XIX, the so-called “escape clause,” the GATT contains at least eight other safeguard provisions which permit contracting parties to derogate from concessions:<sup>1</sup>

- (1) Article VI, which permits the imposition of antidumping and countervailing duties;<sup>2</sup>
- (2) Article XI, which sanctions restrictions to support domestic agricultural policy;
- (3) Article XVIII, which permits trade restrictions to assist economic development of poor countries;<sup>3</sup>
- (4) Article XX, which provides general exceptions to conform with national policies regarding public health and safety;
- (5) Article XXI, which contains national security exceptions;

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<sup>1</sup> The discussion on the GATT safeguards is based primarily on D. ROBERTSON, *FAIL SAFE SYSTEMS FOR TRADE LIBERALISATION* 12-15 (1977). [hereinafter *FAIL SAFE*]. See also J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* ch. 23 (1969).

<sup>2</sup> Article VI was elaborated upon in the Code on Subsidies and Countervailing duties which emerged from the Tokyo Round of Multilateral Trade Negotiations. For a general treatment of the results of the negotiations on the Code see, *GATT THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 129-32 (1979) [hereinafter *TOKYO ROUND*].

<sup>3</sup> Article XVIII has been developed into Part IV of the GATT, “Trade and Development.”

- (6) Article XXVIII, which allows renegotiation of concessions granted under the GATT schedules;
- (7) Article XXV, which permits granting of waivers from the GATT rules under special circumstances; and
- (8) Article XII, which allows the general imposition of quantitative import restrictions for balance of payments reasons.

Because the thrust of this article is on the escape clause provision, the discussion will be limited to the safeguards contained in the GATT Article XIX.

Article XIX has its origin in U.S. practices. An escape clause specifically permitting the withdrawal of a concession if increased imports resulting from that concession caused or threatened serious injury to a domestic industry was included in trade agreements concluded between the United States and Mexico in 1942. In 1945, the Administration agreed to include in all future agreements a general escape clause similar to the one in the 1942 agreement with Mexico, but it was not until February 1947, that the U.S. President directed, by Executive Order, that all future trade agreements contain such a provision.<sup>4</sup>

United States proposals for the Charter of an International Trade Organization (ITO), issued during 1945-46, contained a provision patterned closely after the escape clause in the 1942 agreement with Mexico. In late 1946, in London, there was agreement among members of the ITO preparatory group that such a clause was needed. In early 1947, in New York, the decision was made to include the escape clause in the GATT, which was being developed simultaneously. Subsequently, at the Havana meeting of the ITO, additional changes were made to the text of the escape clause contained in the Charter of the ITO (Article 40 of the Charter), but these changes were not incorporated into the version which had been forwarded to the GATT. With the failure of the ITO to come into existence, the text of the escape clause contained within the GATT became the operative one.<sup>5</sup>

While there is little doubt that the United States was the moving force behind the inclusion of an escape clause in the ITO Charter and in the GATT, it can be argued that the issue was so critical that a clause of this type would have eventually found its way into the GATT.<sup>6</sup> It has

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<sup>4</sup> Kelly, *The "Expanded" Trade-Agreements Escape Clause, 1955-61*, 70 J. POL. ECON. 37 (1962); Leddy & Norwood, *The Escape Clause and Peril Points Under the Trade-Agreements Program*, in *STUDIES IN UNITED STATES COMMERCIAL POLICY* 124-27 (W. Kelly ed. 1963); Kravis, *The Trade Agreements Escape Clause*, 44 AM. ECON. REV. 319-22 (1954).

<sup>5</sup> JACKSON, *supra* note 1, at 554-55. As will be discussed below, the GATT Contracting Parties have interpreted Article XIX in a manner consistent with revised language in the Havana ITO Charter.

<sup>6</sup> This point is made by Gerard and Virginia Curzon, *The Management of Trade Relations in the GATT*, 1 INTERNATIONAL ECONOMIC RELATIONS OF THE WESTERN WORLD 1959-1971, at 222-23 (A. Shonfield ed. 1976) [hereinafter WESTERN WORLD]. On the United States' insistence

been suggested with reference to the U.S. escape clause, but also applicable more broadly,<sup>7</sup> that

[e]ven when the advantages of the international division of labor are well understood, nations are unwilling to sign away unconditionally their right to increase protection in the event of unforeseen inroads on domestic markets. Some kind of escape provision is, therefore, almost an inevitable feature of any international agreement to reduce trade barriers.

It is useful to analyze Article XIX by first focusing on the prerequisites which must be met in order to implement the Article, and then on the characteristics of the remedies which could be triggered. It is important to note that although the article is quite brief (it consists only of five paragraphs) this does not mean that it can be unambiguously interpreted. (The text of the article is reproduced as Appendix 1). As one of the leading legal authorities on the GATT has stated, the "language of Article XIX is extraordinarily oblique, even for GATT language, and interpretations of it are often explainable only by reference to the historical development of the language and the practice under it."<sup>8</sup>

### 1. Prerequisites

Article XIX authorizes a contracting party to impose emergency measures to limit imports provided:

- (i) products are imported into its territory in increased quantities;
- (ii) the increased imports result from unforeseen developments *and* from GATT obligations; and
- (iii) the increased imports cause or threaten serious injury to domestic producers of like or directly competitive products.

The first two points deal with the causality question, while the third addresses the issue of injury.

#### (a) Causality

Three conditions must be present in order for the causation standards of Article XIX to be met. First, the increase in imports has to be the result of a GATT obligation (e.g., a tariff concession, the elimination of a quantitative restriction). This means that Article XIX can not be used to deal with injury which would have occurred in any event (i.e., absent some action by the contracting party which would permit the freer flow of imports). As Jackson has observed, a case could be made

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that the ITO Charter contain an escape clause *see*, C. WILCOX, A CHARTER FOR WORLD TRADE 182-83 (1949).

<sup>7</sup> Kravis, *supra* note 4, at 319.

<sup>8</sup> JACKSON, *supra* note 1, at 557.

that *any* product imported in increased quantities could trigger the use of Article XIX, since contracting parties undertake obligations in the GATT which apply to all products; however, he argues, this would merely establish coincidence of GATT obligation rather than causality.<sup>9</sup>

Second, the increased imports must be the "result of unforeseen developments." The meaning of this expression, which originated in U.S. treaty practice, is not given in the GATT and has been interpreted in different ways by contracting parties. In the notorious Hatters' Fur Case,<sup>10</sup> in which the United States increased tariffs in response to increased imports of women's fur felt hats and hat bodies, the United States argued that the unforeseen development was a style change.<sup>11</sup> The country affected by this action, Czechoslovakia, countered that because fashions are known to be short-lived, the fashion change cited by the United States was not an "unforeseen development."<sup>12</sup> A GATT Working Party agreed with the Czechoslovakian argument but felt that the *degree of change* in fashions regarding women's hats which occurred was unforeseen, and thereby the requirement of Article XIX had been met.<sup>13</sup>

And third, the "increased quantities of imports" must be the cause of the serious injury. The term "increased quantities" has been construed to mean not only increases in the absolute level of imports, but also, following Article 40 of the Havana Charter, cases where imports have risen relative to domestic production even though there has been no actual increase in the level of imports compared to an earlier period.<sup>14</sup>

## (b) Injury

Injury can be actual or threatened, but it must be serious, and must apply to domestic producers of the like or directly competitive product. Although "serious injury" is not defined in the Article, subsequent practice reveals that both actual prejudice (as shown, e.g., by stagnation or decline in domestic output) and mere threat of damage fall within its

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<sup>9</sup> *Id.* at 559.

<sup>10</sup> REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, U.N. Sales No. GATT/1951-3 (1951), reprinted in J.H. JACKSON & W.J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 556 (1986)[hereinafter HATTERS' FUR CASE].

<sup>11</sup> JACKSON, *supra* note 1, at 557.

<sup>12</sup> *Id.* at 557-58.

<sup>13</sup> *Id.* at 559.

<sup>14</sup> This point is made explicitly in GATT, ANALYTICAL INDEX: NOTES ON THE DRAFTING, INTERPRETATION AND APPLICATION OF THE ARTICLES OF THE GENERAL AGREEMENT 106 (3d Revision 1970) [hereinafter ANALYTICAL INDEX]. The Havana Charter inserted the qualifier "relatively" before the phrase "increased quantities of imports." The final text of the Havana Charter is reproduced in U.S. DEP'T OF STATE, PUB. NO. 3206, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 23 (1948).

scope.<sup>15</sup> In the Hatters' Fur Case,<sup>16</sup> a GATT Working Party concluded that Article XIX can not be invoked where imports of a product merely prevent domestic manufacturers from establishing a new industry. That is, injury can only occur where domestic production already exists.<sup>17</sup>

## 2. Remedies

Assuming that all the conditions above have been met, Article XIX authorizes a contracting party to grant import relief to a domestic industry in the form of a tariff increase or quantitative restrictions. In so doing, the following substantive and procedural provisions apply:<sup>18</sup>

- (i) notice is given to the affected parties and an opportunity to consult afforded (except for cases in which there are "critical circumstances where delay would cause damage which it would be difficult to repair");<sup>19</sup>
- (ii) the obligation withdrawn is causally related to the increase in imports;<sup>20</sup>
- (iii) the withdrawal of the concession is to be only "to the extent and for such time as may be necessary to prevent or remedy" the injury;<sup>21</sup>
- (iv) the withdrawal of the concession is to be directed only at the product which caused the injury and not to any other product;<sup>22</sup> and
- (v) although not stated specifically in the Article, a generally-held view is that the withdrawal is on a most-favored-nation (MFN) basis, i.e., not directed at specific nations.<sup>23</sup>

The unstated purpose of consultations with contracting parties who, "having a substantial interest as exporters of the product concerned," and who consider themselves affected by the Article XIX action "is either to dissuade the party concerned from taking action or to obtain concessions, in the form of tariff reductions, in respect of other products."<sup>24</sup> Should the consultation process not result in a mutually satisfactory agreement, the affected parties are authorized to retaliate against the party invoking Article XIX by withdrawing concessions. In some

<sup>15</sup> Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE L. 41, 44 (1981).

<sup>16</sup> HATTERS' FUR CASE, *supra* note 10, at 559.

<sup>17</sup> K. DAM, *THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION* 101 (1970).

<sup>18</sup> The discussion that follows draws heavily on JACKSON, *supra* note 1, at 564-66.

<sup>19</sup> *Id.*, citing GATT Art. XIX, para. 2.

<sup>20</sup> *Id.*, citing GATT Art. XIX, para. 1(a).

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*; see U.N. Docs. E/Conf. 2/C.3/49; E/Conf. 2/C.3/37 (1947-48).

<sup>24</sup> E. MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* 293 (1986).



instances, the consultation process is successful in obtaining agreement on compensation, but in others the outcome is a retaliatory withdrawal of concessions.<sup>25</sup>

### 3. Article XIX Experience

Although the GATT was signed in the fall of 1947, the first instance of action under Article XIX was not reported until early 1950. Over the thirty-nine year period from 1950 through 1988, Article XIX was invoked 138 times (see Appendix 2 for a detailed list of actions notified to the GATT Secretariat as being taken under Article XIX).

As is clear from Table 1, Article XIX was used infrequently during the 1950s, when it was invoked only nineteen times. In subsequent periods, the frequency of invoking Article XIX rose. During the 1960s, GATT was notified of thirty-five Article XIX actions, and of forty-nine in the 1970s. In the 1980s (through 1988), there were thirty-five such actions.

TABLE 1. FREQUENCY OF GATT ARTICLE XIX ACTIONS, 1950-88

<u>Time Period</u>	<u>Number of Actions</u>	<u>Invoking Countries</u>
1950-59	19	U.S. (11), Australia (2), Canada (2), Greece (2), Austria, Germany
1960-69	35	Australia (15), Austria (3), Canada (3), U.S. (3), France (2), Italy (2), Spain (2), Germany, Greece, Nigeria, Peru, Rhodesia-Nyasaland
1970-79	49	Australia (17), Canada (13), U.S. (10), EEC (3), Finland, Iceland, Israel, New Zealand, Norway, Spain
1980-88	35	EEC (11), Australia (5), South Africa (5), U.S. (4), Canada (4), Chile (3), Spain, Switzerland, Austria

Source: Based on Appendix 2.

Table 2 presents a cross-tabulation of the frequency of Article XIX

<sup>25</sup> For example, in a case in which the United States took import relief action under Article XIX with regard to specialty steels, the United States and the European Economic Community (EEC) were unsuccessful in agreeing on appropriate compensatory withdrawals. Instead, the EEC exercised its rights to retaliate and announced its intention to suspend concessions on a range of products imported from the United States. See, GATT ACTIVITIES IN 1983, 58 (1984).

invocation by contracting parties over four different time periods. Developed nations have been responsible for the overwhelming majority of Article XIX actions: 126 out of 138 notifications to the GATT referred to safeguard measures taken by developed nations. Only six developing nations have resorted to Article XIX actions to restrict imports: Chile, Israel, Nigeria, Rhodesia-Nyasaland (Zimbabwe), Peru and South Africa. South Africa has used Article XIX in five instances and Chile in three, all in the 1980s.

TABLE 2. FREQUENCY OF GATT ARTICLE XIX ACTIONS, BY INVOKING COUNTRY AND TIME PERIODS

	<u>1950-59</u>	<u>1960-69</u>	<u>1970-79</u>	<u>1980-88</u>	<u>1950-88</u>
Australia	2 (11)	15 (43)	17 (35)	5 (14)	39 (28)
U.S.	11 (58)	3 (9)	10 (20)	4 (11)	28 (20)
Canada	2 (11)	3 (9)	13 (27)	4 (11)	22 (16)
EEC			3 (6)	11 (31)	14 (10)
Austria	1 (5)	3 (9)		1 (3)	5 (4)
Spain		2 (6)	1 (2)	1 (3)	4 (3)
Greece	2 (11)	1 (3)			3 (2)
France		2 (6)			2 (1)
Germany	1 (5)	1 (3)			2 (1)
Italy		2 (6)			2 (1)
Chile				3 (9)	3 (2)
Finland			1 (2)		1 (1)
Iceland			1 (2)		1 (1)
Israel			1 (2)		1 (1)
New Zealand			1 (2)		1 (1)
Nigeria		1 (3)			1 (1)
Norway			1 (2)		1 (1)
Peru		1 (3)			1 (1)
Rhodesia					
Nyasaland		1 (3)			1 (1)
South Africa				5 (14)	5 (4)
Switzerland				1 (3)	1 (1)
	<u>19 (100)</u>	<u>35 (100)</u>	<u>49 (100)</u>	<u>35 (100)</u>	<u>138 (100)</u>

Note: Figures in parenthesis refer to percentage of actions taken within a given time period.

Source: Based on Appendix 2.

Three developed countries—Australia, Canada and the United States—consistently appear at the top of the list among users of Article XIX. Over the entire period 1950-88, these three nations filed eighty-nine out of 138 actions under Article XIX, or sixty-four percent of the total number of actions taken. By contrast, Western European nations, either individually or jointly for those which form part of the EEC, were

relatively infrequent users of Article XIX until recently. In the 1980s, the EEC invoked Article XIX eleven times, or thirty-one percent of the total number of such actions reported to the GATT during that period. At the other extreme, Japan has never resorted to Article XIX to limit injurious imports.

### III. CRITICAL ANALYSIS OF ARTICLE XIX

The general dissatisfaction with Article XIX is best captured in a statement by Jan Tumlir, a former member of the GATT Secretariat. In a piece arguing for prompt revision of Article XIX, Tumlir wrote, "[Article XIX] is . . . too exacting, in that the country invoking it risks retaliation or paying too much for taking emergency action, and too lenient, in allowing emergency protection to become permanent."<sup>26</sup> Although nearly two decades have elapsed since this assessment, there is no objective reason to disqualify it. In fact, a case could be made that the dissatisfaction with Article XIX, to which Tumlir reacted, has grown in recent years as exports from newly industrialized countries have taken increasing shares of the world trade in manufactures and GATT contracting parties have been frustrated in their attempts to agree on new disciplines regarding the implementation of Article XIX safeguards.

#### 1. Criticisms of Article XIX

Critics have taken issue with Article XIX, arguing that it fails to define certain key concepts, it is not equipped to deal with current economic realities, and it is too costly and cumbersome to use. These general criticisms are discussed below:

##### (a) Definitional Inadequacies

Article XIX is extremely demanding with regard to the causal link between increases in imports and serious injury. A literal reading suggests that the party invoking Article XIX must establish that the increase in imports is the *sole* cause of serious injury to the domestic industry. In the real world, where a multitude of internal and external factors affect the economic health of an industry, only in the most trivial cases could this exacting standard be met. Moreover, Article XIX also requires that the increase in imports in question: (i) be directly related to a concession granted by the invoking country; and (ii) result from unforeseen circumstances.<sup>27</sup> Inasmuch as a literal interpretation of these requirements essentially rules out any application of Article XIX, contracting parties have resorted to their own interpretation of the required link.

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<sup>26</sup> Tumlir, *A Revised Safeguard Clause for GATT?*, 7 J. WORLD TRADE L. 404, 406 (1973).

<sup>27</sup> GATT Art. XIX, para 1 (a).

As noted earlier, Article XIX does not define either serious injury or threat of serious injury. In the absence of an accepted definition, contracting parties invoking Article XIX have dealt differently with the requirement of establishing that there exists actual or prospective serious injury.<sup>28</sup> While some contracting parties have gone to great lengths to define these terms in domestic legislation, establish transparent investigative procedures, and set up special domestic tribunals to issue impartial rulings on the issue of import injury, others have not done so. Some of these national differences in implementation of Article XIX are discussed below. There is a perception that not all contracting parties are equally rigorous in their economic analysis leading to a determination that the serious injury standard has been met. The perception of inequities across countries regarding the causality and serious injury standard is reinforced by the fact that there is no GATT mechanism to review the import injury determinations made by individual contracting parties.<sup>29</sup> The varying interpretations given by contracting parties to the criteria which must be satisfied before an Article XIX action can be taken, and the absence of international surveillance over the decisions, has created a lack of international discipline. As the GATT Director-General evaluated the situation in 1979, "the desire of governments to have *legal cover* for their actions has, on occasions, led to the invocation of Article XIX to justify safeguard measures which patently fell short of the requirements of the Article."<sup>30</sup>

### (b) Relevance

The point has been made in the literature that the types of import surges which were common at the time the GATT was being drafted during the late 1940s were short-term or seasonal in nature.<sup>31</sup> These were the types of emergency situations that the drafters of the GATT attempted to address through Article XIX. As the GATT Executive Secretary admitted in 1964,

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<sup>28</sup> Signatories to the Multifiber Agreement (MFA), concluded under the auspices of GATT, have agreed to a common definition of "market disruption," a concept which arguably is close to the "serious injury" standard in Article XIX. The definition of market disruption appears as Annex A to the MFA. See GATT, ARRANGEMENT REGARDING INTERNATIONAL TRADE IN TEXTILES 20 (1974).

<sup>29</sup> For example, individual country determinations of market disruption and requests for consultations with an exporting country under the MFA must be notified to a standing GATT group, the Textiles Surveillance Body (TSB). The notification must include a factual statement of the reasons and justification for the request, including the latest data concerning elements of market disruption. *Id.* Art. 3.3, at 9.

<sup>30</sup> TOKYO ROUND, *supra* note 2, at 90 (emphasis added).

<sup>31</sup> D.ROBERTSON, FAIL SAFE SYSTEMS FOR TRADE LIBERALISATION 7 1978 (citing GALT, DEVELOPING COUNTRIES IN THE GATT SYSTEM (1978)).

the drafters of Article XIX did not have in their minds the problem which has come to be known as market disruption, that is to say, the disturbance of normal market conditions by a concentration of imports from particular sources of supply at prices substantially below the levels prevailing in the market of the importing country in the conditions of normal competition between supplying countries.<sup>32</sup>

Similarly, the UNCTAD Secretariat has noted that

Article XIX addresses neither the issue of long-term changes in international competitiveness, or the relationship of the Article to the question of development. At the time of negotiating the General Agreement it does not appear to have been envisaged that these broad issues would arise in international trade relationships, and even in an acute form (e.g., steel and textiles); the negotiators were concerned with international trading conditions as they were.<sup>33</sup>

Simply, the drafters of the GATT did not construct Article XIX to deal with the deep-rooted changes in the structure of international trade which have occurred in the last two decades.

The data on notifications in Appendix 2 tend to support this argument. In the 1950s, the time period immediately following the drafting of the GATT, Article XIX was heavily used to address what appears to have been seasonal or cyclical import surges. Out of nineteen actions recorded, eight (forty-two percent) were directed at agricultural or basic commodities (hatters' fur, dried figs, alsike clover seed, apples, strawberries, frozen peas, coal, lead and zinc), presumably the kinds of commodities most susceptible to the short-term trade fluctuations envisioned by the drafters of the GATT.

In subsequent periods, Article XIX was increasingly invoked to deal with emergency situations involving manufactured products, where there is a higher likelihood that import surges were caused by secular changes in the structure of international trade and comparative advantage among nations. In the 1960s, twelve of thirty-six (thirty-three percent) of the Article XIX notifications<sup>34</sup> (timber, linseed oils, lead arsenate, chicken eggs, petroleum and shale oil, turkeys, cheeses, horse meat, oil cakes, corn, potatoes, and raw silk) corresponded to agricultural or basic commodities. In the 1970s, only six of the forty-nine (twelve percent) Article XIX actions (gasoline, cheeses, strawberries, cattle, beef and veal, mushrooms, and brandy) referred to agricultural or basic commodities, the

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<sup>32</sup> "Rationale for Dealing with Market Disruption Through the Application of Article XIX," reproduced as Annex 2 to GATT, *Modalities of Application of Article XIX*, (L/4679) 47 (July 5, 1978).

<sup>33</sup> UNCTAD Secretariat, *An Improved and More Efficient Safeguards System*, (TD/B/978) 20 (Feb. 1984).

<sup>34</sup> For this comparison, the action by Peru on lead arsenate and valves (notification number 33 in Appendix 2) has been treated as two separate cases.

type of products most susceptible to short-term seasonal or cyclical fluctuations. It should be stressed, however, that the statistics above are based purely on the frequency with which Article XIX has been used to address trade problems for different commodities, rather than on a detailed examination of the economic situation underlying each of the actions.

Interestingly, Article XIX notifications in the 1980s are evenly balanced between, on the one hand, agricultural or basic commodities and, on the other, manufactured goods. At the same time, there has been a proliferation of measures which have the same trade-restricting effect as Article XIX safeguards, but which are not taken pursuant to it. As the GATT annual report on international trade developments in 1985-86 describes it,

The current problem is not so much the existence of protection—after all, the GATT rules provide for protection through bound tariffs, as well as various types of temporary increases in import barriers—but rather the form that it is taking and their lack of consistency with GATT rules. Moreover, the GATT system is not only having increasing difficulty in furthering trade liberalization, but also in safeguarding previously negotiated levels of market access.<sup>35</sup>

In its analysis of developments in the trading system over the period April-September 1988, the GATT Secretariat listed over 200 “export restraint arrangements covering either a broad or specific range of items.”<sup>36</sup> These arrangements, which took the form of voluntary export restraints, orderly marketing arrangements, export forecasts, basic price systems, discriminatory import systems, consultation arrangements, industry-to-industry understandings, unilaterally-imposed import allocations, etc., were directed at both manufactured and agricultural products. Product categories most heavily affected by the arrangements were textiles (seventy-one agreements with non-participant countries or with supplier countries concluded outside of the Multifiber Arrangement), agricultural products (fifty-eight arrangements), steel and steel products (fifty-two), electronic products (twenty-three), automobiles and other transportation equipment (twenty), footwear (fifteen), machine tools (thirteen) and miscellaneous products (twenty-five).<sup>37</sup> According to the GATT Secretariat, in several sectors, export restraint arrangements are more important than traditional trade policy measures in affecting trade

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<sup>35</sup> GATT, INTERNATIONAL TRADE 85-86, 28 (Geneva, 1986).

<sup>36</sup> GATT, REVIEW OF DEVELOPMENTS IN THE TRADING SYSTEM: APR.-SEPT. 1988, (L/6435) 133-53 (Nov. 30, 1988), [hereinafter REVIEW]; see also M. KELLY, N. KIRMANI, M. XAFAD, C. BOONEKAMP & P. WINGLEE, ISSUES AND DEVELOPMENTS IN INTERNATIONAL TRADE POLICY, 2 (1988) [hereinafter ISSUES AND DEVELOPMENTS] (noting an increase of export restraint arrangements from 135 to 261, between Sept. 1987 to May 1988).

<sup>37</sup> REVIEW, *supra* note 36 at 67.

flows.<sup>38</sup>

That the drafters of GATT had a specific type of market disruption in mind is evident from their lack of concern regarding the duration of relief. According to Article XIX, concessions can be withdrawn "for such time as may be necessary to prevent or remedy" the injury.<sup>39</sup> The length of time relief might be in place in order to "prevent or remedy" serious injury to a domestic industry is left to the discretion of the invoking party.<sup>40</sup> To be sure, in the case of a shift in trade patterns arising from seasonal or cyclical factors, short-term relief may be able to accomplish these objectives. However, in instances where there has been a shift in comparative advantage in favor of an exporting country or countries, a case could be made that the injury to a domestic industry can only be remedied by permanent restrictions. Because Article XIX fails to place time limits on relief, it appears to sanction permanent restrictions, a concept which runs counter to the temporary nature of relief foreseen by the drafters.<sup>41</sup>

Richardson has observed that although the trading environment has changed radically since Article XIX was drafted, the article itself has not changed, and neither has its interpretation.<sup>42</sup> The most relevant changes in the global economy for the safeguards regime are the growing international mobility of capital and the corresponding amplification of unforeseen adjustment pressures on immobile workers and owners of resources. Thus,

World adjustment problems arguably have become more severe in the past 15 years. Average unemployment rates and excess capacity are higher. Burgeoning, globally integrated financial markets have created volatile changes in exchange rates, international competitiveness, and goods trade. These changes and the strategic sensitivity of multinational firms to governments and each other have aggravated the stimuli prodding workers, farmers, and other owners of immobile resources. Their adjustment problems are made even worse by the potential for substitutability between goods trade and mobile corporate capital. When both goods and firms are internationally mobile, then only slight changes in the economic or the policy environment can bring about striking changes in exports, imports and the livelihood of immobile

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<sup>38</sup> GATT DEVELOPMENTS IN THE TRADING SYSTEM: OCT. 1987 - MAR. 1988, (L/6366) 114 (Aug. 12, 1988).

<sup>39</sup> GATT Art. XIX, para. 1(a).

<sup>40</sup> *Id.*

<sup>41</sup> Of 134 Article XIX actions taken over the period 1950 to 1987, twenty-three had duration of more than five years and thirty-two had duration of three to five years; twenty-six Article XIX measures were in force as of mid-1987. ISSUES AND DEVELOPMENTS, *supra* note 36, at 36. See also Petersmann, *Grey Area Trade Policy and the Rule of Law*, 22 J. WORLD TRADE L. 23 (1988).

<sup>42</sup> D. Richardson, *Safeguards Issues in the Uruguay Round and Beyond*, in ISSUES IN THE URUGUAY ROUND 30 (R. BALDWIN & J.D. RICHARDSON eds. 1988).

factors that are tied closely to them. To a large multinational firm, moving the goods and moving the plant across borders are close substitutes; they are not to the firm's immobile workers and their unions. Displaced workers and mid-level managers who are unable to acquire or transfer skills useful to alternative sectors face long periods of unemployment and below-average earnings.<sup>43</sup>

### (c) Cost

In response to an action by a contracting party under Article XIX, affected parties may "suspend . . . substantially equivalent concessions" previously granted to the invoking party.<sup>44</sup> This means that a contracting party who takes emergency action to deal with sharp increases in imports under Article XIX may be subject to retaliation from the affected parties.

The logic behind this authority to retaliate is the principle of reciprocity. Although nowhere defined in the GATT, the principle of reciprocity is judged as one of the most vital concepts in GATT practice.<sup>45</sup> In GATT usage, the principle of reciprocity means that, in tariff negotiations, contracting parties are required to make tariff concessions (e.g., agree to lower tariffs or refrain from increasing tariffs) only in return for reciprocal concessions from other contracting parties that are judged to be mutually advantageous.

While reciprocity may be essential for tariff negotiations, its role in the regulation of emergency protection is highly questionable. As Tumlrir has argued, very narrowly interpreted, reciprocity tends to equate incremental changes in imports and exports; while perhaps this is a desirable outcome in tariff negotiations, it may not necessarily be desirable in other situations.<sup>46</sup> Thus, he reasons,

[r]eciprocity . . . also means mutual dependence, mutual responsibility and co-operation. Surely it is destructive of the spirit of reciprocity . . . for a country in an emergency to be obliged to pay for taking *bona fide* temporary action, to negotiate such a payment, and to be threatened with retaliation if it does not offer enough.<sup>47</sup>

Although not expressly contained in Article XIX, GATT practice has been for parties granting escape clause relief to offer compensatory concessions to affected trading partners. While compensation has been used sparingly, it has reduced the instances in which retaliation has been

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<sup>43</sup> *Id.* at 32.

<sup>44</sup> GATT Art. XIX, para. 3(a).

<sup>45</sup> DAM, *supra* note 17, at 58-59.

<sup>46</sup> Tumlrir, *supra* note 26, at 408.

<sup>47</sup> *Id.*



resorted to.<sup>48</sup> However, an argument could be made that as average tariffs decline and the number of parties affected by an Article XIX action increase, the ability to redress the effects of emergency actions through compensation may be reduced, and instances of retaliation may become more common.

(d) Cumbersomeness

As a result of several rounds of multilateral trade negotiations on tariffs in the post-War period, average tariffs of industrial countries have been reduced to very low levels. Prior to the most recent round of multilateral negotiations (the Tokyo Round), the trade-weighted average tariff rate of industrial products in developed nations was roughly 7.2%; after the tariff cuts agreed to during the Tokyo Round were fully implemented (cuts were staged over an eight-year period with the final cuts not reached for some products until 1987), the corresponding average rate has been estimated at 4.9%, for an average reduction of 33%.<sup>49</sup> Given this very low level of tariff rates, it has already become cumbersome, and will become more so in the future, for users of Article XIX to offer compensatory concessions in the form of tariff reductions to nations affected by such actions.

To complicate matters, as the structure of international trade has changed, and the number of countries "having a substantial interest as exporters" of a particular product which might be affected by an Article XIX action has grown, application of the Article with respect to compensation and/or retaliation has become exceedingly unwieldy and time-consuming. That a large number of countries are affected results from the GATT "tradition" that remedies pursuant to Article XIX be applied in a non-selective, non-discriminatory manner to all GATT member countries.<sup>50</sup>

Article XIX is silent on whether remedies are intended to be applied on a most-favored-nation (MFN)<sup>51</sup> basis or not. To support the thesis that the drafters of Article XIX had in mind its MFN application, GATT scholars refer to an internal U.S. memorandum prepared at the time of the 1946 London ITO Conference, the conference at which the United States introduced the concept of an escape clause into the docu-

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<sup>48</sup> Petersmann, *supra* note 41, at 36. Through mid-1987, compensation was paid or offered in twenty Article XIX cases, and retaliation against Article XIX actions was resorted to in thirteen cases. *Id.*

<sup>49</sup> TOKYO ROUND, *supra* note 2, at 120.

<sup>50</sup> *Id.* at 90.

<sup>51</sup> As Sauermilch notes, in this context it may be more appropriate to refer to the MFN clause as a "most disfavored nation" clause, since the reference is to trade restrictions rather than trade preferences. Sauermilch, *Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade*, 14 CASE W. RES. J. INT'L L. 83, 95 n.77 (1982).

ment which eventually became the GATT. The memorandum states that, with regard to the escape clauses contained in U.S. bilateral trade agreements after which Article XIX was modelled, the United States "had no authority to take action under such a clause in other than a non-discriminatory manner and therefore must have contemplated its non-discriminatory use."<sup>52</sup>

Further, at the Havana ITO Conference, which took place in November 1947 to March 1948, shortly after the GATT was completed, the parties agreed to an interpretive note which states that actions taken under Article XIX "must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries."<sup>53</sup> But compelling legal arguments have also been made to support the view that selective remedies are not inconsistent with Article XIX and, furthermore, it has been pointed out that GATT Contracting Parties have never unambiguously endorsed the non-discriminatory application of Article XIX.<sup>54</sup>

Diametrically opposed to the argument that MFN application discourages use of Article XIX because of the potentially large number of countries which might be eligible for compensation, but no less important, is the perception that MFN application has given rise to a "reluctance" on the part of some nations to take action on a non-discriminatory basis when products from one or a few countries might be the source of the disruption.<sup>55</sup> According to this view, MFN remedies (particularly quantitative measures) tend to freeze market shares and perpetuate import structure.<sup>56</sup> Particularly affected by these remedies are small and new suppliers, who may find it extremely difficult to place their exports in protected markets.

Critics point to the proliferation of trade restricting measures outside of the GATT (voluntary export restraint agreements and other "grey area" measures) as *prima facie* evidence of the failure of Article XIX and the urgent need for its reform.<sup>57</sup> Critics have argued these

<sup>52</sup> Cited in, *Modalities of Application of Article XIX*, *supra* note 32, at 1-2.

<sup>53</sup> *Analytical Index*, *supra* note 14, at 108. See also, U.S. DEP'T OF STATE, *supra* note 14, Art. 40, at 138.

<sup>54</sup> Bronckers, *The Non-Discriminatory Application of Article XIX GATT: Tradition or Fiction?*, LEGAL ISSUES EUR. INTEGRATION, no. 2 (1981), especially pp. 40-43, 52-53; see also BRONCKERS, SELECTIVE SAFEGUARDS MEASURES IN MULTILATERAL TRADE RELATIONS: ISSUES OF PROTECTIONISM IN GATT, EUROPEAN COMMUNITY AND UNITED STATES LAW (1985). For a critical review of the latter work, see Petersmann, *Economic, Legal and Political Functions of the Principle of Non-discrimination*, 9 THE WORLD ECON. 113-121.

<sup>55</sup> TOKYO ROUND, *supra* note 2, at 90.

<sup>56</sup> *Id.*

<sup>57</sup> *E.g.*, Tumliir, *supra* note 26, at 406; Robertson, *supra* note 1, at 26-27; SAUER MILCH, *supra* note 51, at 117-19; MacBean, *How to Repair the 'Safety Net' of the International Trading System*, 1 THE WORLD ECON. 153 (1978).

measures are not only outside of the GATT framework of rules, but they generally have discriminated against some countries (most often developing countries), have tended to remain in place for long periods of time since there has been little international pressure for removal from nations not directly affected, have led to cartelization of world trade, and have involved no international scrutiny of their justification. In the view of these critics, repair of the Article XIX "safety net" through a multilaterally-agreed code of conduct is a very high priority for GATT contracting parties. Efforts to negotiate a multilateral understanding on safeguards failed during the Tokyo Round of Multilateral Trade Negotiations and subsequent GATT activities. The Uruguay Round provides a new opportunity for such reform to take place.

## 2. Code on Safeguards

### (a) Tokyo Round

In September 1973, 102 countries meeting at the Ministerial level in Tokyo unanimously adopted the Tokyo Declaration<sup>58</sup> and officially launched the Tokyo Round of Multilateral Trade Negotiations (MTN). The aim of the negotiations, as expressed in the declaration, was two-fold: (i) to "achieve the expansion and ever-greater liberalization of world trade. . . which can be achieved, *inter alia*, through the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade;" and (ii) to "secure additional benefits for the international trade of developing countries so as to achieve. . .the acceleration of the rate of growth of their trade. . .[and] an improvement in the possibilities for these countries to participate in the expansion of world trade."<sup>59</sup>

To achieve these aims, the Tokyo Declaration called for negotiations to:

- (i) reduce tariff barriers;
- (ii) reduce or eliminate non-tariff barriers, or their trade-distorting effect, and bring such measures under more effective international discipline;
- (iii) examine the possibilities for the coordinated reduction or elimination of all barriers to trade in selected sectors;
- (iv) examine the adequacy of the multilateral safeguards system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results;
- (v) regarding agriculture, include an approach which recognizes the special characteristics and problems of this sector; and

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<sup>58</sup> TOKYO ROUND, *supra* note 2, at 185 annex.

<sup>59</sup> *Id.*

(vi) treat tropical products as a special and priority sector.<sup>60</sup>

In the context of the present study, three points are significant regarding the negotiating objectives laid down by the signatories to the Tokyo Declaration: First, the singling out of safeguards as an area within the GATT in need of improvement and the explicit link made by the Ministers between improvements to Article XIX and furthering of trade liberalization—no other GATT article was specifically so addressed in the aims of the negotiations. Second, the degree of specificity and urgency in the mandate with regard to negotiations on Article XIX. While on other objectives the Ministers were somewhat vague (e.g., calling for negotiations to “include an examination of the possibilities” for sectoral free-trade agreements), they were quite direct regarding safeguards. And third, the recognition by the Ministers that not only did Article XIX need to be reviewed, but that, perhaps more importantly, the ways in which Article XIX has been implemented needed to be subjected to close scrutiny. Given the directness of the mandate, and the sense of urgency which the Ministers attached to the review, it is striking that the contracting parties could not come to agreement on how to modify the GATT system of safeguards in the Tokyo Round or in subsequent efforts.

In February 1974, the Trade Negotiations Committee, consisting of all the countries participating in the Tokyo Round, established six specialized sub-groups which were charged with doing the preparatory work for the negotiations agreed to in the Tokyo Declaration.<sup>61</sup> A year later (in February 1975), after some of the key countries had obtained the necessary negotiating mandate from their legislators, the Trade Negotiations Committee formally established six groups to conduct the different parts of the negotiations.<sup>62</sup> One of these groups was charged with the safeguards negotiations.<sup>63</sup>

Because of the slow progress being made in the negotiations overall, and also because of the view that negotiations on other issues should lead, safeguard negotiations progressed very slowly. In meetings held during 1975 and 1976, the safeguards group identified key questions it should address. These issues were:

- (i) should safeguard measures be applied on a discriminatory or non-discriminatory basis?
- (ii) should there be a requirement that any safeguard measures be degressive in their effect?

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 8-9.

- (iii) should specific time limits be established during which safeguard measures could be applied?
- (iv) should adjustment assistance be a requirement for the application of safeguard measures?
- (v) how does one provide for sharing the burden among importing nations of disruptive or injurious imports coming from one or a few exporting nations?
- (vi) what conditions constitute market disruption and serious injury?
- (vii) what provisions should be made for international surveillance?<sup>64</sup>

During 1976-77, several developing countries (Brazil, Nigeria and Pakistan) tabled proposals for improving the multilateral safeguards system.<sup>65</sup> They proposed that any new multilateral safeguard system include special rules exempting developing countries from Article XIX measures imposed by developed countries and assurances that safeguards actions would not be targeted selectively against particular countries.<sup>66</sup> Developing countries also proposed that developed countries invoking Article XIX be required to offer adjustment assistance to bring about a shift of resources from the affected industry and into other lines of economic activity. Further, according to the developing countries' proposals, in no case should safeguard measures applied by developed countries be used to affect adversely the growth of developing countries' production and exports.

In April and May of 1978, a group of developed countries known as the "Group of 7" (the United States, the EEC, Japan, Canada, Switzerland, Australia and the Nordic countries) met to develop a common position on safeguards.<sup>67</sup> Working from individual submissions, the group prepared a "Draft Integrated Text on Safeguards" which was circulated for discussion in June 1978.<sup>68</sup> The text was heavily bracketed, reflecting the differing views of the members on certain key points; a headnote made it clear that the document was being issued for discussion purposes only and did not commit any delegation to supporting parts of the text.

Rather than amending Article XIX, the Group of 7 proposed the adoption of an agreement to implement it, or a safeguards code.<sup>69</sup> The proposed code would require that all contracting parties invoking Article XIX meet certain minimum procedural standards relating to criteria for invocation (i.e., injury standard), conditions under which safeguards

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<sup>64</sup> *Id.* at 92-93.

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

<sup>66</sup> G. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 198 (1986).

<sup>67</sup> L. GLICK, MULTILATERAL TRADE NEGOTIATIONS: WORLD TRADE AFTER THE TOKYO ROUND 113 (1984).

<sup>68</sup> GATT, Multilateral Trade Negotiations, Group Safeguards, *Draft Integrated Text on Safeguards*, (MTN/SG/W/39\*) (June 22, 1978), reprinted in GLICK, app. III.

<sup>69</sup> *Id.*

could be imposed (e.g., length of relief), response by the affected parties to Article XIX actions, nature of safeguard actions, the use of export restraints, notification and consultation, surveillance and dispute settlement, domestic procedures to implement safeguard actions, and treatment of developing countries.<sup>70</sup>

Several rounds of discussion on the draft integrated text revealed disagreements on key issues between, on the one hand, the Group of 7 members and the developing countries, and, on the other, among Group of 7 members. Undoubtedly, selectivity in the application of safeguards (i.e., the right to impose safeguard measures only against those countries which are the greatest cause of injury) was the most contentious issue, but there were others as well.<sup>71</sup>

On the issue of selectivity, members of the Group of 7 were divided, with some countries favoring continuation of the GATT practice of MFN application of Article XIX, while others backed a system under which selective action could be taken, although there were differences of opinion regarding whether selective measures could be imposed unilaterally or consensually and whether review by a multilateral surveillance body would occur before or after an action was taken. Developing countries were adamantly opposed to selective safeguards. Other controversial issues were the notions advanced in the integrated draft that developing countries could cease to be treated differentially with regard to certain sectors in which they had attained international competitiveness (i.e., sectoral graduation), the role of export restraints, the criteria for determination of serious injury, the function of the multilateral surveillance and dispute settlement bodies, and the linkage between safeguard actions and domestic adjustment measures.<sup>72</sup>

As the Tokyo Round came to a close in April of 1979, the negotiations on safeguards were deadlocked. In a formal statement issued to close the Tokyo Round, the Trade Negotiations Committee recognized that the work on safeguards called for in the Tokyo Declaration had not been completed, and directed the continuation of negotiations "within the framework and in terms of that Declaration [the Tokyo Declaration] as a matter of urgency, taking into account the work already done, with the objective of reaching agreement before 15 July 1979."<sup>73</sup>

Despite the time extension, very little additional progress was possible. The focus of the supplementary discussions was on the selectivity issue. The positions hardened, with the developing countries insisting on

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

<sup>71</sup> A summary of the views on the key issues of the main participants in the negotiations is given in Merciai, *supra* note 15, at 55-57. See also, *Towards a Reform of the International Safeguards Mechanism*, European Economic Communities Press Release (May 31, 1978).

<sup>72</sup> Merciai, *supra* note 15, at 57.

<sup>73</sup> TOKYO ROUND, *supra* note 2, at 189 annex.

non-discriminatory application of Article XIX and bringing of voluntary export restraint agreements under multilateral rules, while certain developed countries continued to press for a very flexible safeguards system amounting to discretionary authorization of selective measures.<sup>74</sup> On July 26, 1979, when it became apparent that agreement was not reachable, the Group of 7 was disbanded.<sup>75</sup>

(b) Post-Tokyo Round

Undaunted by the failure to reach an agreement during the Tokyo Round, in November 1979 the GATT Council approved continuing negotiations on an improved multilateral safeguards system and established a standing Committee on Safeguards for this purpose.<sup>76</sup> At several meetings held in 1980, 1981 and 1982, the Committee continued to seek a consensus on ways to improve the multilateral safeguards system, but very little progress was made.<sup>77</sup>

At a Ministerial-level session held in November 1982, the GATT Contracting Parties called for a comprehensive understanding on safeguards to be negotiated within the Committee on Safeguards and presented to the Council at its November 1983 session for approval. The understanding was to be

based on the principles of the GATT and contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury and threat thereof, temporary nature, degressivity, structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement with particular reference to the role of the Safeguards Committee.<sup>78</sup>

However, in his report to the Council at the November 1983 session, the Chairman of the Safeguards Committee admitted he was unable to put forward a text containing specific proposals and suggested that efforts should continue in 1984 to accomplish this objective. He summed up the activities of the Committee during the period November 1982 to November 1983 as follows:

A certain progress has been made in further preparing the ground for the comprehensive understanding which Ministers instructed us to seek and which must remain our objective. Our work has shed addi-

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<sup>74</sup> Merciai, *supra* note 15, at 60-61.

<sup>75</sup> *Id.* at 61.

<sup>76</sup> GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, *Safeguards* (L4898) 202 (26th Supp. 1980) [hereinafter this GATT supplementary series publication will be referred to as BISD].

<sup>77</sup> Reports of the meetings held in June and Oct. 1980 are found in BISD, (L/4998 and L/5061), 63-64 (27th Supp. 1981). See also, *GATT Activities in 1981*, 22-24 (Geneva, 1982) and *GATT Activities in 1982*, 36-37 (Geneva, 1983).

<sup>78</sup> BISD, (L/—), 216 (30th Supp. 1984).

tional light on the safeguards issue and revealed new dimensions and facets of this complex problem.<sup>79</sup>

Although informal consultations continued during 1983 and 1984, no significant movement occurred. At the Fortieth Session of the Contracting Parties in November 1984, the Chairman of the Council reported that a mandate by the contracting parties a year earlier to draw up a comprehensive understanding on safeguards to be considered by the contracting parties at their 1984 session had not been fulfilled because of differences of opinion among parties in several areas.<sup>80</sup>

Despite these setbacks, revamping of the safeguards system continues to be a high priority concern. The urgency in strengthening the multilateral safeguards system was highlighted in the report of a group of prominent persons appointed by the GATT Secretary-General in November 1983 to study and report on problems facing the international trading system. Two of the recommendations by this blue-ribbon panel in a widely-circulated report (known as the Leutwiler Report) issued in March 1985 were that:

- (i) when safeguard protection is needed, it should be provided only in accordance to the rules: it should not discriminate between different suppliers, should be time-limited, should be linked to adjustment assistance, and should be subject to continuing surveillance; and
- (ii) a timetable be established to bring into conformity with GATT rules voluntary export restraints and other "grey" area measures which are inconsistent with it.<sup>81</sup>

### (c) Uruguay Round

In October 1985, a special session of Contracting Parties set in motion a preparatory process for a new round of multilateral trade negotiations.<sup>82</sup> In November 1985, at their Forty-First Session, the Contracting Parties formally established a preparatory committee (Prepcom) to determine the objectives, subject matter, modalities for, and participation in, the multilateral trade negotiations and to prepare recommendations for the program of negotiations for adoption at a Ministerial Meeting to be held in September 1986.<sup>83</sup> Among the issues which were highlighted by

<sup>79</sup> *Id.* at 220.

<sup>80</sup> BISD, *Report by the Chairman of the Council to the Fortieth Session of the Contracting Parties* (MDF/4), 136 (31st Supp. 1985).

<sup>81</sup> GATT, *TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION* 38, 42-44 (1985).

<sup>82</sup> The decision of the Contracting Parties at their Fourth Special Session to begin the preparatory process for a round of multilateral trade negotiations is given in BISD, *Decisions and Reports* (L/5876), 9 (32nd Supp. 1986).

<sup>83</sup> BISD, *Decisions and Reports* (L/5925), 10 (32nd Supp. 1986).



the Chairman of the Contracting Parties for the work of the Prepcom were safeguards.<sup>84</sup>

The need to improve the adequacy of Article XIX was also identified as a priority for a new round of trade negotiations in several reports on the subject prepared by academics and research institutions.<sup>85</sup> The consensus of these reports was that improvement of the multilateral safeguards regime in a new round of negotiations would constitute an even greater challenge than in the past, considering the proliferation of what Aho and Aronson have called "bilateral circumventions" of Article XIX (i.e., voluntary export restraints, orderly marketing arrangements, etc.).<sup>86</sup>

The Uruguay Round Declaration, adopted in September 1986, at a special meeting of the GATT Contracting Parties at the Ministerial level in Punta del Este, Uruguay, identified safeguards among subjects for negotiations.<sup>87</sup> It noted that "[a] comprehensive agreement on safeguards is of particular importance to the strengthening of the GATT system and to progress in the MTNs (Multilateral Trade Negotiations)," and directed the negotiation of an agreement on safeguards which:

- (i) shall be based on the basic principles of the General Agreement;
- (ii) shall contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and
- (iii) shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties.<sup>88</sup>

Meeting in January 1987, the Group of Negotiations on Goods (GNG), the body that oversees the conduct of Uruguay Round negotiations on all issues affecting trade in goods, agreed to negotiating structure and negotiating plans for all issues under its domain. The GNG established fourteen negotiating groups, each with a Chairman and operating as a separate entity. One of the groups (Group Number 9) was charged with conducting negotiations on safeguards.<sup>89</sup> The GNG agreed to the following negotiating process for the safeguards group:

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<sup>84</sup> The decision of the Contracting Parties at their Forty-First Session formally establishing the Prepcom and the remarks by the Chairman of the Contracting Parties highlighting safeguards negotiations appear in BISD, *Decision of 28 November 1985 on Establishment of the Preparatory Committee (L/5925)*, 10-11 (32nd Supp. 1986).

<sup>85</sup> A useful summary and critique of four of these reports is given in G. Patterson & E. Patterson, *Importance of a GATT Review in the New Negotiations*, 9 *THE WORLD ECON.* 2 (1986).

<sup>86</sup> M. AHO & J. ARONSON, *TRADE TALKS* 49 (1985).

<sup>87</sup> GATT, Ministerial Declaration on the Uruguay Round, (MIN.DEC) 6-7 (Sept. 20, 1986). The Uruguay Round Declaration is reproduced in *GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT FOCUS NEWSLETTER*, No. 41 (Oct. 1986).

<sup>88</sup> *Id.* at 4.

<sup>89</sup> *Id.*, No. 43, at 3 (Jan. - Feb. 1987).

- (i) Examination of the issues in this area would be carried out with the assistance of papers by participants setting out their specific suggestions for achieving the negotiating objective in this area, and of a paper by the secretariat on relevant work already undertaken in the GATT, including in particular the elements enumerated in the Ministerial Declaration, and any other factual background material as required.
- (ii) Proposals by participants would be examined with a view to drawing up a draft text of a comprehensive agreement as the basis for negotiation.
- (iii) Negotiations will proceed on the basis of the draft text with a view to drawing up and concluding a comprehensive agreement as expeditiously as possible, taking into account that such an agreement is of particular importance to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations.<sup>90</sup>

The first phase of activities (i.e., through the December 1988 Mid-Term Review) of the Negotiating Group on Safeguards was devoted to intensive discussions on each of the elements enumerated in the Punta del Este Declaration of a potential multilateral agreement on safeguards. Reports of the meetings of the Negotiating Group suggest that selectivity continued to be one of the principal stumbling blocks.<sup>91</sup>

For example, the report of the first meeting of the Negotiating Group, held in March 1987, indicates that "the questions of whether or not a safeguard agreement should be based on the principle of non-discrimination. . ." <sup>92</sup> was the source of considerable debate. At the May 1987 meeting of the group, "two proposals, both suggesting that Article XIX actions must continue to be taken on a non-discriminatory basis were presented." <sup>93</sup>

Safeguards was one of the issues on which agreement could not be reached at the December 1988 Mid-Term Review in Montreal. The main contention was that several developing countries insisted that the work plan for the second phase of the negotiations include the following points: (a) safeguard actions should be of limited duration; (b) they should be non-discriminatory; and (c) grey area measures which result in selective application should be proscribed.<sup>94</sup>

At a meeting of the Trade Negotiations Committee at the level of high officials held in Geneva in April 1989, a compromise was reached

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<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.*, No. 45, p. 4 (Apr. 1987).

<sup>93</sup> GENERAL AGREEMENT ON TARIFFS AND TRADE, NEWS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, No. 5, p. 2-3 (July 3, 1987) [hereinafter NEWS OF THE URUGUAY ROUND].

<sup>94</sup> U.S. Trade Representative, *Uruguay Round Progress Report* 16 (Dec. 14, 1988).

that enabled the work of the negotiating group to go forward. The April 1989 compromise suggests that those countries who had sought in Montreal to foreclose the discussion on selectivity gave some ground, in return for an explicit reference to the importance of establishing multilateral control over grey area measures. The text on safeguards agreed to by Ministers stated:

Ministers stress the importance of concluding a comprehensive agreement on safeguards based on the basic principles of the General Agreement which aim to re-establish multilateral control over safeguards, *inter alia*, by eliminating measures which escaped such control. Ministers recognize that such an agreement is vital to the strengthening of the GATT system and to progress in the Multilateral Trade Negotiations. Accordingly, they:

- (a) take note of the in-depth examination of the specific elements which has contributed to a better understanding of the whole issue;
- (b) recognize that, because of the interrelationships between the elements, substantive agreement cannot be reached on individual elements in isolation;
- (c) recognize that safeguard measures are by definition of limited duration;
- (d) in the light of the decision of the Negotiating Group, authorize its Chairman, with the assistance of the secretariat and in consultation with delegations, to draw up a draft text of a comprehensive agreement as a basis for negotiation, without prejudice to the right of participants to put forward their own texts and proposals, preferably before the end of April 1989; and
- (e) agree to begin negotiations on the basis of the draft text by June 1989 at the latest.<sup>95</sup>

#### IV. NATIONAL IMPLEMENTATION OF ARTICLE XIX

As an international agreement, the GATT creates a set of rights and obligations which Contracting Parties each undertake to assume. They do so by adopting legislation which implements, within their borders, the internationally-agreed rules.<sup>96</sup> In many instances, the domestic legislation closely tracks the General Agreement, while in others there are significant differences. Thus, "GATT law leaves to each individual contracting party to decide autonomously on its national level of tariff protection and also provides for generously drafted safeguard clauses."<sup>97</sup>

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<sup>95</sup> GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT FOCUS NEWSLETTER, No. 61, p. 7 (May 1980).

<sup>96</sup> The interplay of international and national legal structures, using the Tokyo Round as an illustration, is explored in Jackson, Louis, & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 268 (1982) [hereinafter *Implementing the Tokyo Round*].

<sup>97</sup> Petersmann, *supra* note 41, at 25.

This section examines domestic legislation to implement Article XIX in four developed nations or entities—the United States, the EEC, Canada and Australia—with the objective of determining the extent to which each of these statutes:

- (i) is consistent with the principles of GATT Article XIX; and
- (ii) incorporates the elements which the GATT Committee on Safeguards, the GATT review group, and the Uruguay Round Ministerial Declaration have identified as being essential for a comprehensive understanding on safeguards.

For comparative purposes, Japan is also examined, although, to date, that nation has not invoked Article XIX to protect domestic industries from import surges.

In particular, domestic safeguards legislation and practice are examined with regard to:

- (a) Transparency;
- (b) Injury standard;
- (c) Type of relief;
- (d) Coverage;
- (e) Length of relief;
- (f) Degressivity;
- (g) Link to structural adjustment; and
- (h) Notification and consultation.

Finally, to test the hypothesis that the disparity across nations regarding the frequency of use of Article XIX is largely attributable to the degree of access which domestic interests have to the legislation,<sup>98</sup> the practice in each nation or entity regarding the procedures to request the initiation of a safeguards action will also be examined.

Recently, Australia (1984) and the United States (1988) have made significant changes to domestic legislation implementing Article XIX. In what follows, both the legislation in force in these two countries prior to the changes and the current legislation are examined.

### 1. *United States*

As mentioned earlier, in 1942 the United States included a safeguards provision in a bilateral trade agreement with Mexico and, in 1947, by Executive Order, the President directed that all future trade agreements contain a safeguards clause. A statutory safeguards provision, tracking Article XIX, was first contained in Section 7 of the Trade Agreements Extension Act of 1951; it was superseded by Section 301 of the Trade Expansion Act of 1962.

The current statutory provisions which implement Article XIX in

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<sup>98</sup> This point is made in WESTERN WORLD, *supra* note 6, at 223-40.

the United States are Section 201-204 of the Trade Act of 1974 (TA), as amended. The Omnibus Trade and Competitiveness Act (OTCA) of 1988, enacted in August 1988, rewrote these sections of the law to encourage positive adjustment by domestic industries, provide provisional relief for perishable agricultural products, and amend rules regarding the timetable for investigations, actions by the President, and post-investigative actions.

(a) Transparency

Section 202 of the TA sets forth the procedures which are to be followed in determining whether there exists injury to a domestic industry caused by import competition. The burden of carrying out such an investigation falls on the U.S. International Trade Commission (USITC), an agency of the U.S. Government independent of the Executive Branch.<sup>99</sup>

Prior to passage of the OTCA, the USITC had to report to the President its findings and their basis within six months after initiating an investigation under Section 201.<sup>100</sup> In cases where import injury was found, the USITC was also charged by law with recommending to the President the amount of the increase in tariffs or the level of quantitative restraint which was necessary to prevent or remedy the injury; the USITC could recommend trade adjustment assistance if it believed this would effectively remedy the injury.<sup>101</sup>

OTCA requires the USITC to submit its determination within 120 days of the filing of a petition unless, before the 100th day, the Commission determines that the investigation is "extraordinarily complicated;" in the latter case, the determination may take an additional thirty days (for a total of 150 days). In cases where import injury is found, the USITC is also charged by law with recommending to the President the amount of the increase in tariffs or the level of quantitative restraint which is necessary to prevent or remedy the injury; the USITC may also recommend one or more adjustment measures, including trade adjustment assistance, if it believes this would effectively remedy the injury.

The OTCA provides accelerated time limits and the institution of provisional relief "when 'critical circumstances' are present or when the investigation concerns a perishable agricultural product."<sup>102</sup> According to the legislation [Section 202(b)(3)(B)], critical circumstances exist "if a substantial increase in imports (either actual or relative to domestic pro-

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<sup>99</sup> *Implementing the Tokyo Round*, *supra* note 96, at 354.

<sup>100</sup> P.L. 93-618, § 201(d)(2).

<sup>101</sup> P.L. 93-618, § 201(d)(1).

<sup>102</sup> Palmeter, *Adjustment to Import Competition: The 'Safeguard' Provision of the Trade Act*, in *THE 1988 TRADE LAW: WHAT IT AFFECTS AND WHAT IT MEANS* 253-54 (D. Birenbaum ed. 1988).

duction) over a relatively short period of time has led to circumstances in which a delay in taking action . . . would cause harm that would significantly impair the effectiveness of such action." Within seven days of receiving an affirmative injury finding and relief recommendation from the USITC, the President is required to proclaim the type and amount of provisional relief, if any, appropriate to address the critical circumstances. This relief continues until replaced with relief proclaimed under Section 203 or modified or discontinued by the President.

When the product on which a petition has been filed is a perishable agricultural commodity, the USITC is required to make a preliminary injury finding and relief recommendation to the President within twenty-one days of filing of the petition. Within seven days the President may proclaim relief provisionally. This relief may be overturned by a negative final injury determination by the USITC.

The statute also requires that the USITC make public the report of its investigation (excluding confidential information) and recommendations and publish a summary in the *Federal Register* [Section 202(f)(3)]. In the course of the investigation, the USITC is required to hold public hearings and afford interested parties (including firms, unions, importers, consumers, foreign governments) the opportunity to be present, to present evidence, and to appear at the hearings [Section 202(b)(4)].

Within sixty days of receiving a report from the USITC containing an affirmative finding of serious import injury, or threat thereof, the President [Section 203(a)] "shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." If the President decides that granting relief is in the national economic interest, he must decide what method and type of import relief will be provided. The President must then transmit to Congress a report indicating the action he has taken. If the President decides that there is no appropriate and feasible action to take, he must so report to Congress, including the reasons for his decision.

The task of reviewing the USITC report and recommending to the President which action he should take has been delegated to the inter-agency trade organization established by Section 242 of the Trade Expansion Act of 1962.<sup>103</sup> This organization is chaired by the United States Trade Representative (USTR) and has representation from other Cabinet agencies.<sup>104</sup> Interested parties are permitted to file briefs with USTR in escape clause cases.

Section 203(c) provides for a Congressional review of Presidential

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<sup>103</sup> *Implementing the Tokyo Round*, *supra* note 96, at 351.

<sup>104</sup> *Id.*

import relief decisions. In instances where the President opts for a form of import relief different from that recommended by the USITC (including a decision not to provide any import relief), Congress could, within ninety days of the date the President transmits the report to Congress, override the President upon the adoption by both Houses of a concurrent resolution disapproving the President's action. In such cases, the USITC-recommended relief would be implemented.

The Supreme Court decision in *Immigration and Naturalization Service v. Chadha*,<sup>105</sup> which ruled the unicameral legislative veto in the Immigration and Nationality Act unconstitutional, put into question the constitutionality of the Congressional review and override provisions in the TA.<sup>106</sup> To reassert its power of disapproval of Presidential escape clause relief decisions in the aftermath of *Chadha*, Congress modified Section 203(c) of the TA. Section 248 of the Trade and Tariff Act of 1984 provides that Congress may override a Presidential relief decision, and implement the USITC-recommended relief plan, if a joint resolution to this effect has been enacted (i.e., it has been passed by both Houses of Congress and signed into law by the President).

#### (b) Injury Standard

Section 202(b)(1)(A) of the OTCA directs the USITC to conduct an investigation to determine ". . . whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."

This injury standard differs from that contained in GATT Article XIX in several ways: (i) while Article XIX requires that the increase in imports be unforeseen and tied to a trade concession, no such linkage is required in the U.S. legislation; (ii) while Article XIX requires the offending imports to be *both* increasing in quantity *and* subject to "certain conditions" (e.g., abnormally low prices) in order to be injurious, the U.S. statute only requires that "an article. . .[is being] imported. . .in such increased quantities;" and (iii) while Article XIX requires that the imports cause, or threaten, "serious injury" to a domestic industry, the U.S. legislation requires that they be, or threaten to be, "a substantial cause of serious injury." Section 202(b)(1)(B) defines "substantial cause" as a cause which is "important and not less than any other cause."

While the terms "serious injury," "threat of serious injury," or

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<sup>105</sup> 462 U.S. 919 (1983).

<sup>106</sup> For a thoughtful analysis of the *Chadha* decision and its possible implications for the escape clause veto, see Note, *An Escape for the Escape Clause Veto?*, 8 MD. J. INT'L L. & TRADE 277 (1984).

“substantial cause” are not defined in the statute,<sup>107</sup> Section 202(c) gives guidance to the USITC regarding some of the factors which should be taken into account in considering these concepts:

**REGARDING SERIOUS INJURY:** (i) the significant idling of productive facilities in the domestic industry; (ii) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profits; and (iii) significant unemployment or underemployment within the industry.

**REGARDING THREAT OF SERIOUS INJURY:** (i) a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry; (ii) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development; and (iii) the extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets.

**REGARDING SUBSTANTIAL CAUSE:** An increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

Further, in making its injury determinations, the statute directs the USITC to take into account the condition of the domestic industry over the course of the relevant business cycle and other factors—other than imports—which may be a cause of serious injury. Finally, the statute states that “the presence or absence of any factor which the Commission is required to evaluate. . . is not dispositive” of whether or not injury, or threat of injury, is present.

### (c) Type of Relief

The following remedies were available to the President in safeguards actions [Section 203(a) of the TA]:

- (i) an increase in, or imposition of, any duty;
- (ii) a tariff-rate quota;
- (iii) modify, or impose, any quantitative restriction;
- (iv) negotiate orderly marketing agreements (OMAs) with foreign countries to limit exports to the United States; or
- (v) a combination of the above remedies.

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<sup>107</sup> Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 547, 588 (1987) makes the point that not only has the Congress chosen not to define these terms, amendments in the Trade and Tariff Act of 1984 suggest that Congress opposes any movement in this direction. The same comment is applicable to the OTCA.



The OTCA added five other remedies to the above list:

- (vi) implement one or more adjustment measures, including the provision of TAA;
- (vii) establish procedures to auction import licenses to permit the allocation among importers of quantities of the product allowed by quotas;
- (viii) initiate international negotiations to address the underlying cause of the rise in imports or to alleviate the injury;
- (ix) submit to Congress legislative proposals to facilitate efforts by the domestic industry to make a positive adjustment to import competition; and
- (x) take any other action under the authority of law that the President considers appropriate and feasible.

Notwithstanding the openendedness of the relief options, there are statutory limits on the maximum level of relief which can be proclaimed. Thus, Section 203(e)(3) [formerly Section 203(d)(1)] provides that when increasing or imposing duties, a rate may not be imposed which is "more than 50 percent ad valorem above the rate (if any) existing at the time the action is taking." Similarly, Section 203(e)(4) [formerly Section 203(d)(2)] states that when imposing relief in the form of a quantitative restriction (including OMAs), the level of restraint will not be "less than the quantity or value of such article imported into the United States during the most recent period that is representative of imports of such article." Article 203(f) [formerly Section 203(e)(2)] permits modification of the type of relief after it has been implemented by sanctioning negotiation of OMAs to replace previously-proclaimed relief in another form (i.e., duty increases, tariff-rate quotas, or quantitative restraints).

#### (d) Coverage

Section 126(a) of the TA stipulates that "any duty, or other import restriction or duty-free treatment" proclaimed under the Act be applied to products from all foreign countries, i.e., on an MFN basis, unless explicitly exempted in the Act or in other legislation. Section 203(k) of the TA provided one such exemption regarding safeguards actions, "but only after consideration of the relation of such actions to the international obligations of the United States." This provision was eliminated in the OTCA. In practice, however, the United States has implemented safeguards relief in a nondiscriminatory, or MFN, basis.

Thus, in determining whether there has been import injury in safeguards cases, U.S. law directs that imports from all sources be considered. Similarly, relief actions in the form of tariff increases or quantitative restrictions have also been aimed at all sources of imports, consistent with the provisions of GATT Article XIII (requiring contracting practices imposing quantitative restrictions to "aim. . . at a distri-

bution of trade. . .approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions”).

The only exception to the MFN application of safeguards relief arises when the President opts for proclaiming relief in the form of negotiated orderly marketing agreements (OMAs) with selected foreign suppliers. If negotiated OMAs are ineffective in providing effective relief, the law [Section 203(f)(2), formerly Section 203(e)(3)] permits the President to proclaim a different form of relief (i.e., quotas, tariff increases, tariff-rate quotas, or a combination), presumably on an MFN basis.

### (e) Length of Relief

Section 203(h)(1) of the TA stipulated that relief granted under the safeguards provisions had a time limit of five years. However, relief could be extended (before it expired) for one three-year period if the President determined that doing so was in the national economic interest [Section 203(h)(3)]. In making such a determination, the President had to take into account the advice of the USITC regarding the probable economic effect of the extension of relief on the industry concerned as well as other factors. Since Section 203(i) provided that no investigation under Section 201 could be made regarding articles which received safeguards relief until two years after that relief had expired, it was not possible statutorily to receive continuous safeguards relief for more than eight years.

The OCTA modified the TA with respect to extension of relief. Section 203(e)(1) states that the length of time safeguards relief can be in effect shall not exceed eight years; should the initial effective period for relief be less than eight years, the President could extend the relief period once, but the total length of relief (the initial period plus the extension) could not exceed eight years.

However, relief may be reduced or terminated by the President under certain conditions. Pursuant to Section 203(h)(4) of the TA, the President could modify import relief at any time, whenever he determined that doing so was in the national economic interest. In making such a determination, the President had to take into account the advice of the USITC and seek advice from the Secretary of Commerce and the Secretary of Labor that reducing or terminating relief was in the national interest. Under the OTCA [Section 204(b)], the President can modify relief *after* he receives the first relief monitoring report by the USITC (due on the second anniversary of granting of relief). The President can modify relief if, based on this report plus advice from the Secretaries of Commerce and Labor, he determines that:

- (i) the domestic industry has not made adequate efforts to make a positive adjustment to import competition; or
- (ii) the effectiveness of the safeguard action has been impaired by changed economic circumstances that warrant modification.

The President may also modify relief if he determines, after a majority of the representatives of the domestic industry submits a petition for modification, that the domestic industry has made a positive adjustment to import competition.

(f) Degressivity

Section 203(e)(5) [formerly Section 203(h)(2)] provides for the progressive liberalization, to the extent feasible, of escape clause import relief granted for more than three years; the liberalization may take the form of an increment in the level of imports which may be entered (if relief took the form of a quota or an OMA) or entered at pre-relief tariff rates (in the case of a tariff-rate quota), or of a reduction in the additional rate of tariff imposed.

The liberalization of relief is to take effect not later than in the fourth year of relief. In cases where import relief was extended beyond the time period for which it was originally proclaimed, Section 203(h)(3) of the TA stipulated that the level of relief could be no greater than what it was immediately before the extension. This latter provision has been dropped in the OTCA amendments.

(g) Link to Structural Adjustment

Even before passage of the OTCA, escape clause relief in the United States was linked to adjustment. The language of the TA, as well as the reports of the House and Senate Committees considering the legislation, make it abundantly clear that in drafting Sections 201-203 Congress was concerned with facilitating the adjustment of industries affected by imports. That escape clause import relief was perceived as an instrument for structural adjustment is reinforced by two of its characteristics: temporary and degressive. The intent of the Congress was to create the conditions so that, at the end of the relief period, industries receiving relief would find themselves in a different footing *vis-à-vis* imports than before.

Thus, Section 201(a)(1) of the TA stated that the purpose of relief was "facilitating orderly adjustment to import competition." This linkage between relief and adjustment was elaborated upon in the Senate Finance Committee Report on the TA:

The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international

competition.”<sup>108</sup>

Although not explicitly defined either in the legislation or in the Committee reports, “adjustment” could be construed, within the context of Sections 201-203, to encompass not only the modernization and increased competitiveness of an industry (e.g., through increased investment) but also its “orderly” contraction. Thus, Section 201(a) requested petitioners to indicate the purpose for which relief was being sought, among which is “the orderly transfer of resources to alternative uses.” According to the House Ways and Means Committee Report, the “fundamental purpose” of safeguards relief was

...to give additional time to permit a seriously injured domestic industry to adjust and to become competitive again under the relief measures and, at the same time, to create incentives for the industry to adjust, if possible, to competitive conditions in the absence of long-term import restrictions.<sup>109</sup>

Finally, in determining whether relief was in the national economic interest, Section 202(c)(3) required that the President take into account “the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the Nation’s economy.” As stated in the Senate Finance Committee Report,

The escape clause is not intended to protect industries which fail to help themselves become more competitive through reasonable research and investment efforts, steps to increase productivity and other measures that competitive industries must continually undertake.<sup>110</sup>

That the purpose of escape clause relief is to promote adjustment by U.S. producers to import competition is clearly set forth in the OTCA. Section 201(a) states that, pursuant to an injury finding by the USITC, the President shall

take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

Positive adjustment to import competition has occurred [Section 201(b)] when:

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<sup>108</sup> SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974: REPORT OF THE COMM. ON FINANCE, S. REP. NO. 1298, 93d Cong., 2d Sess. 119 (1974) [hereinafter COMM. ON FINANCE].

<sup>109</sup> HOUSE COMM. ON WAYS AND MEANS, TRADE REFORM ACT OF 1973: REPORT OF THE COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, TOGETHER WITH DISSENTING VIEWS TO ACCOMPANY H.R. 10710, H.R. DOC. NO. 571, 93d Cong., 1st Sess. 44 (1973).

<sup>110</sup> COMM. ON FINANCE, *supra* note 108, at 122.

- (i) the domestic industry is able to compete successfully with imports after actions taken under Section 204 terminate or it experiences an orderly transfer of resources to other productive pursuits; and
- (ii) dislocated workers in the industry experience an orderly transition to productive pursuits.

The statute clarifies that an industry could be considered as having made positive adjustment to import competition even if the industry does not have the same size and composition as it had at the time an escape clause investigation was initiated.

Petitioners may submit to the USITC and the United States Trade Representative a plan to facilitate positive adjustment to import competition; prior to submitting such a plan, petitioners may seek consultations with relevant government agencies. The plan is considered by the USITC in making its recommendation for remedy to the President, and by the President in deciding what relief, if any, to impose.<sup>111</sup> Whether or not an adjustment plan is submitted, in the course of its investigation, the USITC will seek information on actions being taken, or planned, by firms and workers in the industry to make a positive adjustment to import competition and will take that information into consideration in its deliberations.

#### (h) Notification and Consultation

There are no specific provision in Sections 201-204 of the TA regarding notification of escape clause actions to the GATT or to affected trading partners. As a matter of practice, however, the United States Government does notify the GATT Council [under Article XIX(2)] of the initiation of escape clause investigations and of all other significant milestones in the process. The same information is also transmitted to trading partners through diplomatic channels. Similarly, there are no formal escape clause consultation procedures in the TA although trading partners may request them to offer their views regarding any aspect of a case. In instances where relief is granted in the form of authority to negotiate OMAs, the USG initiates contact with specific trading partners identified as OMA candidates.

Under U.S. law, initiation of a safeguards investigation can originate with the private sector or with the government. Under Section 201(a)(1) of the TA, a petition for safeguards relief could be filed by "an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry." An investigation could also be instituted at the request of the President or the United States Trade Representative, upon resolution of either the Committee on

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<sup>111</sup> Suchman, *Adjustment to Import Competition: Section 201*, THE 1988 TRADE LAW: WHAT IT AFFECTS AND WHAT IT MEANS 249 (D. Birenbaum ed. 1988).

Ways and Means of the House of Representatives or the Committee on Finance of the Senate, or by the USITC on its own motion. These provisions were not modified (other than by changes in section numbers) by the OTCA.

In practice, escape clause investigations have been initiated overwhelmingly at the request of the private sector, primarily a firm or a trade association, sometimes with support of a labor union.<sup>112</sup> Out of fifty-five safeguard investigations instituted by the USITC since the effective date of the TA and through September 30, 1985, only seven (thirteen percent) resulted from a request from the government: one each by the President (Mushrooms, investigation number 201-17), the United States Trade Representative (Stainless steel and alloy tool steel, 201-48), and the USITC (Clothespins, 201-36); and two each by the Committee on Ways and Means (High-carbon ferrochromium, 201-35; Bolts, nuts and large screws, 201-37) and by the Finance Committee (Sugar, 201-16; Footwear, 201-18.)<sup>113</sup>

## 2. *European Economic Community*

The Treaty of Rome, which created the European Economic Community (EEC), provided for the elimination of tariffs and removal of other restrictions on trade among member nations to be accomplished within a twelve-year transition period. Recognizing that the external trade policies pursued by member states could jeopardize the expansion of internal trade, the drafters of the Treaty of Rome provided for the progressive establishment of a common external commercial policy.

The establishment of an external common commercial policy (CCP) is provided for in Articles 3b and 110-116 of the Treaty of Rome. Article 3b provides for the establishment of the common external tariff, while Articles 110-116 provide for coordination of member states' policies regarding commercial relations with other countries. Other relevant articles are those which relate to implementation of the common external tariff (Articles 18, 25 and 27-29) or to imports and exports of agricultural products (Articles 40 and 43).<sup>114</sup> On the export side, the main instruments of the CCP are export controls and export promotion measures,

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<sup>112</sup> In a review of the implementation of the escape clause, the General Accounting Office (GAO) recommended that the TA be amended to "prohibit one segment of the manufacturing process (e.g., labor or management) to petition, unless it is evident that this is the only segment from which specific adjustment commitments will be sought." GAO REP. TO CONG. 52 (Aug. 5, 1981). No change has been made to the law in response to the GAO recommendations.

<sup>113</sup> Based on information in Office of the U.S. Trade Representative, *Trade Action Monitoring System* (mimeographed, Sept. 30, 1985).

<sup>114</sup> P.J.G. KAPTEYN AND P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 359 (1973). See also Le Tallec, *The Common Commercial Policy of the EEC*, 20 INT'L AND COMP. L.Q. 732 (1971); D. SWAN, THE ECONOMICS OF THE COMMON

including export subsidies. On the import side, they are the common external tariff, quantitative restrictions, and safeguard measures.

By the end of the transition period (Jan. 1, 1970), important steps had been taken in creating the CCP. A common external tariff was adopted on July 1, 1968. In December 1968, the EEC issued a list of products whose importation into the EEC was liberalized,<sup>115</sup> and established common rules applicable to imports from certain third countries.<sup>116</sup> Subsequently, these rules have been modified several times to expand the list of liberalized products and to limit the ability of member states to take safeguard measures independently.<sup>117</sup>

The current EEC common import rules from countries other than state-trading countries, the People's Republic of China and Cuba, are contained in Regulation 288/82, adopted by the Council on February 5, 1982.<sup>118</sup> Article 1.2 sets forth that

"Importation into the Community of the products referred to in paragraph 1 [i.e., all EEC imports excluding textile products as well as any imports from state-trading countries, the People's Republic of China and Cuba] shall be free and not subject to any quantitative restriction."<sup>119</sup>

Exceptions to the above are products subject to quantitative restrictions maintained on the grounds of public morality, public policy or public security or for the protection of the health of humans, animals or plants, national treasures or industrial and commercial property, etc., and safeguard measures.

Title V of Regulation 288/82 contains the safeguards provisions. Two types of safeguards measures are provided: an interim fast-track safeguards action which can be implemented at once by the Commission subject to review and approval by the Council (Article 15), and a more permanent safeguard which may be adopted by the Council (Article 16).

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MARKET (1984) (primarily chs. 1 and 5); Dahrendorf, *External Relations of the European Community*, SEARCH OF A NEW WORLD ECONOMIC ORDER (H. Corbett & R. Jackson eds. 1974).

<sup>115</sup> Regulation No. 2041/68, 18 O. J. EUR. COMM. (No. L. 303) 1ff (1968).

<sup>116</sup> Regulation No. 2045/68, 18 O.J. EUR. COMM. (No. L. 303) 43 (1968).

<sup>117</sup> Regulation No. 1025/70, O.J. EUR. COMM. (No. L 124) 6 (spec. ed. 1970II); Regulation No. 1439/74 17 O.J. EUR. COMM. (No. L 159) 1 (1974); Regulation No. 926/79 22 O.J. EUR. COMM. (No. L 131) 15 (1979).

<sup>118</sup> Regulation No. 288/82, 25 O.J. EUR. COMM. (No. L 35) 1 (1982). Two important articles on this regulation, on which we have drawn substantially, are VOLKER, *The Major Instruments of the Common Commercial Policy*, PROTECTIONISM AND THE EUROPEAN COMMUNITY (J. BOURGEOIS ed., 2nd ed. 1987); Lussenburg, *New EEC Safeguard Measures: Regulation 288/82*, 16 CASE W. RES. J. INT'L L. 337 (1984). Common rules for imports from state-trading countries and from the People's Republic of China, respectively, are addressed by Regulation No. 1765/82, 25 O.J. EUR. COMM. (No. L 195) 1 (1982) and Regulation No. 1766/82, 25 O.J. EUR. COMM. (No. L 195) 21 (1982).

<sup>119</sup> *Id.*

In its Preamble, Regulation 288/82 states that Community protective measures must be adopted "with due regard for existing international obligations"<sup>120</sup> and there is an explicit reference to GATT Article XIX.

(a) Transparency

Titles II and III of Regulation 288/82 lay down consultation and investigation procedures to be followed prior to implementing safeguards measures. The first step in the process is the establishment of an Advisory Committee, formed of representatives of Member States, to review requests for safeguards measures (Article 5.1). The Committee reviews the data provided by the petitioner and, if after consultation, it is apparent that there is sufficient evidence to justify an investigation, the opening of an investigation is announced in the *Official Journal of the European Communities*. The legislation is silent on how long this review may last, but in one case, the investigation was instituted approximately fifty days after the request for the safeguards measure.<sup>121</sup> The announcement gives a summary of the information received and indicates how, and within what period of time, interested parties may submit information and their written views (Article 6.1). In the same case mentioned above, a period of thirty days was established for interested parties to submit information and views.<sup>122</sup>

The investigation is carried out by the Commission. The Commission may check the validity of information it has received with importers, traders, agents, producers, trade associations and organizations. It may be assisted in this task by the staff of the Member State on whose territory the investigation is being carried out (Article 6.2). The Commission may also hear natural and legal persons provided they have made a request in writing to appear, can show that they are likely to be affected by the outcome of the investigation, and can show that there are "special reasons" for them to be heard orally (Article 6.4). However, the "special reasons" are not defined in the Regulation.

There is no procedure in the Regulation whereby interested parties may be able to challenge the investigation process, its results, or the decision of the Commission although it has been pointed out that EEC exporters, importers, and producers may have standing to bring a claim

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<sup>120</sup> This point is made in I. VAN BAELE & J.F. BELLIS, *INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY* 164 (1985).

<sup>121</sup> In a case involving imports of tableware and other articles of common pottery and stone-ware, the request for safeguards measures was presented on April 14, 1982, and the notice of initiation of investigation was published on June 8, 1982. The notice of investigation appears in 25 O.J. EUR. COMM. (No. C 144) 3 (1982).

<sup>122</sup> *Id.*



before the European Court of Justice.<sup>123</sup> Member States may, within one month of the communication of a decision by the Commission on a safeguard measure, refer the decision to the Council for confirmation, amendment, or revocation. If within three months of referral of the matter to the Council the latter has not given a decision, the measure taken by the Commission is deemed revoked (Articles 15.5 and 15.6).

Notwithstanding the above, it is not clear that these elaborate consultation and investigation procedures will actually be used. Under the fast-track procedures of Article 15, the Commission must decide within five days whether or not to maintain a safeguard action taken by a Member State, subject to an appeal procedure to the Council. Arguably, this five day period would only permit a superficial investigation and would not give sufficient opportunity for interested parties to record their views. Article 15 also authorizes the Commission, of its own initiative, to impose immediate safeguard measures and, in these instances, an investigation is not required. Article 7.4 does provide for the possibility of a retroactive investigation, but the Article is sufficiently vague so that such an exercise may not need to be undertaken.

#### (b) Injury Standard

Regulation 288/82 authorizes the imposition of safeguards measures

. . . where a product is imported into the Community in such greatly increased quantities and/or on such terms as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products.<sup>124</sup>

There are several differences between the injury standard in the Regulation and Article XIX: (i) while Article XIX requires that the increase of imports be unforeseen and linked to a trade concession, there is no such linkage in the Regulation; (ii) while Article XIX requires the offending imports to be *both* increasing in quantity and subject to "certain conditions" (e.g., abnormally low price) in order to be injurious, the Regulation establishes that they would be so if either they increased, *or* they were imported under such conditions as to cause injury, *or both*;<sup>125</sup> and (iii) while Article XIX requires that the imports cause or threaten "serious injury" to domestic producers, Regulation 288/82 requires that

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<sup>123</sup> This point is made in Lussenburg, *supra* note 118, at 351. To my knowledge, no case has been brought to date against measures adopted pursuant to Regulation 288/82.

<sup>124</sup> Regulation 288/82, 25 O.J. EUR. COMM. (No. L35) 1 (1982).

<sup>125</sup> Van Bael and Bellis make the point that in practice, injury determinations under Regulation 288/82 have always been based on the twin findings that the volume of imports of the relevant product has increased and that the prices of these imports were undercutting the price of the like Community product. A finding that the prices of imported products undercut those of domestic products has been made in all the cases where protective measures have been adopted under Regulation 288/82. VAN BAEL & BELLIS, *supra* note 120, at 176-77.

“substantial injury” be inflicted on Community producers. It is not clear whether these two injury standards represent the same level of injury, as neither Article XIX nor the Regulation actually define these terms.

Regulation 288/82 does include (Article 9) a series of factors which will be examined in order to determine whether or not there is actual or threat of substantial injury caused by imports:

- (i) the volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;
- (ii) the prices of the imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community; and
- (iii) the consequent impact on the Community producers of similar or directly competitive products as indicated by trends in certain economic factors such as:
  - production
  - stocks
  - sales
  - market share
  - prices (i.e., depression of prices or prevention of price increases which would normally have occurred)
  - profits
  - return on capital employed
  - cash flow
  - employment.

In cases where a threat of injury is alleged, the Commission “shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury” and may take into account:

- (i) the rate of increase of the exports to the Community; and
- (ii) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community.

The interim safeguard (Article 15.1) requires that, in addition to meeting the injury or threat of injury standard, there also be present “a critical situation, in which any delay would cause injury which it would be difficult to remedy.” Presumably, this is a higher level of injury than in other cases, but the Regulation does not elaborate on what set of factors would constitute a “critical situation.”

### (c) Type of Relief

The only type of relief measure sanctioned by Regulation 288/82 is a quota. Quotas may be established at the regional, member State, or

Community-wide levels. In establishing the quota, Article 15.2 directs the Commission to take note of:

- (i) the desirability of maintaining, as far as possible, traditional trade flows;
- (ii) the volume of goods exported under contract on normal terms and conditions before the entry into force of the measure; and
- (iii) the need to avoid jeopardizing achievement of the aim pursued in establishing the quota.

The cryptic third condition above may refer to additional actions which may be necessary should patterns of trade shift over time as a result of a quota on a single, or a few, trading partners.

Students of Regulation 288/82 have made the point that forms of relief other than quotas may be permissible. For example, according to McGovern:

Possibly because the regulations providing for protective measures are also the ones which establish a regime for imposing quantitative restrictions, Community safeguard actions rely exclusively on quotas. However, Article XIX of the General Agreement allows the use of tariff increases, and these can probably be regarded as coming within the language of the regulations.<sup>126</sup>

Similarly, Van Bael and Bellis<sup>127</sup> have noted that whereas the language of Articles 15 and 16 is broad enough to cover any form of protective measures, including the institution of a tariff quota, Community institutions thus far have only resorted to quotas in implementing Regulation 288/82.

#### (d) Coverage

There is room for ambiguity in Regulation 288/82 regarding the issue of whether the safeguard measures are to be implemented on a non-discriminatory, or MFN, basis. The preamble to the Regulation indicates that one of its objective is to adopt a system of measures which would safeguard Community interests "with due regard for existing international obligations."<sup>128</sup> However, the nondiscriminatory application of safeguards is not mentioned in the operative part of the regulation.

A case could be made that, despite the allusion in the preamble, Regulation 288/82 has been devised in such a way as to sanction selective safeguards, a view which would be consistent with EEC positions on this issue in the negotiation of a code on safeguards. Several references in the body of Regulation 288/82, and the record of its application, tend to support this view.

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<sup>126</sup> MCGOVERN, INTERNATIONAL TRADE REGULATION, *supra* note 24, at 309.

<sup>127</sup> VAN BAEL & BELLIS, *supra* note 120, at 181.

<sup>128</sup> Regulation 288/82, 25 O.J. EUR. COMM. (No. L35) 1 (1982).

For example, according to Regulation 288/82, one of the factors which may be relied upon to determine whether there is a threat of import injury is the "export capacity in the country of origin or export" (Article 9.2). The implication is that where exports from a single country are responsible for the threat of injury, the remedy would be tailored in such a way as to limit imports from the offending nation. Further, in taking a safeguard action, Article 15.2 states that the Commission will attempt to maintain "traditional trade flows," a condition which might discriminate against countries which are recent suppliers.

A safeguards case regarding imports into France and the United Kingdom of tableware and other stoneware articles pursuant to Regulation 288/82 illustrates the compatibility of the Regulation with a regime of selective safeguards. For example, the notice of initiation of an investigation in this case states:

The Commission has been informed. . .that imports of tableware and other articles. . .originating in certain third countries, in particular South Korea and Taiwan, have increased and that they are taking place under conditions likely to cause injury to a Community industry.<sup>129</sup>

The Commission's notification that a global quota had been established, published in the *Official Journal of European Community*, makes no reference to specific countries. However, the notification repeats the allegation of French producers that imports from third countries, particularly from South Korea and Taiwan, were likely to be injuring domestic producers. No information is given in the notification as to how the global quota would be allocated among suppliers.

Subsequent developments in this case suggest that the intent of the relief may have been to control exports from one or a few countries. Shortly after the safeguard action was implemented, the Commission repealed it as it was deemed to be unnecessary in view of the undertaking by the Government of South Korea to voluntarily limit exports of the products in question to France and the United Kingdom.<sup>130</sup> No reference is made in the Commission's statement regarding what undertakings, if any, were received from Taiwan and from other nations presumably also affected by the action. Based on the undertaking by the Government of South Korea, the Council subsequently confirmed the Commission's decision to repeal the safeguards measure.<sup>131</sup>

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<sup>129</sup> 25 O.J. EUR. COMM., *supra* note 121, at 3.

<sup>130</sup> 26 O.J. EUR. COMM. (No. L 96) 8-9 (1983). See also VAN BAEL & BELLIS, *supra* note 120, at 198.

<sup>131</sup> 26 O.J. EUR. COMM. (No. L 200) 43 (1983).

(e) Length of Relief

Regulation 288/82 is silent regarding the length of time a safeguards measure may be maintained. To be sure, the interim safeguards measures permitted by Article 15 are time-limited, as a Member State may refer the decisions to the Council and the latter may revoke them. However, measures instituted by the Commission or a Member State and confirmed by the Council, or instituted by the Council under Article 16, arguably may be of a permanent nature. In practice, safeguard actions taken by the EEC have been for a limited time period. For example, the action taken with regard to tableware and stoneware imports was for a three year period.

Article 18 does provide for the possibility of a Member State or the Advisory Committee to request consultations within the Committee for the purpose of ascertaining whether the application of a given measure is still necessary. Presumably, should the Committee find that a measure is no longer necessary, it may propose to the Council that it be revoked.

(f) Degressivity

Regulation 288/82 is also silent on the issue of whether safeguard restrictions must be liberalized over time. The relief instituted by the Commission in the tableware and stoneware safeguards action, to which reference has been made above, was in the form of a three year quota at the same level for each year. However, the three year voluntary restraint agreement negotiated with South Korea did provide for a very limited expansion over time (about two percent per annum) in the allowed volume of exports.

(g) Link to Structural Adjustment

Regulation 288/82 does not establish any explicit connection between safeguards measures and the structural adjustment process. Since the relief provided by safeguards measures instituted under Regulation 288/82 may be permanent and invariant, it can be argued that such relief may impede, rather than promote, structural adjustment. With regard to safeguard measures taken through May 1985, there was no indication that they were linked to any restructuring plan of the Community industry concerned.<sup>132</sup>

(h) Notification and Consultation

Regulation 288/82 does not contain provisions regarding notification of the GATT or of trading partners prior to, or after, imposition of safeguards measures. During the investigation process, interested parties

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<sup>132</sup> VAN BAELE & BELLIS, *supra* note 120, at 185.

may submit their views, but there is no procedure whereby exporting nations may be notified of the proceedings or consulted regarding any alternative approaches to remedy import injury. However,

[i]n practice, the Commission affords all interested parties the opportunity of making their views known both in writing and orally. The private parties that most often avail themselves of this opportunity are importers of the products under investigation as well as retailers and wholesalers' trade associations. Governments of the affected exporting countries also present their views to the Commission in writing and orally.<sup>133</sup>

Most likely, in safeguards cases, the Commission follows general notification and consultation procedures. Thus, safeguard actions taken under Regulation 288/82 have been routinely notified to the GATT under Article XIX(2) and there is evidence from the mentioned case on tableware and stoneware that the Commission consults with affected foreign nations.

Actions under Regulation 288/82 can be initiated by a Member State,<sup>134</sup> by the Commission or by the Council. Private parties (e.g., a firm, an industry association, a group of workers) cannot directly initiate a safeguards case, although they can influence their national government (i.e., a Member State), the Commission, or the Council, to do so on their behalf.<sup>135</sup>

### 3. Canada

There are now three ways in which Canadian legislation provides for safeguard actions to be taken:

- (i) under Section 8 of the Customs Tariff Act, if in the judgement of the Minister of Finance goods are being imported into Canada under such conditions as to cause or threaten serious injury to Canadian producers of like or directly competitive products;
- (ii) under the authority of Section 5 of the Export and Imports Permits Act based on a finding by the Textile and Clothing Board or the Canadian Import Tribunal (which superseded the Anti-dump-

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<sup>133</sup> *Id.* at 189.

<sup>134</sup> It is not clear whether Member States still have the authority to institute safeguards measures on their own behalf, i.e., without requesting the Commission to do so. The article in Regulation 288/82 which permitted Member States to take interim safeguards actions (Article 17) was due to expire on Dec. 31, 1984. Prior to that date, the Commission was supposed to develop revised rules for these measures, for consideration by the Council prior to the end of 1984. As of the fall of 1985, the Commission had not yet published the amended rules, and therefore it can be presumed that Article 17 is no longer in effect. According to Yannopoulos, as of 1985 Member States are obliged to ask in advance the agreement of the Commission before they take safeguards actions. Yannopoulos, *The European Community's Common External Commercial Policy: Internal Contradictions and Institutional Weaknesses*, 19 J. WORLD TRADE L. 456 (1985).

<sup>135</sup> VAN BAELE & BELLIS, *supra* note 120, at 189.

- ing Tribunal) that imports are causing or threatening serious injury to domestic producers; and
- (iii) under the Meat Import Law of 1982 regarding imports of fresh, chilled or frozen beef and veal, whenever circumstances in both the domestic and world markets combined are likely to cause injury to domestic producers.<sup>136</sup>

In addition, since 1979 the Canadian government has adopted a fast-track safeguard mechanism to protect horticultural interests affected by imports originating primarily from the United States.<sup>137</sup> These administrative procedures were announced by the Minister of Agriculture in 1979 and are imposed under authority of the Customs Tariff Act.

(a) Transparency

According to Section 8(1) of the Customs Tariff Act, safeguards measures may be imposed provided it has been established that imports cause, or threaten, serious injury to domestic producers based on:

- (i) a report by the Minister of Finance;
- (ii) an inquiry made by the Canadian Import Tribunal under Section 48 of the Special Import Measures Act; or
- (iii) in the case of textile and clothing products, an inquiry made by the Textile and Clothing Board under the provisions of the Textile and Clothing Board Act.

The Canadian Import Tribunal, which superseded the Anti-dumping Tribunal effective December 1, 1984, now makes injury determinations in antidumping, countervailing duty and safeguards cases. The Canadian Import Tribunal is

an independent, quasi-judicial tribunal, whose mandate is to inquire as to whether the importation of goods is causing material injury to Canadian producers or is retarding the establishment of production in Canada and to determine appropriate action.<sup>138</sup>

These investigations result in the issuance of findings by the Tribunal; on the basis of the findings, National Revenue, Customs and Excise levy antidumping or countervailing duties. In safeguard cases, the Tribunal issues reports which "assist the government in determining whether safeguard actions should be taken respecting other imports."<sup>139</sup>

The Tribunal is composed of five members, appointed by the Canadian government to serve terms of seven years. There is also the possibil-

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<sup>136</sup> MINISTRY OF EXTERNAL AFFAIRS, A REVIEW OF CANADIAN TRADE POLICY: A BACKGROUND DOCUMENT TO CANADIAN TRADE POLICY FOR THE 1980S 137 (1983) [hereinafter REVIEW OF CANADIAN TRADE POLICY].

<sup>137</sup> *Id.* at 138.

<sup>138</sup> CANADIAN IMPORT TRIBUNAL, ANNUAL REPORT 1984 at 9 (1985).

<sup>139</sup> *Id.*

ity of appointing up to five temporary members for up to three years. The Tribunal has the status in Canada of a court of record, and its findings are appealable to the Federal Court of Canada on points of law.

Upon receipt of a reference from the Governor in Council, the Secretary of the Import Tribunal publishes in the *Canada Gazette* a "Notice of Commencement of Inquiry" setting forth the legal authority for the inquiry, the subject of the inquiry, the dates for written submissions, instructions regarding treatment of confidential information, whether the Tribunal has been directed to hold public hearings, etc. A copy of the Notice of Commencement of Inquiry is sent to all known domestic producers and trade associations and to the government of any country considered by the Tribunal as having an interest in the inquiry. In the process of its investigations, the Tribunal generally conducts hearings, which are normally open to the public. Interested parties may make representations before the Tribunal; the Tribunal may subpoena any person and require that person to give evidence at a hearing. Reports of the safeguards investigations are generally made public and summaries are published in the annual reports of the Tribunal.

Inquiries pursuant to safeguards cases "are advisory rather than adjudicative, and any action which may follow is decided by the Governor in Council who is not bound by the Tribunal's report."<sup>140</sup>

### (b) Injury Standard

Emergency import action under the Customs Tariff Act may be taken if it has been established that

. . . goods of any kind, that are the product of any country, are being imported into Canada under such conditions as to cause, or threaten serious injury to Canadian producers of like or directly competitive products.

Similarly, under the authority of Section 5(2) of the Export and Import Permits Act, safeguard actions may be taken where it appears that

. . . goods of any kind are being imported or are likely to be imported into Canada at such prices, in such quantities and under such conditions as to cause or threaten serious injury to the production in Canada of like or directly competitive goods. . .

The injury standard in the Canadian safeguards legislation differs from that in GATT Article XIX in two respects: (i) while Article XIX requires that rising imports be unforeseen and tied to a trade concession, there is no such linkage in the Canadian legislation; and (ii) while Article XIX requires the offending imports to be *both* increasing in quantity and "subject to certain conditions" to be injurious, the Canadian legisla-

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<sup>140</sup> *Id.* at 10.



tion requires only that importation occur "under such conditions." Canadian legislation is consistent with Article XIX with regard to severity of the injury: both Article XIX and Section 8(1) of the Customs Tariff Act provide that the injury caused by imports must be "serious."

(c) Form of Relief

The only remedy possible under the Customs Tariff Act is the imposition of a surtax. The legislation does not set any limit on the rate of surtax which may be imposed; it does provide, however, that

. . . no such rate shall, at the maximum, exceed the rate that in the opinion of the Governor in Council is sufficient to prevent further injury or the threat of injury.

It has been reported that the rate of surtax has usually been established "at 50 to 100 percent of the value for duty or at a level representing the difference between an established floor price and the export selling price."<sup>141</sup>

Notwithstanding the above discussion, it appears that the Customs Tariff Act also permits safeguards relief in the form of tariff-rate quotas. Thus, according to Section 8(1)(e), imports may be subject to a surtax

. . . at a rate specified in the order that varies from time to time as the quantity of such goods imported into such region or part of Canada during a period specified in the order equals or exceeds totals specified in the order. . .

Safeguards relief in the form of quantitative restrictions is provided for in the Export and Import Permits Act. Products may be placed on the Import Control List (ICL) solely for the purpose of monitoring trade flows [Section 5(3)], in which case import permits are issued as matter of course, or for the purpose of limiting imports pursuant to a safeguards action [Section 5(2)]. In the latter case, import permits are restricted and are determined on the basis of an import allocation scheme set up by the Department of External Affairs. Quota levels are generally fixed with reference to the level of imports in a recent representative period, usually the average of the last three years.

(d) Coverage

Canadian application of safeguards appears to be generally consistent with the GATT principle of nondiscriminatory application. Thus, with regard to a safeguards action taken in 1971,

. . . Canadian authorities went to exhaustive lengths to ensure an equi-

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<sup>141</sup> Sarna, *Safeguards Against Market Disruption—The Canadian View*, 10 J. WORLD TRADE L. 361 (1976).

table application of the global quota that was imposed in terms of precise product definitions, price-breaks, establishment of country reserve quotas within the global quota, allocation of quotas to historical importers on the basis of past performance, allocation of a fixed percentage of the quota to new importers, and the provision of unreserved quota in which both new and traditional suppliers could compete. In fact, Canada exceeded its obligations under this escape clause since a global quota made available on a first-come first-served basis would have been adequate.<sup>142</sup>

Similarly, in 1976, Canada imposed quantitative restrictions on clothing imports under Article XIX safeguards. Regarding this action, it has been noted that "in accordance with Article XIX rules, the restrictions were applied on a non-discriminatory basis."<sup>143</sup>

Notwithstanding the above, Canada has pursued a solution to certain import problems by resorting to voluntary export restraint arrangements with specific suppliers in lieu of global safeguard measures. It has been suggested that voluntary export restraints are "the least painful and by far the preferred form of special measures for protection in Canada."<sup>144</sup> An example of this type of arrangement is the one negotiated with Japan regarding automobiles. As a publication of the Ministry of External Relations describes it, "discussions with Japan have led to that country exercising self-restraint in the export of automobiles, a measure analogous to safeguard action, as it did in the late 1950s and 1960s regarding export of non-textile low-cost consumer products such as stainless steel flatware."<sup>145</sup>

#### (e) Length of Relief

Emergency import actions taken under the Customs Tariff Act are temporary and may not be in effect for a period exceeding three years; they may be revoked at any time pursuant to a resolution to this effect adopted by both Houses of Parliament. In those instances when the relief action is taken pursuant to a report of the Minister of Finance (as opposed to a finding of injury by the Canadian Import Tribunal or the Textile and Clothing Board), the measure expires after 180 days unless:

- (i) an extension is approved by both Houses of Parliament;
- (ii) the Canadian Import Tribunal reports to the Governor in Council (pursuant to Section 48 of the Special Import Measures Act) that the goods are still being imported into Canada (from the country or countries named in the report) under such conditions as to

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<sup>142</sup> *Id.* at 357.

<sup>143</sup> STONE, CANADA, THE GATT AND THE INTERNATIONAL TRADE SYSTEM 109 (1985).

<sup>144</sup> Sarna, *supra* note 141, at 357.

<sup>145</sup> REVIEW OF CANADIAN TRADE POLICY, *supra* note 136, at 137-38.

- cause or threaten serious injury to Canadian producers of like or directly competitive products; or
- (iii) where the imports are textile and clothing goods within the meaning of the Textile and Clothing Board Act, the Textile and Clothing Board reports that the goods are still being imported into Canada from the country or countries named in the report under such conditions as to cause or threaten serious injury to Canadian producers of like or directly competitive products.

Under the authority of the Export and Import Permits Act, products can be added to the ICL for the purpose of limiting their importation pursuant to a safeguards action. According to Section 5 of the Act, a product may not remain in the ICL beyond three years.

(f) Degressivity

Canadian safeguards legislation does not specifically provide for degressivity of tariff or quantitative relief measures.

(g) Link to Structural Adjustment

Canadian safeguards legislation does not provide an explicit link between relief and structural adjustment. However, to the extent that either tariff or quantitative relief measures are temporary, there is an implicit recognition that structural adjustment should occur during the period of relief.

(h) Notification and Consultation

There are no specific provisions in the Canadian safeguards legislation regarding notification of safeguards actions to the GATT or to affected trading partners. However, as a matter of practice, Canada does notify the GATT of safeguards actions and routinely consults with parties affected by such actions.

Safeguard actions in Canada are initiated by a government department. Such an initiative may result from letters and complaints from businessmen and citizens directed at a department, from ministers themselves, or from Members of Parliament concerned about market disruption attributable to imports. In general, there is no general right of direct petition for safeguards actions in Canada, with the limited exception of textiles and clothing products (under the Textile and Clothing Board Act) and petitions for removal of items from the Generalized System of Preferences.

#### 4. *Australia*

In Australia, import barriers can be adjusted, pursuant to the Customs Tariff Act, through two different types of procedures:

- (i) "administrative" procedures, in which administrators are given responsibility for applying narrowly-defined technical criteria to determine whether a variation should be made; and
- (ii) "public" procedures, involving general criteria and wide public participation.

Administrative procedures are generally used in the area of "trade policy," which includes trade agreements with other countries (bilateral and multilateral), preferential trade agreements, and commodity agreements. Among the adjustments subject to the public procedures is the imposition of temporary safeguards relief.<sup>146</sup>

(a) Transparency

The Industries Assistance Commission (IAC) is an independent, advisory body, responsible for conducting public inquiries and advising the government on assistance to industries. The term "assistance," as defined in the Industries Assistance Commission Act of 1973, is very broad, including measures provided:

- (i) on a long-term basis so as to develop a particular industry structure;
- (ii) on a temporary basis to offset some particular short-term fluctuation in the business environment or to provide a greater period for adjustment to a change in circumstances than would otherwise be available; and
- (iii) to compensate factors for the disruptive effects of change, or to facilitate the movement of resources into particular activities.<sup>147</sup>

Pursuant to (ii) above, Part IV of the Industries Assistance Commission Act of 1973 established a Temporary Assistance Authority (TAA) charged with inquiring into, and reporting on, whether urgent action should be taken to provide assistance to an industry experiencing difficulties from import competition.<sup>148</sup> Acting on a "reference" (referral) by the Minister for Business and Consumer Affairs, the TAA was normally required to report within forty-five days:

- (i) whether it was necessary that urgent action be taken to provide assistance to that industry; and
- (ii) if such urgent action was necessary, the nature and extent of the assistance that the Authority recommended should be provided to the industry (Section 30).

In October 1984, the Industries Assistance Commission Act of 1973

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<sup>146</sup> Industries Assistance Commission, *Annual Report 1981-82* Ch. 3, "Co-ordinating Tariff Administration." (1982).

<sup>147</sup> Organization for Economic Cooperation and Development, *Transparency for Positive Adjustment* 41 (1983).

<sup>148</sup> *Id.*

was amended. Among the principal changes instituted effective October 1984 were the abolition of the TAA and revisions to the provisions relation to temporary assistance. Functions previously carried out by the TAA have been absorbed by the IAC.

Initiation of inquiries are made public through publication in the *Gazette*. Inquiries are held in public and evidence is taken under oath or affirmation (Section 32), except where confidential information is involved, in which cases the information may be taken in private. The IAC (and, prior to October 1984, the TAA) may summon a person to appear before it to present testimony or to produce books and documents necessary for conducting the inquiry. Reports on the inquiries are made publicly available. In addition, the IAC must submit an annual report to the government on:

- (i) the assistance provided to industries by the Commonwealth Government and the effect of that assistance on the development of those industries;
- (ii) the economic performance of those industries and the principal factors affecting that performance; and
- (iii) the general effect on the Australian economy of the provision of that assistance.

It is generally recognized that Australia excels in the transparency of its assistance to domestic industries, including safeguards import relief.<sup>149</sup> For instance, a broad study of analytical methods for evaluation of the economic effects of government policy interventions, with particular reference to subsidies and other forms of assistance, conducted by the Organization for Economic Cooperation and Development (OECD) concludes that the IAC

is notable in that it has been created specifically to evaluate governmental programmes of assistance to industry on an impartial basis using advanced techniques of economic analysis. . . . [T]his body has had some notable success in publicising economic consequences of proposed subsidy programs in Australia and thus influencing public opinion with regard to these.<sup>150</sup>

#### (b) Injury Standard

Section 30(A)(3) of the Industries Assistance Act of 1973 directed the TAA to inquire

whether. . . goods are being imported in such increased quantities as to

<sup>149</sup> On this point, see Snape, *Australia's Relations with GATT*, 60 THE ECON. REC. 16, 22 (Mar. 1984).

<sup>150</sup> *Transparency for Positive Adjustment*, supra note 148, at 46.

cause or threaten serious injury to that industry in relation to like or directly competitive goods produced by the industry. . .

This injury standard differed from that contained in GATT Article XIX in two ways: (i) while Article XIX requires that the increase in imports be unforeseen and tied to a trade concession, no such linkage was required in the Australian legislation; and (ii) while Article XIX required the offending imports to be *both* increasing in quantity *and* subject to "certain conditions" in order to be injurious, the Australian statute merely required that the items be "imported in such increased quantities." Both the Australian legislation and GATT Article XIX required that the imports caused or threatened "serious injury" to a domestic industry.

The October 1984 amendments deleted the above import injury standard and did not substitute any other formulation in its place. Pursuant to the current legislation (Section 29A), the IAC

shall have regard for the desire of the Commonwealth Government that temporary assistance be provided to an industry . . . only if there has been a change in the circumstances under which the relevant industry, or a group of industries that includes the relevant industry, operates.

To fall within the purview of the law, the change of circumstances is one that:

- (i) is largely outside of the control of the relevant industry;
- (ii) is peculiar to, or is having a particularly severe impact on, the relevant industry or a group of industries that includes the relevant industry; and
- (iii) has caused, or threatens, serious injury to the relevant industry.

Although the IAC legislation does not explicitly specify objective criteria with regard to the determinants of serious injury or the threat of serious injury, the inquiry process generally covers the following factors:

- (i) detailed analyses of the condition of the domestic industry (output, employment, investments, profits);
- (ii) the current condition of the domestic market of the industry (orders, stocks, market shares, imports); and
- (iii) other factors affecting the domestic industry's competitive position.

### (c) Type of Relief

Pursuant to Australian legislation, temporary safeguards relief may take the form tariff increases or quantitative import restrictions. Although the point has been made that the Australian Government has a strong preference for relying on tariffs, rather than on quantitative re-

strictions, whenever it is necessary to provide temporary import relief,<sup>151</sup> the record on temporary relief actions under Article XIX notified by Australia to the GATT does not bear this out. Thus, out of thirty-nine safeguard actions officially notified by Australia to the GATT over the period 1950-88, twenty-six (sixty-seven percent) proclaimed relief in the form of quantitative restraints while thirteen (thirty-three percent) relied on tariff increases (see Appendix 2).

#### (d) Coverage

Australia applies safeguards on a nondiscriminatory basis. Quantitative restrictions generally take the form of a global quota, apportioned among all suppliers on the basis of trade performance in an earlier period.

Several examples of Australia's strong backing for the principle of nondiscrimination in trade policy have been given in the literature:

- (i) Australia's withdrawal (in 1976) from the Multifiber Arrangement, which provides for bilateral restraint arrangements that by their very nature are discriminatory between countries; Australia now uses global tariff-quotas for restraints of clothing, textiles and footwear imports;
- (ii) during the Tokyo Round of trade negotiations, Australia opposed amending Article XIX of the GATT or changing its interpretation to permit selective application of safeguard measures;
- (iii) also during the Tokyo Round, and subsequently, Australia has argued that Codes emerging from the round should be applied to all parties, rather than only to code signatories;<sup>152</sup> and
- (iv) in the Uruguay Round safeguards negotiations, Australia was one of five "Pacific Rim" countries who presented a negotiating proposal in May 1987 suggesting that safeguard measures should be clearly non-discriminatory.<sup>153</sup>

#### (e) Length of Relief

Safeguards relief pursuant to the Industries Assistance Commission Act of 1973 was granted for a twelve month period [Section 30(D)(1)]. Prior to the expiration of the relief period, the Minister could extend it for another twelve month period on the advice of the TAA or the IAC. Whenever relief was likely to be in force for more than two years, the industry had to be referred to the IAC for a review.<sup>154</sup> As amended in October 1984, the Industries Assistance Commission Act appears to preclude extension of relief beyond the original twelve month period.

<sup>151</sup> P. J. LLOYD, *NON-TARIFF DISTORTIONS OF AUSTRALIAN TRADE* 12 (1973).

<sup>152</sup> Snape, *supra* note 149, at 20.

<sup>153</sup> NEWS OF THE URUGUAY ROUND, *supra* note 93.

<sup>154</sup> *Transparency for Positive Adjustment*, *supra* note 147, at 41

## (f) Degressivity

There are no provisions in the Industries Assistance Commission Act for degressivity of safeguards relief.

## (g) Link to Structural Adjustment

Pursuant to Section 30 (1)(b) of the Industries Assistance Commission Act of 1973, in cases in which the TAA found that urgent action should be taken to provide assistance to an industry that was experiencing difficulty by reason of the importation of any goods, the Authority was required to report the nature and extent of the assistance that should be provided. In making this recommendation, the TAA was bound by the guidelines of the IAC, namely,

- (i) improving the efficiency with which the economy uses its resources;
- (ii) ensuring a consistent industry policy;
- (iii) taking account of the interests of consumers and users of products affected by the IAC's proposals; and
- (iv) providing for public scrutiny of assistance measures.<sup>155</sup>

The IAC was required to ensure that any measures to achieve changes in the structure of industry were recommended only after having due regard to the capacity of the economy to sustain such changes and to absorb any members of the work force displaced by those changes.<sup>156</sup>

The IAC was also required (Section 45 of the Act) to report annually on its operations, including:

- (i) the assistance provided to industries by the Commonwealth Government and the effect of that assistance on the development of those industries;
- (ii) the economic performance of those industries and the principal factors affecting that performance; and
- (iii) the general effect on the Australian economy of the provision of that assistance.

The IAC could not include recommendations for changes in the nature or extent of the assistance provided to particular industries, but could include recommendations for changes in the nature or extent of the assistance provided by the Commonwealth Government to industries generally.

In the Industries Assistance Commission Act currently in force [Section 22(1)], the Commonwealth Government lays out the following policy guidelines for the IAC to take into account in performing its functions:

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<sup>155</sup> *Id.* at 44.

<sup>156</sup> *Id.*



- (i) to encourage the development and growth of Australian industries that are internationally competitive, export-oriented and capable of operating over a long period of time with minimum levels of assistance;
- (ii) to facilitate adjustment to structural changes in the economy by industries and persons affected by those changes, and to minimize social and economic hardships arising from those changes; and
- (iii) to recognize the interests of other agencies, and of consumers, likely to be affected by measures proposed by the Commission.

#### (h) Notification and Consultation

Although there are no specific requirements in the Industries Assistance Commission Act regarding notification of safeguards relief to the GATT, as a matter of practice the Government of Australia does make such notifications pursuant to Article XIX(2).

There is no general right of direct petition for safeguards actions in Australia. An investigation into whether imports have disrupted the domestic market by the IAC is triggered by a "reference" from the Minister with jurisdiction over the IAC; prior to 1984, investigations by the TAA were triggered by the Ministry for Business and Consumer Affairs. During the 1970s and early 1980s, the IAC fell under the jurisdiction of the Minister for Business and Consumer Affairs; in the mid-1980s, the IAC was shifted to the Treasury portfolio.<sup>157</sup> The appropriate Minister may take such a step on his own initiative or as a result of appeals from domestic industries, from citizens, or from other members of the government.

#### (5) Japan

The main instruments of Japanese control over imports are the Control Law, the Transactions Law and the Customs Tariff Law.<sup>158</sup> In addition, several other laws (twenty-seven as of 1982) control imports of specific products.

Article 52 of the Control Law provides that any person wishing to import a commodity into Japan may be required to obtain approval do so in the form of an import control order issued by the Cabinet.<sup>159</sup> There is no explicit requirement in the statute of a finding of serious injury to a domestic industry prior to the imposition of an import order. On their face, import restrictions pursuant to Article 52 of the Control Law are inconsistent with Article XIX safeguards since they are not predicated

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<sup>157</sup> INDUSTRIES ASSISTANCE COMMISSION, INQUIRY PROCEDURES 1 (1988).

<sup>158</sup> IMPLEMENTING TOKYO ROUND, *supra* note 96, at 315.

<sup>159</sup> *Id.*

on a finding of serious injury to the domestic industry due to increases in imports.

In addition to providing a broad import approval system, Article 52 of the Control Law also authorizes the Ministry of International Trade and Industry (MITI) to establish an import quota system for specific items.<sup>160</sup> While import controls may be related to various purposes, the most important is the protection of domestic industries. In cases where MITI has established an import quota, importers must obtain MITI's approval prior to applying for an import license. Reportedly, this system was widely used during the 1950s and 1960s to restrict imports into Japan. More recently, the number of items controlled by the import quota system declined significantly, but residual restraints remain on imports of:

- (i) meats and dairy products;
- (ii) marine products;
- (iii) miscellaneous beans and oil seeds;
- (iv) fruits, vegetables and preparations thereof;
- (v) cereals;
- (vi) coal; and
- (vii) hides and leather products.<sup>161</sup>

Pursuant to the Transactions Law, Japanese importers of a commodity may enter into an agreement to fix purchase price, limit quantities to be purchased, set minimum quality standards, or restrict import channels, without running afoul of the Japanese anti-monopoly laws.<sup>162</sup> In order to be able to enter into such an agreement, one of the following conditions must be met:

- (i) there must be substantial restraint of competition or a monopoly in the country or place of export to Japan of the commodity in question;
- (ii) an import agreement is necessary to carry out an agreement between the Japanese government and the government of the exporting country; or
- (iii) a pooling of the demand for a raw material through an import agreement is necessary to insure that there is a sufficient demand in Japan for the raw material to be exploited in a foreign country, thereby facilitating the exploitation and development of this raw material in the foreign country.<sup>163</sup>

Import agreements have been used in at least two instances, to regulate imports of scrap iron from the United States (1975) and silk from China

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<sup>160</sup> *Id.* at 316.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 316-17.

<sup>163</sup> *Id.* at 317 (*quoting* Yushutsunyu torihiki ho (Export and Import Transaction Law, Law No. 299 of 1952 (as amended), Article 7-2(1)).

(1976).<sup>164</sup>

A third important statute regulating imports is the Customs Tariff Law.<sup>165</sup> Pursuant to this law, the Government of Japan is authorized to enforce customs valuation procedures, impose antidumping and countervailing duties, and proclaim special tariff increases.<sup>166</sup> Article 9-2 authorizes the imposition of an emergency tariff, in addition to the regular tariff, when

. . . due to a sharp decline in the price or other unforeseeable changes in the exporting country, there is a sudden increase in imports to Japan, causing material injury to a domestic industry that competes with the imported commodity, or when a threat thereof exists. . .<sup>167</sup>

It appears that the procedure for imposing emergency tariffs under Article 9-2 of the Customs Tariff Law generally tracks Article XIX in that: (i) it is designed to deal with unforeseen increases in imports; and (ii) a finding of material injury to the domestic industry, or a threat of injury, is required in order to trigger the imposition of the special tariff.<sup>168</sup>

Reportedly, the special tariffs authorized by the Customs Tariff Act have been used very seldom.<sup>169</sup> The relatively rare use of these special tariffs may be related to the very high level of overall protection of the Japanese market provided by the import quota system which was in effect until the late 1960s.<sup>170</sup> The process of gradual liberalization of the Japanese market which has taken place since the late 1960s has coincided with a period in which Japanese industries generally have been quite competitive internationally, therefore not requiring additional import protection.<sup>171</sup>

In fact, in the thirty-three year period since accession to the GATT in 1955 through 1988, Japan has not notified a single instance of use of emergency import relief under the Customs Tariff Act on Article XIX grounds. Japanese Government officials justify the lack of reliance on safeguard measures to assist specific industries on a reluctance to appear to be favoring one domestic industry over others.<sup>172</sup>

Nevertheless, certain Japanese industries have faced structural decline either as a result of shrinking demand for their outputs (e.g., shipbuilding), lack of competitiveness stemming from high energy costs (e.g., petrochemicals, aluminum), or the emergence of new competitors (e.g.,

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<sup>164</sup> *Id.* at 317.

<sup>165</sup> *Id.* at 319.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Conversations held by the author with Japanese Government trade officials.

textiles and apparel). To promote adjustment in these declining industries, in July 1978, Japan adopted the Structurally Depressed Industries Law. Pursuant to this law, qualifying industries are eligible for a number of government policy measures, including financial aid to finance scrapping of excess capacity, exemption from antitrust legislation to form recession cartels, and special employment legislation which facilitates transferring out of excess labor from declining industries.<sup>173</sup> The legislation was modified and renewed in 1983.<sup>174</sup> To our knowledge, import restrictions are not among the measures authorized under the Structurally Depressed Industries Law.<sup>175</sup>

Heretofore declining industries in Japan have been associated with either a collapse in world demand or with increased competition in third markets (i.e., a loss of export markets). Should Japan continue its import liberalization program, it may find in the near future that domestic industries also lose competitiveness in the domestic market. Continuation of recent import trends<sup>176</sup> may bring increased pressure from domestic industries on the Japanese Government to limit imports.

## V. CONCLUSION

Through its thirty-nine year history, Article XIX has been invoked by GATT contracting parties an average of less than four times per year. The relative infrequent use of Article XIX is symptomatic of its weaknesses and limitations. It was not designed to deal with current economic realities, it is too costly and cumbersome to use, and its implementation lacks international discipline. The charge has been made that nations facing disruptive import surges increasingly circumvent Article XIX and use more "pragmatic"—and often GATT inconsistent—measures to address their import problems.

Law and practice in the United States, the EEC, Canada, and Australia related to implementation of escape clause import relief generally follows the spirit, if not the letter, of Article XIX. With respect to some issues, national practice in all four countries or entities diverts from the GATT rules (i.e., with regard to the requirement that import surges be

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<sup>173</sup> See, e.g., G. R. Saxonhouse, *Industrial Restructuring in Japan*, J. JAPANESE STUD. 273, 304-20 (1979); Boyer, *How Japan Manages Declining Industries*, FORTUNE (Feb. 10, 1983) at 58; R. M. Uriu, *The Declining Industries of Japan*, 38 J. INT'L AFF. 99 (1984); Wheeler, Janow & Pepper, *Japanese Industrial Development Policies in the 1980's*, 1982 HUDSON INST. See especially Ch. VII, "Policies for Declining Industries"; and GAO, *Industrial Policy: Japan's Flexible Approach*, ID-82-32 (June 1982), especially Ch. 5, "Industrial Policy in the Declining Sectors."

<sup>174</sup> Johnson, *The Institutional Foundations of Japanese Industrial Policy*, 27 (No. 4) CAL. MGMT REV. 59 (1985)

<sup>175</sup> A summary of the provisions of the law is given in Saxonhouse, *supra* note 173, at 315.

<sup>176</sup> See, e.g., Darlin, *Japan is Getting a Dose of What it Gave the U.S.: Low-Priced Imports*, *The Wall St. J.* 1, 17 (Jul. 20, 1988).

related to specific concessions), identifying some areas that are ripe for change in the current GATT safeguards regime. With regard to other issues, on which arguably Article XIX is not entirely clear (e.g., selectivity, type of relief action), there are differences in national law and practice. Not surprisingly, there is a close correlation between differences among contracting parties in national legislation and unresolved issues in the negotiations on a safeguards code.

With regard to transparency, all four nations or entities undertake thorough investigations of the economic merits of petitions for escape clause relief and afford interested parties—including importers—an opportunity to present views. In the United States, Canada and Australia, these investigations are conducted by quasi-governmental bodies—in the United States by International Trade Commission, in Canada by the Canadian Import Tribunal and in Australia by the Australian Industries Assistance Commission (earlier, the Temporary Assistance Commission)—while in the EEC the investigation is conducted by the EEC Commission. Canada, the EEC and the United States (since 1988) also have provisions for fast-track import relief. In Canada, these provisions are applicable only to horticultural imports (originating primarily in the United States). In the EEC, fast-track relief (pursuant to Article 15 of Regulation 288/82) is not limited to perishable products, although, in practice, its application seems to have been directed at such products. The fast-track escape clause in the United States is only applicable to perishable products.

Canadian and Australian legislation have adopted the same import injury standard (“serious injury”) as Article XIX. The injury standard in the EEC’s legislation (“substantial injury”) appears very close to that in Article XIX as well. In the United States legislation, however, imports must be “a substantial cause of serious injury,” arguably a higher standard of injury than required in Article XIX, as “substantial cause” has been defined in the U.S. legislation as a cause which is no less important than any other cause. Consistent with Article XIX, legislation in all four countries or entities recognize the concept of prospective injury (i.e., the threat of injury) and sanction relief in such circumstances. The legislation of all four countries or entities appear to ignore the Article XIX requirements that the increase in imports: (1) be unforeseen; and (2) result from GATT obligations.

United States legislation authorizes safeguards relief in the form of tariff increases, imposition of a quota or a tariff-rate quota, negotiation of an OMA with one or more exporting countries, or a combination of the above.<sup>177</sup> Canadian and Australian legislation permits increasing tariffs

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<sup>177</sup> The OTCA also permits other forms of non-trade policy relief in escape clause cases. These other forms of relief are described in the text.

or imposing quantitative restrictions and, in the case of Canada, also imposing tariff-rate quotas. The only type of relief authorized by EEC legislation is quantitative restraints.

As might be expected considering positions taken during the various attempts to negotiate a code on safeguards, there are significant differences among countries regarding the coverage of safeguards. Domestic legislation tends to be vague on whether safeguards actions are to be taken on an MFN basis or against specific suppliers.

It can be argued that in practice, the United States, Canada and Australia have generally applied Article XIX safeguards on an MFN basis. The situation *vis-à-vis* the EEC, traditionally a supporter of selective measures in the safeguards code negotiations, is somewhat unclear. However, it appears that selectivity is not incompatible with EEC safeguards legislation and practice.

Regarding the time limits for safeguards relief, there are differences across the four countries or entities. In Australia, relief could only be imposed for a twelve month period, subject to one extension for another twelve month period. Thus, granting relief for a period beyond the two years required a review by the Industries Assistance Commission. Statutory changes introduced in 1984 appear to ban extension of relief beyond the original twelve month period. Canadian legislation limits safeguards relief to three years. In the United States, safeguards relief could be granted for up to five years with a possible extension of relief for up to three additional years. The OTCA permits relief for up to eight years, with no possibility for extension. In the EEC, fast-track safeguards measures are time-limited, but actions initiated by the Commission or a Member State, and confirmed by the Council, or initiated by the Council, appear to have no statutory time limit.

Safeguards legislation in the United States explicitly provides for progressive liberalization of relief, whenever it is granted for a period longer than three years. This liberalization may take the form of an increment in the level of imports which may be entered (if relief took the form of a quota or an OMA), or entered at pre-relief rates (in the case of a tariff-rate quota), or of a reduction in the additional rate of tariff imposed. Further, whenever relief was extended beyond its original duration, it could not provide a higher level of protection than it did immediately before the extension.<sup>178</sup> The safeguards legislation of Canada, Australia and the EEC are silent on the issue of degressivity. For Canada and Australia, this silence may be a function of the very short period of time for which safeguards relief may be authorized. Although not explicitly contained in the statute (i.e., Regulation 288/82), it ap-

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<sup>178</sup> This latter provision has been mooted by changes in the OTCA that do not permit extension of relief beyond an eight year period.

pears that in practice the EEC sometimes liberalizes quotas pursuant to safeguards relief.

The link between safeguards relief and structural adjustment in the legislation of the four countries or entities analyzed ranges from moderate to nonexistent. To the extent that safeguards relief is temporary in the United States, Canada and Australia, it could be argued that there is an implicit recognition in these nations that structural adjustment should take place during the period of relief. In the case of the United States, there has been a more direct link between import relief and adjustment. Thus, the legislative history of Section 201 of the Trade Act of 1974 sets forth that the aim of safeguards relief was to provide an industry the opportunity to "adjust to the freer international competition" or to "adjust and to become competitive again under the relief measures. . . .and to create incentives for the industry to adjust, if possible, to competitive conditions in the absence of long-term import restrictions." Further, among the factors the President had to take into account in deciding whether to grant import relief to an industry injured by imports was the probable effectiveness of import relief as a means of providing adjustment. Changes to U.S. trade law in the OTCA have made a more explicit link between escape clause relief and adjustment in the United States. In fact, the objective of the escape clause is to "facilitate efforts by the domestic industry to make a positive adjustment to import competition."

Notification and consultation procedures related to safeguards actions appear to be quite similar in all four countries or entities. Although not explicitly addressed in the safeguards legislation, parties routinely notify safeguard actions to the GATT, pursuant to Article XIX(2), and engage in discussions with affected trading partners as appropriate.

Our examination of domestic legislation and practice regarding safeguards does not support the hypothesis that the ability of domestic interests to petition for an investigation is responsible for the disparity across countries in the frequency with which Article XIX is used. Among the four countries or entities examined, only the United States has a process through which an affected firm, industry association, certified or recognized union, or group of workers, can petition for an investigation which may ultimately lead to a safeguards action. Canada and Australia, which account for forty-four percent of all Article XIX actions notified to GATT over the period 1950-88, do not afford their private sector the opportunity to petition directly for relief. The EEC, which has taken about one-third of the Article XIX actions notified to the GATT since 1980, does not have a direct petitioning procedure either.

A more tenable hypothesis is that the main users of Article XIX—Canada, Australia and the United States—are countries that have incorporated escape clause provisions into statutory law, suggesting that there

is a relationship between the openness with which safeguard provisions are promulgated and the frequency with which they are used.<sup>179</sup>

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<sup>179</sup> See G. WINHAM, *supra* note 66, at 121-22.



APPENDIX 1  
TEXT OF ARTICLE XIX

*Emergency Action on Imports of Particular Products*

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES,

the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Source: General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, Volume IV (Geneva, 1969), pp. 36-37.

## APPENDIX 2

*Article XIX Actions Notified to GATT, 1950-88*

<u>Action</u>	<u>Invoking Party</u>	<u>Product</u>	<u>Measure Taken</u>	<u>Date Introduced</u>	<u>Date Terminated</u>
1	U.S.	Women's fur felt hats and hat bodies	Value bracketed <i>ad valorem</i> duties, replaced by compound rates for products	1 Dec 50	June 56 (XXVIII:4 reneg.)
2	U.S.	Hatter's fur	<i>Ad valorem</i> duty, replaced by compound rates subject to an <i>ad valorem</i> floor and ceiling	9 Feb 52	14 Sept 58
3	U.S.	Dried figs	Specific duty increased	30 Aug 52	1966 (XXVIII:4 reneg.)
4	U.S.	Alsike clover seed	Specific duty increased for imports above a fixed annual quota	1 July 54	30 June 59
5	Greece	Apples	Specific duty, replaced by increased <i>ad valorem</i> duty plus 75% surtax	March 1955	Oct 55 (XXVIII:4 reneg.)
6	U.S.	Bicycles	Specific duties increased as well as floor and ceilings with respect to <i>ad valorem</i> equivalents	19 Aug 55	Jan 61 (XXVIII:4 reneg.)
7	U.S.	Towelling of flax, hemp or ramie	<i>Ad valorem</i> duty increased	26 July 56	1966 (XXVIII:4 reneg.)
9	Greece	Electric refrigerators	<i>Ad valorem</i> duty increased	3 Oct 56	June 1961 (XXVIII:4 reneg.)
10	U.S.	Spring clothespins	Specific duty increased	9 Nov 57	Feb 1961 (XXVIII:4 reneg.)
11	U.S.	Safety pins	<i>Ad valorem</i> duty increased	29 Nov 57	28 Jan 66
12	Canada	Frozen peas	Specific duty increased	12 Feb 58	15 June 59
13	Australia	Printed cotton textiles	Ban on import licenses	27 Feb 58	15 May 58
14	U.S.	Clinical thermometers	<i>Ad valorem</i> duty increased	22 May 58	7 Jan 66
15	Germany	Hard coal and hard coal products	Repeal of general license from countries outside the ECSC. Further contracts subjected to individual licensing	4 Sep 58	
16	U.S.	Lead and zinc	Separate country allocated quarterly quotas representing 80 percent of average competitive imports during 1953-57	1 Oct 58	22 Oct 65 (ores and concentrates) 22 Nov 65 (metals)

<u>Action</u>	<u>Invoking Party</u>	<u>Product</u>	<u>Measure Taken</u>	<u>Date Introduced</u>	<u>Date Terminated</u>
17	Austria	Porcelain	Specific duty increased	1 Jan 59	1 Jan 61 (XXVIII:1 reneg. effective from same date)
18	Australia	Footwear	Import licensing issued to the extent of 100 percent of imports during 1956-57. All footwear imports required to carry specific licenses	1 Apr 59	20 May 60 (new tariffs introduced)
19	U.S.	Stainless steel flatware	Various compound duties replaced by increased <i>ad valorem</i> duties or compound duties depending on the article, on imports valued under certain price when imported in excess of a tariff quota. Quotas increased and over-quota rates reduced on 7 Jan 66 retroactively to 1 Nov 65	1 Nov 59	11 Oct 67
20	Australia	Motor mowers and engines	Global non-discriminatory import licensing of engines for motor mowers at 25 percent of requirements; for other engines at 100 percent of requirements	30 May 60	17 July 61 (new tariffs introduced)
21	U.S.	Cotton typewriter ribbon cloth	Duties increased to various higher <i>ad valorem</i> rates	22 Sept 60	11 Oct 67
22	Australia	Piecegoods and non-pile fabrics, woolen	Compound duties (piecegoods) and <i>ad valorem</i> duties (fabrics), replaced by higher temporary duties	26 May 61	13 Dec 64 (XXVIII:1 reneg.)
23	Nigeria	Cement	Import licenses prohibited, except for contracts concluded prior to 14 Dec 61	14 Dec 61	—
24	U.S.	Sheet glass (principally window glass)	Increased specific duties varying with type of glass (concession partly restored on 11 Jan 67, 1 May 72 and 2 Feb 73)	17 Jun 62	1 Feb 74

<u>Action</u>	<u>Invoking Party</u>	<u>Product</u>	<u>Measure Taken</u>	<u>Date Introduced</u>	<u>Date Terminated</u>
25	U.S.	Wilton and velvet carpets	<i>Ad valorem</i> duty increased (concession partly restored (Jan 1972))	17 Jun 62	1 Jan 73
26	Australia	Timber	Non-discriminatory global quota licensing on basis of 25 percent of imports in the two year period ending 30 Jun 62	9 Jul 62	11 Jan 64 (new tariff introduced)
27	Australia	Parts for refrigerating appliances	Additional specific duties for some parts; additional <i>ad valorem</i> duty for others, on top of bound <i>ad valorem</i> rate	31 Jul 62	May 67 (XXVIII-reneg.)
28	Australia	Antibiotics	Non-discriminatory quantitative licensing on an administrative basis. For certain antibiotics, 1 imported unit per each 9 locally produced unit purchased; for others, licenses issued at annual rate of 20 percent of 1961-62 imports	3 Aug 62	4 Jun 63
29	Australia	Forged steel flanges	Additional <i>ad valorem</i> duty	12 Oct 62	May 67 (XXVIII-reneg.)
30	Rhodesia Nyasaland (beginning 1 Jan 64 Southern Rhodesia only)	Cotton & rayon piece goods	Import restrictions on products of a certain weight and valued under a certain price per sq. yd.	5 Nov 62	28 Feb 64 (new tariff introduced)
31	France	Foundry pig-iron	Introduction of specific duty, whenever higher than the <i>ad valorem</i> duty. (Minimum protection reduced Nov 1966)	15 Feb 64	31 Dec 70
32	Italy	Foundry pig-iron	Same as above	15 Feb 64	31 Dec 70
33	Peru	Lead arsenate and valves	Specific duty introduced on formerly duty-free lead arsenate; increased specific duty on valves	23 Feb 63 (lead arsenate) 26 Feb 63 (valves)	
34	Austria	Chicken eggs	Suspension of the liberalization	24 Feb 64	9 Mar 64

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35	Australia	Linseed oils	Duty free entrance and specific duties replaced by increased duty	27 Feb 63	22 Apr 65 (XXVIII-reneg.)
36	Australia	Heat resisting glass-ware	Specific duty introduced for imports valued over certain f.o.b. price	14 May 64	March 68 (XXVIII: 4 reneg.)
37	Germany	Petroleum and shale oils, etc.	Import licenses introduced	10 Dec 64	—
38	Australia	Copper, brass sheet and strip	Quantitative restrictions	4 Mar 65	1 Sept 65
39	Greece	Tires	Specific duties replaced by higher <i>ad valorem</i> duties. The increase was reduced in Apr 66	22 Apr 65	31 May 71
40	Australia	Polyethylene twine, cordage rope and cable	Quantitative restrictions (on imports from Japan)—see item 48	14 Jan 66	1 Jan 69
41	Australia	Alloy steels	Additional specific duty	29 Apr 66	1982
42	Spain	Cheese	Individual licensing and temporary ban on imports; after 5 June 70, changed to duties subject to threshold prices. Duties were increased in March 1972, pending consultations with the principal supplying countries concerning new threshold prices	30 Jun 66	
43	Spain	Synthetic rubber	A 15 percent provisional customs duty was imposed on synthetic rubber based on polybutadienne	2 Feb 67	—
44	Australia	Used 4-wheel drive vehicles	Quantitative restrictions	21 Apr 67	—
45	Austria	Matches	Quantitative restrictions	14 Nov 67	1 Jan 68
46	Canada	Turkeys	Special valuation levied for imports at distressed prices to protect against sales at less than cost	17 Nov 67	31 Dec 68
47	Australia	Knitted coats and the like	Quantitative restrictions	19 Dec 67	1 Sept 72
48	Australia	Polypropylene twine, cordage and cable	Quantitative restrictions (on imports from the U.S.)—see item 40	4 Jan 68	1 Jan 69
49	France	Horse meat	Quantitative restrictions	17 Mar 68	30 Dec 71

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50	Austria	Oilcakes	Specific duty	15 Jul 68	1 Mar 69
51	Canada	Potatoes	Special valuation levied for imports entering Western Canada	12 Sept 68	2 Nov 68
52	Canada	Corn	Special valuation levied for total Canadian imports	30 Oct 68	31 Dec 68
53	Italy	Raw silk	1) Reintroduce the customs duty on raw silk already laid down in the Common External Tariff 2) establish an EC-wide quota (duty-free) for raw silk amounting to the difference between the demand for and production of raw silk within the Community; 3) apply this same Common External Tariff duty on a permanent basis, from 1 Jan 76 if in 1976 Italian production of silk-worm cocoons made it possible to produce not less than 1,000 tons of a raw silk a year.	19 May 69	—
54	Australia	Knitted shirts	Quantitative restrictions	9 Jun 69	1 Sep 72
55	U.S.	Pianos	Increased <i>ad valorem</i> duty	21 Feb 70	20 Feb 74
56	Canada	Motor gasoline	Discretionary licensing for import into Canada (east of the Province of Manitoba)	7 May 70	16 June 73
57	Canada	Men's and boys' woven fabric shirts	Surtax applied for imports from all countries. To limit restrictive impact and ensure equity, quantitative exemptions were established for countries with recent substantial interest "consistent with that set out in Annex B of the (Cotton Textiles Arrangement)."	2 Jun 70	29 Nov 71
58	Israel	Radio equipment	Increased <i>ad valorem</i> duty	1 Jan 71	21 Mar 71
59	Canada	Fresh and preserved frozen strawberries	Surtax	21 May 71	21 Jul 71 & 18 Aug 71

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60	Canada	Men's and boy's shirts woven or knitted	Global quotas with country reserves for imports under a certain price.	30 Nov 71	
61	U.S.	Ceramic tableware articles	Various increased compound duties for imports valued under or between certain prices, depending on the articles. Some "high" value goods also included	1 May 72	5 Oct 78
62	EEC	Tape recorders	Import licenses limited to a certain quantity	1 Apr 73	31 Dec 73
63	Canada	Fresh cherries	Surtax	30 Jun 73	3 Aug 73
64	U.S.	Ball bearings	Increased <i>ad valorem</i> or compound rates, depending on the item, if valued not over certain unit prices	1 May 74	30 Apr 78
65	Canada	Cattle, beef, veal	Annual global quotas, based on 4-year average imports	12 Aug 74	1 Jan 76
66	Australia	Certain footwear	Quantitative restrictions. Quotas allocated to established importers without restrictions as to source of supply	1 Oct 74	22 Nov 77 (partial removal)
67	Australia	Motor vehicles	Global quotas	1 Feb 75	8 Dec 76 (partial removal for light commercial vehicles on 30 Mar 75)
68	Australia	Hot-rolled and cold-rolled sheets and plates of iron or steel	Global quotas	1 Jan 75	5 May 76
69	Australia	Certain apparel	Additional duties in excess of a tariff quota	1 Mar 75	April 88
70	Australia	Ophthalmic frames, sunglass frames and sunglasses	Quotas allocated to importers without restriction as to source of supply	1 Mar 75	25 May 76
71	New Zealand	Woven polyester fabrics	Import licenses	1 Apr 75 (coverage extended May 75)	18 Mar 76
72	Canada	Worsted spun acrylic yarns	Global quota for products under a certain export price	1 Jan 76	



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73	Australia	Sand boots and shoes; parts of footwear	Quantitative restrictions included within the scope of restrictions under item 66	1 May 76	22 Nov 77
74	Australia	Files and rasps	Quotas allocated to importers on the basis of import performance in 1974 and 1975 and without restriction as to source of supply	25 May 76	
75	U.S.	Specialty steel	Orderly marketing agreement with principal supplier (Japan) covering three years, plus three-year restraints on imports from other foreign suppliers	14 Jun 76	13 Feb 80
76	Australia	Knitted and woven dresses	Additional specific duties for imports in excess of tariff clearances after 1 July 76	1 Jul 76	April 88
77	Canada	Work gloves	Three-year global quota for imports under a certain export prices; subquota for 100 percent cotton gloves.	1 Jul 76	
78	Canada	Textured polyester	Surtax on imports exported at less than a specified value, applied on mfn basis among exporting countries	7 Jul 76	23 Dec 76
79	Australia	Electrical chest freezers	Global import licensing, applying to all imports except those under existing special trading arrangements in the New Zealand-Australia Free Trade Agreement	10 Aug 76	
80	Canada	Double-knit fabrics	Global quota	8 Oct 76	—
81	Canada	Beef and veal	General import permit replaced by individual permit control. Permits issued on basis on global quota allocated among supplying countries in accordance with their market shares in the base period	18 Oct 76	31 Dec 76

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82	Canada	A range of clothing items	Global quotas administered (other than for outerwear) on basis of importers' 1975 performance	29 Nov 76	—
83	Finland	Women's panty hose	Surcharge equivalent to difference between a basic price and import price applied non-discriminatorily on all imports taking place under that price. Originally imposed for 6 months; subsequently extended until 26 June 78	27 Dec 76	—
84	U.S.	Non-rubber footwear	Orderly marketing agreements with Korea and Taiwan for four years; import licensing system with Hong Kong	28 Jun 77	30 Jun 81
85	U.S.	Color TV receivers	Orderly marketing agreement with Japan for three years; subsequently, OMAs also concluded with Korea and Taiwan. OMAs with Korea and Taiwan extended to June 1982	1 Jul 1977	OMA with Japan terminated 30 June 80; with Korea and Taiwan terminated 30 June 82
86	Australia	Passenger motor vehicles	Global quotas	12 July 77	
87	EEC (U.K.)	Portable TV sets from Korea	Annual quotas	2nd half of 1977	Repealed-22 Jun 79 when Korea agreed to voluntary export restraints
88	Australia	Brandy	Temporary additional specific duties increasing the margin between customs and excise rates existing at the time of binding	23 Sept 77	—
89	Australia	Fixed resistors	Import licenses	10 Nov 77	—

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90	Australia	Thongs, gumboots and sporting footwear	Thongs with value for duty below certain prices included within scope of existing quantitative restrictions (see items 66 and 73); import licensing procedures for certain specialty sporting footwear and gumboots	22 Nov 77	—
91	Canada	Footwear	Global quota	5 Dec 77	—
92	Australia	Wool worsted yarns	Global tariff quotas (additional specific duty)	1 Mar 78	—
93	Australia	Round blunt chainsaw files	Included in action on files and rasps (Item 74)	29 Mar 78	—
94	U.S.	CB radio receivers	Increased <i>ad valorem</i> duty for three years to be phased down annually. The items were removed from GSP	11 Apr 78	10 Apr 82
95	Australia	Double-edged safety razor blades	Quantitative restrictions for 2 years	21 Apr 78	
96	EEC	Preserved cultivated mushrooms	Suspension of import licenses. Not applied to third countries which can assure that their exports do not exceed a reasonable quantity	26 May 78	15 May 80 (export assurances received from suppliers)
97	Australia	Sheets and plates of iron or steel	Global quota	1 Jul 78	30 Apr 80
98	U.S.	High carbon ferro-chromium	Tariff increase for three years; extended for one additional year	11 Nov 78	11 Nov 82
99	U.S.	Industrial fasteners	Tariff increase for three years	26 Dec 78	6 Jan 82
100	Norway	Various textile items	Global quota on countries other than those with which bilateral textile programs were in effect; EFTA and EC countries also excluded	1 Jan 79	28 Jun 84 replaced with bilateral agreements under the MFA
101	Iceland	Furniture, cupboards and cabinets, windows and doors	Import deposit scheme	1 Jan 79	
102	Spain	Other heterocyclic compounds; nucleic acids	Tariff increase (change to tariff schedules)	19 Feb 79	
103	U.S.	Clothespins	Global quota for three years; extended for three additional years	23 Feb 79	

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104	U.S.	Porcelain-on-steel cooking ware	Tariff increase for four years	1 Jan 1980	
105	EEC (U.K.)	Yarn of synthetic fibers	Quantitative restrictions	19 Feb 1980	31 Dec 80
106	Spain	Cheeses	Partial suspension of imports	7 May 1980	
107	EEC	Mushrooms	Cultivated mushrooms in brine—subject to import documents; preserved mushrooms—suspension of import licenses	11 Jun 1980	31 Dec 80
108	Australia	Certain work trucks and stackers	Quantitative restrictions	15 Sept 80	
109	U.S.	Prepared or preserved mushrooms	Tariff increase for three years	2 Dec 80	
110	Canada	Non-leather footwear	Quota	24 Nov 81	
111	Canada	Leather footwear	Quota	9 Jul 82	
112	Australia	Flat steel products, pipes and tubes of iron and steel	Tariff quota	Aug 82	
113	Switzerland	Table grapes	Tariff increase	3 Sept 82	
114	Australia	Hoop or strip metal of iron or steel	Quota	20 Sept 82	
115	Canada	Yellow onions	Surtax	27 Oct 82	
116	EEC	Dried grapes	Minimum price	2 Nov 82	
117	EEC (U.K., France)	Tableware and other articles used for domestic or toilet purposes, of stoneware	Global quota	1 Jan 83	16 Apr 83 (voluntary export restraint negotiated with principal supplier)
118	U.S.	Motorcycles	Tariff rate quota for 5 years	16 Apr 83	
119	Australia	Certain filament lamps	Increased <i>ad valorem</i> duties	19 Jul 83	
120	U.S.	Specialty steel	Tariff increases on plates and sheet and strip for four years; global quota on rods, bars and alloy tool steel for four years	20 Jul 83	
121	Australia	Non-electrical domestic refrigerators and freezers	Increased tariffs	5 Aug 83	June 85
122	EEC (France)		Certain electronic piezo-electric quartz watches with digital displays	Global quota	13 Apr 84
123	Chile	Sugar	Tariff surcharge	26 Jul 84	
124	South Africa	Certain footwear	Duty increase	9 Nov 84	
125	Chile	Wheat	Duty increase	27 Nov 84	

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126	Canada	Fresh, chilled and frozen beef, and veal	Global quota	1 Jan 85	
127	EEC	Morello cherries	Increased tariffs for imports below a minimum price	18 June 85	
128	South Africa	Malic acid	Duty increase	9 Aug 85	
129	Chile	Edible vegetable oils	Duty increase	28 Sept 85	
130	EEC	Provisionally preserved raspberries	Increased tariffs for imports below a minimum price	17 Jan 86	
131	EEC	Sweet potatoes	Suspension of import certificates	19 April 86	
132	South Africa	Tall oil fatty acids; calibrated and graduated pipettes, burettes, volumetric flasks, and measuring glasses; high carbon steel wire	Duty increase	June 86	
133	Austria	Broken rice	Global quotas	19 March 87	
134	EEC (Spain)	Certain steel products	Global quotas	30 March 87	
135	South Africa	Optical fibre and optical fibre bundles (extended to cover tin plate)	Duty increase	16 October 87	15 April 88
136	EEC	Frozen squid	Suspension of imports below a reference price	20 Nov 87	
137	South Africa	Footwear	Duty increase	9 March 88	
138	EEC (Portugal)	Refrigerators and freezers	Global quotas	1 May 88	

Sources: General Agreement on Tariffs and Trade, Modalities of Application of Article XIX, L/4679 (5 July 1978), updated by the author using GATT notification documents.