Market Safeguards against Import Competition: Article XIX of the General Agreement on Tariffs and Trade

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by Thomas Sauermilch*

I. INTRODUCTION

A. The Economic and Political Background

The post war period witnessed progressive economic growth and steady trade liberalization. This movement began with the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. During this period, the quantitative import restrictions imposed during the economic turbulence of the 1930's were removed, and tariffs in international trade were substantially reduced.

Between 1947 and 1967 six rounds of GATT trade negotiations took place. While the five rounds prior to the Dillon Round in 1962 took an item-per-item approach to tariff reductions, the Kennedy Round from 1963-67 introduced the principle of multilaterality to these tariff negotiations. The result was an across-the-board tariff cut averaging 33 percent. This liberal international trade climate promoted growth in developed countries which, to some degree was transmitted through trade to the developing countries.

This climate changed, however, with the collapse of the Bretton Woods System in 1971, the oil crisis in 1973, and the onset of the worldwide recession in developed countries beginning in 1974. Relatively high unemployment rates, stagnant economic growth, and a further shift of comparative advantage in favor of developing countries contributed to the emergence of protectionist pressures in developed countries. The post-1973 situation has therefore been characterized by a steady increase in protectionist trade measures similar to those prevalent during the 1930's.1

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1 This era has been labelled the "new protectionism." See, e.g., Balassa, The "New
In 1973, during this period of economic uncertainty, the Tokyo Round of Multilateral Trade Negotiations (MTN) was launched. Ninety-nine countries in diverse stages of development, including GATT non-members, participated in the negotiations. For the first time, non-tariff barriers to international trade, which constitute the major manifestation of the new protectionism, were integrated into the negotiations. One of the aims of the negotiations as defined by the Tokyo Declaration was to "include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results."

Article XIX provides safeguards against import competition. Frequently, trading nations differ as to whether a particular measure represents a legitimate safeguard or a protectionist device. While prior trade disputes were governed by the appropriate international rules (such as Article XIX) the new protectionist trends tend to circumvent these rules or operate under special exemption from them. Actually, contracting parties to the GATT have seldom invoked the safeguard clause of Article XIX but have resorted instead to analogous actions. These new protectionist measures reflect the inadequacy of the prevailing rules within the changed atmosphere of international trade. The Tokyo Round constitutes an effort to reconcile these changed economic circumstances with the legal rules currently governing international trade. This article concentrates on the particular aspect of the safeguard question prior to and during the Tokyo Round.

B. The General Agreement on Tariffs and Trade (GATT)

The present institutional framework for the conduct of international commerce, the GATT, was generated by postwar efforts to restore inter-

Protectionism" and the International Economy, see 12 J. WORLD TRADE L. 409 (1978) (discussing the post-war trade developments which fanned the protectionist flames).

2 The term "Tokyo Round" refers to the September, 1973 opening Meeting of Ministers in Tokyo which culminated in the 1977 negotiations. For an overview of the groundwork and conduct of the MTN see 1 O. LONG, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS chs. 1-4 (1979).

3 GATT: Tokyo Declaration on Multilateral Trade Negotiations, para. 3(d), GATT Press Release GATT/1134 (Sept. 14, 1973), reprinted in 12 INT’L LEGAL MATERIALS 1533, 1534 and 1 O. LONG, supra note 1, at 185-86.

4 See Appendix A for the text of article XIX.

5 See generally B. NOWZAD, THE RISE ON PROTECTIONISM 1-6 (International Monetary Fund Pamphlet No. 24, 1978); Balassa, supra note 1, at 409-414, 433; Wassell, Background to Current Trade Issues, in WORLD TRADE: CONSTRAINTS AND OPPORTUNITIES IN THE 80's 12 (B. Balassa ed. 1979).

national trade. The initial work, however, focussed on the formation of an International Trade Organization (ITO), and, after a series of international conferences, resulted in the signing of the Final Act of the ITO Charter at Havana in March, 1948. The Havana Charter, founded upon proposals primarily posed by the United States, contains chapters on "Employment and Economic Activity," "Economic Development and Reconstruction," "Commercial Policy," "Restrictive Business Practices," and "Intergovernmental Commodity Agreements," and includes chapters on the organizational and procedural aspects of these issues. For reasons which may be summarily described as perfectionist and protectionist, the U.S. Congress failed to adopt the ITO Charter.

Meanwhile, during the ITO Charter negotiations at Geneva in 1947, a General Assembly was developed. It stemmed from tariff negotiations between 23 countries. These negotiations resulted in a record number of bilateral agreements which produced generalized concessions. This multilateral trade conference was initially regarded as the first of a number of such conferences presumably to be conducted under the authority of the ITO. To ensure that the agreements would not later be disregarded, the record, formally entitled "The General Agreement on Tariffs and Trade," incorporated many of the commercial policy provisions of the draft ITO Charter. The ITO, however, was never established, and the GATT, by default became the principle legal framework for world trade.

GATT has never fully been implemented, but it was and continues to be applied by each contracting party through the the Protocol of Provisional Application. This action was taken in order to bypass the problem of governmental approval, especially in the United States, of GATT provisions which were of such general character that they could not be implemented domestically without such approval. The United States had entered the GATT negotiations under the authority of the Trade Agreements Act. On the basis of this Act the GATT was negotiated by the

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as GATT]. The amended text of GATT is reprinted in 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 (1969) [hereinafter cited as GATT, BISD].

7 U.S. Dept' of State, Havana Charter for an International Trade Organization and Final Act and Related Documents (Commercial Policy Series No. 113), (1948).


9 Haiti is the only country to have adopted GATT definitively. Lacking the numbers required by Article XXVI(6) to implement GATT, Haiti may apply the provisions only through the Protocol of Provisional Application, done Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 308 [hereinafter cited as GATT Protocol]. See J. JACKSON, supra note 8, at 60-63.

United States as a congressional executive agreement which in principle does not require subsequent congressional approval. Some of the general policy provisions such as the lowering of tariff barriers could not be clearly subsumed under the authority of the Trade Agreements Act. Additionally, the contracting parties bound themselves to the general commercial policy provisions of Part II of GATT only "to the fullest extent not inconsistent with existing legislation." This so-called grandfather clause ensures that governmental actions consonant with national legislation enacted prior to GATT and in conflict with the commercial policy provisions of GATT do not constitute a violation of the General Agreement.

Since GATT was designed as a treaty and not as an international organization, the initial organizational structure was weak. The only institutional body mentioned in the General Agreement is the "CONTRACTING PARTIES." Article XXV paragraph 1 provides that: "[R]epresentatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement."15

The term "CONTRACTING PARTIES" was chosen over "Interim Trade Committee" since the former implied joint action of the treaty signatories rather than the delegation of authority to an international body. This point was especially relevant to the United States, which was only authorized under the Trade Agreements Act to enter into an international treaty and not to participate in the establishment of an international organization. The institution, composed of the "CONTRACTING PARTIES," can be described as the general forum or assembly of GATT member nations which convene once a year. GATT has since proved sufficient for the performance of all the necessary organizational and procedural tasks.

The GATT Secretariat under the Director-General performs the administrative functions typical of the secretariats of other international organizations. The Council, which consists of representatives of all contracting parties, carries out the intersessional work of the "CONTRACTING PARTIES." The primary function of the Council is, inter alia, to ensure the permanent surveillance of the contracting parties.

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12 GATT Protocol, supra note 9, at 1(b).
13 GATT, supra note 6, at art. XXV(1).
14 See J. JACKSON, supra note 8, at 120.
15 For a discussion of the structure and development of the Secretariat see K. DAM, supra note 11, at 399-40; J. JACKSON, supra note 8, at 145-50.
over GATT affairs. The establishment of permanent GATT Committees which consist of representatives of all contracting parties has been a usual practice in GATT history. These committees include the Balance-of-Payments Committee, the Committee on Trade and Development, and the Textile Committee (established to facilitate the administration of the Textile Arrangements). These committees may usually set up subsidiary bodies in the form of working parties or panels which study and resolve particular problems. This structure of permanent committees and temporary panels was expanded at the Tokyo Round. At that time a permanent committee was established which is empowered to set up ad hoc subsidiary bodies.

The only significant change in the text of the GATT occurred in 1964 with the adoption of Part IV concerning "Trade and Development". This provision recognized the special situation of developing countries in international trade.

C. The GATT Principles of Non-Discrimination and Reciprocity

The principle of non-discrimination pervades the entire GATT framework. The most obvious provision is Article I section 1, the Most-Favoured-Nation (MFN) clause. Any customs advantage given for a particular product by one party to another must also be given to all other contracting parties with respect to that good.

To understand the basic rationale behind the MFN clause, it must be seen against the background of the decline of trade during the 1930's and World War II. The principle of non-discrimination was essential to the successful reconstruction of international trade. If every country observed this principle, all countries would benefit in the long run from a more open, equitable international trade structure. Products of one GATT member would not suffer a competitive disadvantage compared to like

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16 K. DAM, supra note 11, at 339; J. JACKSON, supra note 8, at 156-57.
17 J. JACKSON, supra note 8, at 157-62.
19 Part IV encourages developed countries to grant favorable treatment to developing nations, but it does not create a legal obligation to provide such treatment. See K. DAM, supra note 11, at 236-42; J. JACKSON, supra note 8, at 640-48.
20 The "most favored nation" clause is set out in Appendix B. Other provisions of GATT which implement the principle of non-discrimination include: art. III(7); art. IV(6); art. V(2), (5), (6); art. IX(1); art. XII(1); art. XVII(1); art. XVIII(20); and art. XX(j). Although the actual wording may differ, these clauses have been read to require that the treatment given one CONTRACTING PARTY must be the same as that given to any other CONTRACTING PARTY. See J. JACKSON, supra note 8, at 255.
products of any third member state and the free trade principle of comparative advantage would fully develop.²¹

The MFN clause generated the legal assurance for equal trade conditions. It has been observed that MFN treatment "transposes equality under international law into the economic field."²² Thus, MFN treatment, which appears in the economic field as a pragmatic approach toward liberalizing international trade, developed under GATT into a legal principle of equality.²³

Theoretically, MFN treatment has to be granted on an absolutely unconditional basis. In practice, however, the rule of reciprocity has an impact on unconditional MFN treatment. Although no explicit reciprocity clause limits the MFN principle, it is implicitly understood in the GATT framework that trade negotiations are conducted under the assumption of "substantially equivalent" concessions on a reciprocal basis.²⁴ Hence, reciprocity can be described as a "give and take," implying mutual gains.²⁵

A reference to the idea of reciprocity can be found in Article XXVIII which requires that tariff negotiations are to be conducted on a "reciprocal and mutually advantageous basis."²⁶ Thus, MFN treatment operates within a legal framework which recognizes the principle of reciprocity as one of its most vital concepts.²⁷ The MFN clause and the reciprocity principle complement each other. The latter provides a basic rule for the conduct of trade negotiations while the former implements the results of these negotiations on a multilateral basis ensuring overall trade liberalization.²⁸ Both principles came under challenge with the growing diversification of the international community.²⁹

D. Safeguard Provisions in International Trade Agreements

The need for safeguard provisions in international trade agreements

²² Gros Espiell, supra note 21, at 35.
²³ Id.
²⁴ Id. at 36.
²⁵ Ibrahim, Developing Countries and the Tokyo Round, 12 J. WORLD TRADE L. 1, 3 (1978).
²⁶ GATT, supra note 6, at art. XXVIII(1).
²⁷ K. DAM, supra note 11, at 59; Curzon & Curzon, supra note 21, at 156-62.
²⁸ Ibrahim, supra note 25, at 4.
²⁹ J. JACKSON, supra note 8, at 242-45; Gros Espiell, supra note 21, at 37-44.
derives from the conflict between internal economic and social responsibilities of governments and their international obligations. Increasingly, governments in the modern world face demands to intervene in the economic process to protect the interests of domestic factions and promote social and economic aims. No segment of contemporary society is immune from this type of governmental intervention and protection. This resulted largely from technological advances in communication and transportation which created markets where participants shared more common political and economic interests than ever before. Social and educational progress also contributed to this development by laying the foundation for the effective "articulation of new political, social and economic aspirations."

At the same time, however, the international obligations of independent nations have increased, precisely because these factors have had consequences which transcend national boundaries. International economic interdependence has grown with the development of international markets. Today, domestic economic intervention affects other states. Thus, it became desirable to ascertain mutually acceptable international goals to be implemented through the conclusion of international agreements and the creation of international organizations.

National governments operate on two levels: domestic regulation and international cooperation. Although these levels are partially congruent, each imposes constraints on governmental policy. Domestic measures may interfere with international obligations and international commitments may limit the freedom to pursue domestic interests. In order to provide a means of reconciling such conflicts, safeguard clauses have traditionally been adopted in international agreements. By invoking a safeguard provision, a country may protect its domestic interests without impairing its international obligations.

The reason for safeguard provisions is twofold. First, they serve economic necessities. Trade liberalization promotes economic growth and development according to the principle of comparative advantage. This process involves adjustment since efficiently operating domestic industries might suddenly face more efficient foreign producers. Industries in some countries decline, while industries in other countries expand. To en-

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31 Id. (citing I. KRAVIS, DOMESTIC INTERESTS AND INTERNATIONAL OBLIGATIONS (1963)).
32 Id.
33 Id.
34 Id. at 1-2.
35 Id. at 2.
36 Id. at 3-5.
sure an orderly and gradual shift of comparative advantage, adjustment to changed patterns of international trade must be regulated. For this purpose safeguard provisions may be invoked which permit temporary trade restrictions and ease the hardship of the adjustment process for the affected industries and workers.

Second, safeguards are adopted for political reasons. In the event of unforeseen difficulties they provide means to derogate international obligations. Since governments are usually more aware of their domestic obligations, absolute international commitments might be too onerous on the domestic political level. Those worried about the domestic implications of international obligations may rest assured that under exceptional circumstances an escape hatch remains. Domestic interests are permitted to prevail under certain circumstances. Thus, domestic reluctance towards international commitments can be assuaged. These safeguards promote a sense of “good will” which encourages member nations to enter into international agreements. They also ensure the continued existence of the agreement, since countries would be forced to reevaluate it in the event of a national emergency.

In order to make a safeguard system work, safeguard clauses must be carefully drafted. If safeguards are defined too narrowly or are subjected to overly strict conditions, governments might use means outside the influence of the international agreement to protect their national interests. If safeguards are designed too liberally such as to invite their frequent invocation, they obviate the objectives of the agreement.

The use of safeguards will be discussed in the following analysis of emergency actions taken against the import of particular products causing injury to domestic producers. Before turning to the “escape clause” of Article XIX, the safeguard system of GATT will be briefly outlined, since particularly in the case of GATT it has been argued that “the exceptions to the rules of trade laid down by the document appear to be more numerous than the conformances.”

E. Safeguard Provisions in GATT

In addition to Article XIX, the GATT contains at least nine different safeguard clauses. Article VI, paragraphs 2 and 3 permit the imposition of anti-dumping and countervailing duties. The GATT does not prohibit dumping and subsidies, but rather regards them as unfair trade practices against which countries can defend themselves by imposing anti-dumping

37 Id. at 5.
38 Id. at 6.
40 GATT, supra note 6, at art. VI(2), (3).
and countervailing duties.\textsuperscript{41} Both safeguard actions were reviewed during the Tokyo Round and were thereafter elaborated in an effort to achieve more effective international discipline and surveillance. Furthermore, the Revised GATT Anti-dumping Code brought certain provisions into line with the Code on Subsidies and Countervailing Duties, most notably the determination of injury.\textsuperscript{42}

Article XI, paragraph 2 permits, as an exception to paragraph 1, the imposition of quantitative restrictions with respect to the importation and exportation of products.\textsuperscript{43} Paragraph 2(c), which allows import restrictions on any agricultural or fisheries product, was critical to the developing countries for the protection of their essential resources of primary products and to pursue development programs in this field.\textsuperscript{44}

Under Article XII countries may impose quantitative import restrictions to safeguard their external financial position and their balance of payments.\textsuperscript{45} In practice, however, the means of Article XII proved to be inadequate and countries resorted to import surcharges and similar financial measures in order to restore a balance of payments equilibrium.\textsuperscript{46} Moreover, procedural delays in the GATT surveillance system called for an improvement of the provision. This topic was dealt with at the Tokyo Round. As a result, countries are now entitled to impose restrictive import measures other than the quantitative restrictions under Article XII provided certain requirements are fulfilled.\textsuperscript{47}

Article XVIII was overhauled in 1955.\textsuperscript{48} Section B transposes the provisions of Article XII for the particular use of developing countries. Sections A and C were originally designed to allow developing countries use of restrictive import measures to promote and protect the establishment of infant industries. The Tokyo Round broadened the use of such measures. Now countries may resort to Article XVII to implement programs aimed at the development of new production structures or the modification of existing structures in order to achieve fuller and more efficient use of resources in accordance with the priorities of their economic

\textsuperscript{41} J. Jackon, supra note 8, at 401-03.
\textsuperscript{43} GATT, supra note 6, at art. XI(2).
\textsuperscript{44} J. Jackon, supra note 8, at 317-18.
\textsuperscript{45} GATT, supra note 6, at art. XII.
\textsuperscript{46} See D. Robertson, supra note 30, at 15.
\textsuperscript{47} GATT, Declaration on Trade Measures Taken for Balance-of-Payments Purposes, done Nov. 28, 1979, — U.S.T. —, T.I.A.S. No. —, U.N.T.S. —, reprinted in GATT, BISD, supra note 6, at 26th Supp. 205; 1 O. Long, supra note 2, at 100-03.
\textsuperscript{48} See J. Jackson, supra note 8, at 640.
The general exceptions of Articles XX and XXI have been described as provisions that "may be most troublesome and most subject to abuse of all GATT exceptions."\(^5\) According to these provisions governments may not be prevented from adopting measures which are regarded as necessary to protect health and welfare\(^5\) (Article XX) as well as national security (Article XXI).\(^5\) Such provisions are typical to international commercial treaties. An inherent danger lies in the easy application of general terms, such as "essential security needs" for justifying trade restrictions.\(^5\) Particularly noteworthy is Article XXI(i) which authorizes export restrictions in the case of short domestic supply.\(^5\) Although little consideration has been given to this provision in the past, it nevertheless provides a framework within which procedures for the regulation of export controls can be established. The oil embargo of 1973 may illustrate that sudden restrictions on supply are potentially as disruptive as sudden increases of imports.\(^5\) Article XX has not been invoked, and it can be assumed that misuse of the provision can be counterbalanced by Article XXIII, the GATT clause on nullification and impairment.\(^5\) Article XXI has been invoked several times, but most disputes have been settled after consultation.\(^5\)

The waiver is the most flexible safeguard clause in GATT.\(^5\) Under exceptional circumstances a country may be released from its GATT obligations under Article XXV, section 5. A waiver must be approved by a two-thirds majority of votes cast by more than half of the contracting parties. In general, waivers under Article XXV, section 5 fall into one of the following seven categories:\(^5\)

1) Newly independent states were allowed to retain old trade preferences usually with their former colonial powers.


\(^{50}\) J. JACKSON, supra note 8, at 741.

\(^{51}\) GATT, supra note 6, at art. XX.

\(^{52}\) GATT, supra note 6, at art. XXI. Provisions similar to Article XX and XXI commonly appear on other commercial treaties. See D. ROBERTSON, supra note 38, at 13-14.

\(^{53}\) D. ROBERTSON, supra note 38, at 14.

\(^{54}\) GATT, supra note 6, at art. XX(I)(i).

\(^{55}\) D. ROBERTSON, supra note 38, at 14.

\(^{56}\) J. JACKSON, supra note 8, at 741-42. Most recently Sweden has referred to Article XXI "in spirit" in order to justify import restrictions, but nevertheless agreed to consultations. See GATT ACTIVITIES IN 1975, at 61.

\(^{57}\) J. JACKSON, supra note 8, at 748-52.

\(^{58}\) GATT, supra note 6, at art. XXV(5).

\(^{59}\) For a more complete development of these seven categories see J. JACKSON, supra note 8, at 545-46 nn.1-7.
2) Contracting parties were temporarily released from their GATT obligations in order to recognize their fiscal system.
3) Regional associations of states not covered by Article XXIV were legalized.
4) Special agreements between some countries and the International Monetary Fund were authorized to avoid the provisions of Article XV.
5) Special import restrictions, such as surcharges, were permitted because of balance of payments difficulties.
6) Import quotas on agricultural products which were in violation of GATT were subsequently legalized.
7) Various time limits required by GATT were extended.

Several other GATT provisions contain clauses similar to the waiver.

Under Article XXIII, tariff concessions may be withdrawn or modified three years after their initial negotiation. And under Article XXXV, a contracting party is entitled to refrain from applying the GATT to any new member. This provision became important with the accession of Japan to the GATT in 1955.

II. ARTICLE XIX AND THE ISSUE OF "MARKET DISRUPTION"

The United States was the chief proponent of Article XIX, the escape clause. A similar clause appeared in a trade agreement between the United States and Mexico in 1942. During the congressional hearings on the Trade Agreements Extension Act, concerns about the disruptive impact of increasing imports on the domestic industry as a consequence of the Act surfaced. The U.S. State Department quelled these fears by incorporating proper safeguard provisions in its reciprocal trade agreements beginning with the Mexican agreement. Indeed, the escape clause of Article XIX was an important factor in the tacit approval of the GATT by Congress after ITO failed to materialize.

As outlined by the United States, the purpose of the escape clause

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60 GATT, supra note 6, at art. XXIII.
61 Id. at art. XXXV. This provision has been invoked frequently against Japan since 1955. See, GATT, Analytical Index 161-62 (2d rev. 1966).
62 See J. JACKSON, supra note 8, at 553. The text of Article XIX is reprinted in Appendix A.
65 K. DAM, supra note 11, at 107 n.64 (citing C. WIcox, A CHARTER FOR WORLD TRADE 183 (1949)).
was to give GATT member states more flexibility in emergency situations and to provide temporary import relief as an exception to the GATT commitments. Thus, safeguard action under Article XIX was understood to be restricted in its application to temporary emergency measures. Later, Congress wrote the escape clause into statutory law with the Trade Agreements Extension Act of 1951, and has continued to include it in subsequent laws.

Article XIX permits safeguard actions against import competition. A nation is entitled to take such action only if it has fulfilled three basic sets of requirements:

1) There must be an abnormal increase in the import of a certain product.
   This criterion is fulfilled not only in the case of absolute but also relative import increases as it was expressed in the escape clause of the Havana Charter, Article 40, and reasserted by the "CONTRACTING PARTIES" with respect to Article XIX GATT in a Working Party Report in 1948.

2) The increased imports must be a result of both unforeseen developments and GATT obligations.
   This implies that a contracting party has no right to invoke Article XIX, if the import increase would have occurred anyway.

3) The imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to the domestic producers of like or directly competitive goods.

To summarize, the invocation of Article XIX is subject to three causal factors: first, the increased imports have to be causally related to unforeseen developments; second, they must affect GATT obligations; and third, they must cause serious injury.

Subject to the fulfillment of these requirements, the invoking party may either withdraw or modify a tariff concession or impose a quantita-

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66 J. Jackson, supra note 8, at 554-55.
68 The report stated, "[I]t was also the understanding of the working party that the phrase 'being imported . . . in such increased quantities' in Article XIX, paragraph I(a), was intended to cover cases where imports may have increased relatively, as made clear in Article 40, paragraph I(a), of the Havana Charter." 2 GATT, BISD, supra note 6, at 44-45 (1952).
69 K. Dam, supra note 11, at 101.
70 J. Jackson, supra note 8, at 557.
tive import restriction on the product in question. The imposition of a quantitative restriction must be understood as a departure from the general obligation to refrain from quantitative restrictions under Article XI GATT.

The safeguard action itself has to comply with certain substantial and procedural conditions:

1) The withdrawn obligation has to relate causally to the increase in imports implying that only the obligation which provided the opportunity of the increased imports may be revoked.
2) The withdrawal must be only with respect to the imported product in question and not to any other product.
3) The safeguard measure shall only be maintained "to the extent and for such time as may be necessary to prevent or remedy such injury."

This condition refers to the envisaged temporary character of safeguard measures under Article XIX which were to apply for a limited time to emergency cases only. A government taking action under Article XIX should continually review the safeguard measure and reconsider its action as soon as the protection is no longer necessary.

4) The safeguard measure has to be applied in a nondiscriminatory manner, in accordance with the most-favoured-nation clause. Consequently, all supplier countries have to be treated equally.

Although the application of the MFN clause involves terminological difficulties, the essential non-discriminatory application of Article XIX measures originates from an interpretative note to Article 40 of the Havana Charter. According to Article XIII, quantitative restrictions are required to apply directly in a

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71 GATT, supra note 6, at art. XIX(1)(a). See J. Jackson, supra note 8, at 559, 565.
72 The conditions are set out in J. Jackson, supra note 8, at 564.
73 GATT, supra note 6, at art. XIX(1)(a). Professor Jackson relies on the "in respect to such product" language to infer this causal requirement. J. Jackson, supra note 8, at 564 n.2.
74 GATT, supra note 8, at 564 n.2.
75 Id. at art. XIX(1)(a).
76 See GATT, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT 29 (1951)[hereinafter cited as Hatters' Fur Case].
77 In the case of trade restrictions instead of trade preferences the MFN clause appears to be a "most disfavoured-nation clause."
78 See J. Jackson, supra note 8, at 564 n.5 (quoting the Interpretative Note). The note states: "It is understood that any suspension, withdrawal or modification under paragraphs 1(a), 1(b), and 3(b) 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." U.S. Dept. of State, Havana Charter for an International Trade Organization, supra note 7, at 65; see also K. Dam, supra note 11, at 105.
non-discriminatory fashion.

5) The safeguard action is furthermore subject to certain procedural criteria. Prior to the imposition of safeguards of importing country must notify the "CONTRACTING PARTIES" of the measures which it intends to take and has to then enter into consultations with the concerned GATT member countries. Only under "critical circumstances" might the safeguard action be introduced without prior consultations, but consultations must commence immediately after the action has been taken.79

During these consultations the importing country either makes compensatory concessions to the parties affected by the safeguard action or agrees to compensatory withdrawal of concessions by the affected parties.80 The compensation practice developed ad hoc in the consultations with all concerned countries participating. Therefore compensation derives from the MFN principle.81

If an agreement is not reached, the importing country is, nevertheless, free to take the emergency action. In this case, however, the exporting countries are allowed to suspend substantially equivalent concessions, provided they give notice to the "CONTRACTING PARTIES" and the latter do not disapprove.82 This compensatory remedy is applied in a discriminatory fashion against the importing country, since it is basically aimed at reassessing trade shares according to the principle of reciprocity.83

The advantage for the safeguarding country in offering compensation is that it may designate the items on which it is prepared to make compensatory concessions. Compensatory retaliation measures taken by the affected exporting country are subject to retaliatory trade restrictions.84

It is important to remember that Article XIX constitutes an exception to the general prohibition against quantitative restrictions under Article XI and, if quantitative restrictions are in fact imposed, this has to be done in a non-discriminatory fashion.

A. Application of Article XIX

Article XIX has been invoked approximately one hundred times.85

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79 GATT, supra note 6, at art. XIX.
80 See J. JACKSON, supra note 8, at 565.
82 GATT, supra note 6, at art. XIX(3)(a).
83 J. JACKSON, supra note 8, at 566.
84 G. CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 118 (1965).
85 The estimate of one hundred invocations of Article XIX is based on a variety of studies. See GATT, Analytical Index 109-13 (rev. ed. 1970)(provides information up to
Safeguard actions have been relatively few in recent years and have usually taken the form of quantitative restrictions. Approximately one-third of the Article XIX disputes have been resolved by compensation offers. These settlements were confined to tariff actions. Furthermore, it has been estimated that in about half of the cases the exports of developing countries were affected.

As early as 1951, a major case revealed one of the weaknesses of Article XIX, and the vague definition of its requirements. The Hatters' Fur Case grew out of a trade dispute between the United States and Czechoslovakia. In 1950, the United States withdrew a tariff concession which has been negotiated at Geneva in 1947. A prior investigation by the U.S. Tariff Commission had resulted in the conclusion that women's fur hats were being imported in increased quantities and under such conditions as to cause serious injury to the domestic industry. Accordingly, the United States took action under Article XIX and withdrew the applicable tariff concession. This action was challenged by Czechoslovakia and referred by the "CONTRACTING PARTIES" to a specially appointed working party.

In its report the working party concluded that the term "unforeseen development" should be interpreted to mean "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated." On the basis of that interpretation, the Czechoslovak delegation argued that the change of fashion, which caused the increased imports, was not an unforeseen development, since "it is universally known that fashions are subject to constant changes." The working

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86 See B. NOWZAD, supra note 5, at 77; Meier, supra note 85, at 496.
87 See Meier, supra note 85, at 496; Tumlir, supra note 81, at 409 n.8.
88 Tumlir, supra note 81, at 410 n.9.
89 Bhagwati, Market Distruption, Compensation and GATT Reform 4 WORLD DEV. 989, 993 (1976).
90 Hatters' Fur Case, supra note 76.
92 Hatters' Fur Case, supra note 76, at 10 quoted in J. JACKSON, supra note 8, at 560-61.
93 Hatters' Fur Case, supra note 76 at 10.
party agreed with that view, but concluded that "the degree to which the change in fashion affected the competitive situation could not reasonably be expected to have been foreseen by the U.S. authorities in 1947" and therefore the "unforeseen development" requirement was satisfied. 94

With this conclusion the working party reached a rather lenient interpretation of this requirement of Article XIX. Increased imports alone, provided they occur to a degree which could not have been foreseen, are enough to constitute an "unforeseen development." Certainly this would be the case whenever imports increased substantially with the result being that increased imports alone are evidence of an "unforeseen development." 95

The working party did not refer to the second causal requirement, that the increased imports must involve GATT obligations. It held only that the concession granted by the United States at Geneva was substantial and had the effect of reducing the price in favor of the imported items. 96 Theoretically, every question of causality requires that coincidental and causal relationships be distinguished. However, in practical application there is a strong tendency to equate coincidence with causality. Since a GATT obligation exists for virtually every product, the impact of a GATT obligation on increased imports seems to be established in almost every case. 97 Consequently, a country invoking Article XIX must simply show increased imports of a certain item covered by a GATT obligation.

The third causal prerequisite of Article XIX requires that the imports cause or threaten serious injury to domestic producers of like or directly competitive products. With respect to the finding of a "serious injury" the working party reached a result as inconclusive as that regarding the determination of "unforeseen developments." The case was decided in favor of the United States despite their failure to provide sufficient evidence of injury. In fact, the working party agreed with the Czechoslovak contention that the "data cannot be said to point convincingly in either direction," 98 implying that a serious injury was not proved.

The working panel based its decision on the view that "the United States were [sic] not called upon to prove conclusively that the degree of injury . . . must be regarded as serious; since the question under consideration was whether or not they are in breach of Art. XIX, they are enti-

94 Id. at 12. (emphasis added).
95 See J. JACKSON, supra note 8, at 561.
96 Hatters' Fur Case, supra note 76, at 9, 13.
97 J. JACKSON, supra note 8, at 559.
98 Hatters' Fur Case, supra note 76, at 22. For a critical evaluation of the U. S. data see the statement of the Czechoslovak delegate. Id. at 15-20.
tled to the benefit of any reasonable doubt.\textsuperscript{99} Since no conclusive facts had been advanced by Czechoslovakia, it had failed to overcome this doubt.\textsuperscript{100}

Considering the restricted party’s virtual inaccessibility to the facts of the injury, and the fact that an Article XIX action is an exception to the general GATT rules, the imposition of the burden of proof upon the affected country appears to contradict the logical legal burden.\textsuperscript{101} In any case, this procedural ruling seems to imply that countries can count on much easier access to Article XIX than might have been concluded from the original wording of the provision. As a net result, Article XIX became applicable in nearly every situation of increased imports. Consequently, it became desirable to define the term “serious injury” more precisely and to require comprehensive and conclusive evidence of the causal relationship between the increased imports and the injury.

The present importance of Article XIX, can be examined through analysis of more recent cases. The range of recently affected products includes the traditional labor-intensive products of developing countries, such as textiles, leather goods and footwear, and more frequently advanced items, such as electronic equipment, machinery, tools, ballbearings, and other minor manufactures.\textsuperscript{102} In the production of the latter items the developing countries\textsuperscript{103} and Japan have become increasingly competitive and accordingly have been the principally affected countries. The following cases illustrate the trend regarding Article XIX.

In 1974, Australia invoked Article XIX regarding certain footwear;\textsuperscript{104} in 1975, regarding motor vehicles, footwear, carpets, steel sheets and plates, and textiles;\textsuperscript{105} and in 1978 reiterated the motor vehicle restrictions.\textsuperscript{106} Canada invoked Article XIX with respect to cattle, beef and veal

\textsuperscript{99} Id. at 23.
\textsuperscript{100} Id. at 22.
\textsuperscript{101} The proper allocation of the burden of proof depends on a variety of factors, including which party has easier access to the information. \textit{See} Morgan, \textit{Some Observations Concerning Presumptions}, 44 Harv. L. Rev. 906, 911 (1931).
\textsuperscript{102} \textit{See} UNCTAD, Implications for Developing Countries of the New Protectionism in Developing Countries 4, TD/226 (March 6, 1979); D. Robertson, \textit{supra} note 30, at 24.
\textsuperscript{103} One has to be aware of the generalization of the term “developing countries.” Developing countries can be differentiated according to their income per capita and other factors into such categories as least developed countries and less developed countries. Only the most advanced of the less developed countries, such as Singapore, Taiwan, South Korea, Mexico, Brazil, and Argentina, which are experiencing the beginning of a significant industrialization process, produce manufactures in direct competition with the producers in the industrialized countries. These newly industrialized countries are referred to in this context.
\textsuperscript{104} GATT Activities in 1974, at 49.
\textsuperscript{105} GATT Activities in 1975, at 55.
\textsuperscript{106} GATT Activities in 1977, at 68.
in 1974;\textsuperscript{107} with respect to clothing items in 1976;\textsuperscript{108} again with respect to veal and beef in 1976;\textsuperscript{109} and in 1977 with respect to double knit fabrics.\textsuperscript{110} The United States took emergency action under Article XIX with respect to specialty steel in 1976.\textsuperscript{111} The European Community imposed selective import quotas under Article XIX on television receivers from South Korea.\textsuperscript{112} Finland invoked Article XIX in 1977 with respect to women's panty hose, which was particularly criticized as being aimed at developing countries.\textsuperscript{113} And finally Norway took import measures under Article XIX in 1978 regarding textiles in order to legalize previously established restrictions on imports from Hong Kong.\textsuperscript{114}

B. Circumvention of Article XIX

In contrast, most situations where imports caused or threatened serious injury to domestic industries were addressed without regard to Article XIX. Despite access to the escape clause, there is a general reluctance to invoke this provision. The reasons for this reluctance reveal additional difficulties concerning the application of Article XIX which were eliminated during the Tokyo Round.\textsuperscript{115}

Various techniques have been used to sidestep Article XIX. These circumventions occurred in the form of measures within the framework of GATT, measures not specifically covered by the GATT but still within its auspices, and measures in complete disregard of GATT.

1. Circumvention of Article XIX Inside the GATT Framework

Methods of bypassing Article XIX can be found in other GATT safeguard clauses.\textsuperscript{116} Depending on the type of product, whether primary or manufactured, and depending on general circumstances, alternative clauses can be invoked.

In this context, an early case arose with Japan's accession to the GATT in 1955. Japanese exports, mainly of textiles, grew rapidly in the early 1950's and created a major problem for the industrialized states of the western hemisphere. But instead of invoking Article XIX, the proper

\textsuperscript{107} GATT Activities in 1974, at 51.
\textsuperscript{108} GATT Activities in 1976, at 66.
\textsuperscript{109} Id. at 76.
\textsuperscript{110} GATT Activities in 1977, at 69.
\textsuperscript{111} GATT Activities in 1976, at 74.
\textsuperscript{112} GATT Activities in 1978, at 85.
\textsuperscript{113} GATT Activities in 1977, at 69.
\textsuperscript{114} GATT Activities in 1978, at 95-96.
\textsuperscript{115} I. O. Long, supra note 2, at 90.
\textsuperscript{116} See supra notes 40-59 and accompanying text; See also GATT Provision in Relief from Injurious Imports, supra note 85, at 124-25.
provision for emergency actions on imports, the affected countries resorted to article XXXV, which entitles any contracting party to avoid GATT obligations to any new contracting party to whose application it does not consent. An十四 countries, representing about 40 percent of the GATT foreign trade refused to consent to Japan's accession under Article XXXV. In total, 43 countries resorted to the contemporaneous Article XXXV action against Japan. Relatively few contracting parties understood the Article XXXV action as a temporary device.

A GATT working party was established to examine the issue in 1961. It reported that one principal motivation for using Article XXXV was to impose special discriminatory restrictions on Japan. The working party revealed that the Article XXXV actions were mainly motivated by the threat Japanese exports posed to the domestic industries of the invoking countries—precisely the Article XIX issue.

During that time another problem of increased import competition occurred. The sudden increase in textile exports from developing countries led to the establishment of a GATT working party in 1960. Its report on "Market Disruption" caused by so-called low-wage manufactures, in particular cotton textiles, revealed additional problems related to Article XIX. Thus the report determined:

that whether or not safeguards against situations of "market disruption" were already available within the provisions of the General Agreement, there were political and psychological elements in the problem which rendered it doubtful whether such safeguards would be sufficient to lead some contracting parties which are dealing with these problems outside the framework of the General Agreement or in contravention of its provisions to abandon these exceptional methods at this time.

In its statement the working party referred to the increasing practice of sidestepping the entire GATT framework through "voluntary" bilateral restraint agreements designed to deal with the market dislocations caused by increased imports. However, the purpose of the report, to achieve a detailed analysis of Article XIX and the economic, social, and commercial aspects of market disruption, was not fulfilled. The only result reached

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117 GATT, supra note 6, at art. XXXV.
118 See K. DAM, supra note 11, at 348 (citing GATT, Analytical Index 161-62 (rev. 2d ed. 1966)). A total of 43 countries invoked Article XXIV against Japan. Id.
119 Id.; Curzon & Curzon, supra note 21, at 254-55.
120 GATT, BISD, supra note 6, 10th Supp. 69 (1962).
121 GATT, BISD, supra note 6, 10th Supp. 70 (1962). By comparison, Article XIX must be applied in a non-discriminatory manner. See supra note 78 and accompanying text.
122 GATT, BISD, supra note 6, 10th Supp. 71 (1962).
125 See GATT, BISD, supra note 6, 9th Supp. 27-28, 108 (1961) (outlining the purpose
on the issue was a more elaborate, yet still insufficient definition of "market disruption," which in essence is nothing more than another term for the "serious injury" requirement of Article XIX.\textsuperscript{126}

2. Circumvention of Article XIX under the Auspices of GATT

In response to the widespread Article XXXV actions, Japan entered into bilateral agreements with most of the important trading countries invoking the provision.\textsuperscript{127} In these agreements Japan "voluntarily" agreed to restrain its exports of products causing market disruption.\textsuperscript{128} Consequently, these countries discontinued to invoke Article XXXV and the principle of "orderly marketing" was endorsed.\textsuperscript{129} By the mid-1960's Japan had concluded such agreements with about 20 trading partners. The most important commodities affected were textiles and clothing items.\textsuperscript{130} Since textile imports also originated in high proportions in various developing countries and caused the greatest dislocation among all products in the markets of the industrialized countries, these products were singled out for special treatment under GATT auspices.\textsuperscript{131}

a. The Short-Term Arrangement on Cotton Textiles

Upon the initiative of the United States, the first formalized agreement on market disruption, the Short-Term Arrangement regarding cot-
ARTICLE XIX

The Long-Term Arrangement on Cotton Textiles

The Long-Term Arrangement on Cotton Textiles (LTA), which entered into force in October 1962, followed the orderly marketing approach of its predecessor to avoid disruptive import effects. It was intended to be equally in the interest of both developing and developed countries by reference to disruptive effects in importing and exporting

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133 Id. at art. I.

134 Id. at art. I(A).

135 See supra note 126 and accompanying text.

136 Short-term Arrangement, supra note 132, at App. A.

137 Id. at App. B.

138 See G. Patterson, supra note 127, at 310.

139 The Arrangement was designed to remain in effect for the twelve-month period beginning October 1, 1961. Short-term Arrangement, supra note 132, at art. I.

In addition, the LTA expressly considered the comparative advantage of the developing countries by "providing larger opportunities for increasing their exchange earnings from the sale in world markets of products which they can efficiently manufacture."\(^\text{142}\)

Under the safeguard provision of Article 3 of the LTA, an importing country could request export restraints from the exporting country.\(^\text{143}\) If the exporting country did not accede to the request, import quotas could be imposed.\(^\text{144}\) As in the STA, the term "market disruption" was based on the GATT working party definition, but subject to some interpretative changes.\(^\text{145}\) Thus, the price criterion of subparagraph (ii) was to be determined in relation to the prices at which other exporting countries sell their goods in the importing country,\(^\text{146}\) and the damage criterion of subparagraph (iii) referred to damage "caused directly by market disruption and not by any change of consumer taste, technological advance, or similar factors."\(^\text{147}\) Finally, a "threat" of market disruption meant an "actual and not a potential threat."\(^\text{148}\) But despite these efforts to define "market disruption" more explicitly and to make safeguard actions less likely, the United States immediately imposed 115 Article 3 restraints during the first 12 months of the Agreement. The action affected 49 out of the 64 categories already included in the STA.\(^\text{149}\)

Furthermore the LTA, under Article 4, permitted mutually acceptable bilateral arrangements to regulate trade in cotton textiles on terms not inconsistent with the objectives of the Agreement.\(^\text{150}\) There has been a shift in emphasis from Article 3 actions to Article 4, which in the case of the United States has been demonstrated in relation to 29 countries by 1972.\(^\text{151}\)

Some of the most severe criticism of the LTA centered around the insufficient definition of "market disruption", a problem which had sur-

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\(^{141}\) Id. at preamble, 4th consideration.
\(^{142}\) Id. at preamble, 2d consideration.
\(^{143}\) 114A. Compare id. at art. 3(1) with Short-term Arrangement, supra note 132, at art. I(A).
\(^{144}\) Long-term Arrangement, supra note 140, at art. 3(3).
\(^{145}\) Id. at Annex C; see also notes 135-136 and accompanying text.
\(^{147}\) Id. at para. 27.
\(^{148}\) Id. at para. 28.
\(^{149}\) K. DAM, supra note 11, at 307-08; Metzger, Injury and Market Disruption from Imports in 1 U.S. Comm'n Int'l Trade & Investment Pol'y, United States International Economic Policy in an Interdependent World 167 (1971) [hereinafter cited as the WILLIAMS REPORT].
\(^{150}\) Long-term Arrangement, supra note 140, at art. 4.
\(^{151}\) See GATT, BISD, supra note 6, 19th Supp. 48 (1973).
faced under Article XIX.\textsuperscript{182} The argument is that the term “sharp and substantial increase” as well as the price and damage criteria have been interpreted rather liberally in order to justify restraint measures even when the changes resulted mainly from internal factors.\textsuperscript{183} At least in the case of the United States, the implementation of such restrictions had been facilitated by the overzealous categorization of textile products.\textsuperscript{184} The developing countries had not been able to diversify their exports to the extent that would have been necessary to shift their production from one category to another. This left some categories underutilized while others had been restricted. Thus the exporting countries never realized the expansion of exports as envisaged by the LTA.\textsuperscript{185}

Further, these restrictions (or threats thereof) have been used by the importing countries to press for bilateral export restraint agreements with the exporting countries.\textsuperscript{186} As a result, the major importing countries succeeded in replacing the provisions of the LTA and in reducing the multilateral surveillance with a bilateral imbalance in favor of their stronger economies. While exporting countries were also required to restrict their exports, the importing countries were able to intensify investment in their domestic textile industry instead of phasing out inefficient industries. As a result, the importing countries succeeded in preserving or strengthening their production structure, thus threatening the very export potential of the developing countries.\textsuperscript{187}

The United States, on the other hand, charged the exporting countries with refusing to ensure an orderly development of trade. They were accused of not limiting their exports and of permitting the circumvention of export restraints by transshipments and third-country transactions.\textsuperscript{188} In spite of this heavy criticism,\textsuperscript{189} the LTA was extended\textsuperscript{190} until the

\textsuperscript{182} See GATT, BISD, supra note 6, 12th Supp. 68 (1964); K. DAM, supra note 11, at 312;
\textsuperscript{183} Id. at 311-12; G. PATTERSON, supra note 127, at 314.
\textsuperscript{184} GATT, BISD, supra note 6, 13th Supp. 56 (1965); G. PATTERSON, supra note 127, at 314.
\textsuperscript{185} GATT, BISD, supra note 6, 12th Supp. 66, 68 (1964); GATT, BISD, supra note 6, 13th Supp. 56 (1965); K. DAM, supra note 9, at 311-12; G. PATTERSON, supra note 127, at 314; Metzger, supra note 149, at 180.
\textsuperscript{186} K. DAM, supra note 11, at 307-08; G. PATTERSON, supra note 127, at 313.
\textsuperscript{187} GATT, BISD, supra note 6, at 14th Supp. 67, 77 (1966); Metzger, supra note 149, at 180.
\textsuperscript{188} K. DAM, supra note 11, at 309.
Multi-Fibre Arrangement entered into force in January 1974.161

c. The Multi-Fibre Arrangement

The Multi-Fibre Arrangement (MFA) was negotiated under the auspices of GATT as were its predecessors, the LTA and the STA. Several factors contributed to its establishment, most importantly the mutual dissatisfaction of the developing countries with the LTA.162

The developing countries regarded the LTA as too restrictive in light of their export needs and were particularly dissatisfied with the easy implementation of discriminatory trade barriers by the industrialized countries under the procedures of the LTA.163 The industrialized countries in turn did not feel their markets were effectively protected from import disruption.164 The developing countries preferred a newly negotiated protectionism approach in order to offset the likelihood of uncontrolled protectionism by the developed countries, while the latter agreed to the compromise in order to promote the concept of orderly marketing.165

The novel features of the MFA are: first, the more detailed definition of “market disruption” in Annex A of the Agreement;166 second, the more elaborate safeguard system under Articles 3 through 6 and Annex B;167 and third, the establishment of the Textiles Surveillance Body (TSB) which essentially performs surveillance and dispute settlement func-

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163 See supra notes 152-157 and accompanying text.

164 See supra note 158 and accompanying text.

165 See Perlow, supra note 162, at 100-01 n.32; Taake & Weiss, The World Textile Arrangement: The Exporter's Viewpoint, 8 J. World Trade L. 624, 636-27, 650-52 (1974). The Multi-Fibre Arrangement embodies the fundamental balance struck between the interests of the exporting (developing) countries and their importing (developed) counterparts. Article 1 provides:

[The basic objectives shall be to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries.]

Multi-Fibre Arrangement, supra note 161, at art. 1(2).

Another factor contributing to the Multi-Fibre Arrangement was the emergence of synthetic fibres. See Taake & Weiss, supra note 165 at 626.

166 Multi-Fibre Arrangement, supra note 161, at Annex A.

167 Id. at arts. 3-6 & Annex B.
The MFA appears to be sound as a whole, based upon more detailed rules and more thorough consideration of the needs of developing countries.\(^{169}\)

The determination of what constitutes market disruption is, in virtually every respect, more detailed and comprehensive than the previous definitions and requires "an examination of the appropriate factors having a bearing on the evolution of the state of the industry in question such as: turnover, market share, profits, export performance, employment, volume of disruptive and other imports, production, utilization of capacity, and productivity and investments.\(^{170}\)

The "sharp and substantial price increase" criterion has been refined by requiring that the "increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising . . . from the existence of production capacity in the exporting countries."\(^{171}\)

The "price differential" criterion includes more workable terminology by providing for a price comparison "at comparable stages of commercial transaction, and with the prices which normally prevail for such products sold in the ordinary course of trade . . . in the importing country."\(^{172}\) Finally, the MFA definition refers especially to the interests of the exporting country with respect to its "stage of development, the importance of the textile sector to the economy," and other economic key factors such as trade balance and balance of payments.\(^{173}\)

The mechanism of implementing safeguards and the principles governing such action have been considerably refined. If an importing country believes its market is being disrupted, it must consult with the exporting country concerned with a view toward removing such disruption. At the same time, detailed information on the reasons and justifications for

\(^{168}\) Id. at art. 11.

\(^{169}\) See, e.g., id. at art. 1(2) (which refers to the "avoidance of disruptive effects . . . in both importing and exporting countries"); art. 1(3) (which considers as "a principal aim . . . to further the economic and social development of developing countries and secure a substantial increase in their export earnings from textile products and to provide scope for a greater share for them in world trade in these products"); see also id. art. 6(1)-(4) (on the special situation of developing exporting countries).

The rule oriented approach of the Multi-Fibre Arrangement is evident in the elaborate safeguard system and the precise criteria for the determination of "market disruption." See id. at Annex A. This makes international trade for all participating countries more predictable and, in the case of trade disputes, protects the weaker participants from the imposition of "solutions" by the stronger trading partners.

\(^{170}\) Id. at Annex A(I).

\(^{171}\) Id. at Annex A(II)(i).

\(^{172}\) Id. at Annex A(II)(ii).

\(^{173}\) Id. at Annex A(III).
the safeguard request shall be furnished to the TSB.\textsuperscript{174}

If no such agreement arises out of the consultations within 60 days, the importing country may nevertheless impose import restrictions. These restrictions have to conform to the provisions of Annex B which determines the level beyond which imports or exports of textile products may not be restrained.\textsuperscript{175} In emergency cases the importing country may impose restriction at a higher level and without prior consultation.\textsuperscript{176} Such emergency situations exist in “highly unusual and critical circumstances, where imports of a textile product or products during the period of sixty days . . . would cause serious market disruption giving rise to damage difficult to repair.”\textsuperscript{177} In any case, the matter must be reported immediately to the TSB which makes appropriate recommendations and forwards these recommendations to the GATT Textiles Committee.\textsuperscript{178}

In imposing safeguards, the importing country must consider imports from all sources and seek to preserve a proper standard of equity.\textsuperscript{179} Furthermore it must endeavor to avoid discriminatory measures in situations where market disruption is caused by imports from more than one exporting country.\textsuperscript{180} If, under Article 3, safeguards are unavoidable they must be implemented in accordance with the provisions of Article 6.\textsuperscript{181} These provisions emphasize the dependency of developing countries on the textile trade and urge more favorable treatment of developing countries.\textsuperscript{182}

Restraint measures may not exceed one year. However, they can be renewed or extended.\textsuperscript{183} Bilateral restraint agreements, however, may be concluded for periods in excess of one year.\textsuperscript{184} Safeguard measures are to be kept under review and the progress in eliminating such measures must be reported to the TSB.\textsuperscript{185}

Article 4 permits the conclusion of bilateral restraint agreements in-

\textsuperscript{174} Id. at art. 3(3).
\textsuperscript{175} Id. at art. 3(5).
\textsuperscript{176} Id. at art. 3(6).
\textsuperscript{177} Id. at art. 3(6). Annex B. establishes the preceding 12 months as the reference period for restraints. Id. at Annex B(1). It further provides that the level of imports must be raised by not less than six percent annually, if restraints last longer than one year. Id. at Annex B(2). This six percent floor refers to the Multi-Fibre Arrangement as it stood prior to its extension in 1981. During the extension negotiations, European textile lobbies pressed for a reduced guaranteed import level. See Perlow, supra note 162, at 112-13 n.86.
\textsuperscript{178} Multi-Fibre Arrangement, supra note 161, at art. 3(5) (iii) & (6).
\textsuperscript{179} Id. at art. 3(2).
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at art. 6(1)-(4).
\textsuperscript{183} Id. at art. 3(8).
\textsuperscript{184} Id.
\textsuperscript{185} Id. at art. 3(9).
so far as they are consistent with the basic objectives and principles of the Agreement.\textsuperscript{188} The full details of these agreements, which must be more lenient than Article 3 restrictions, must be reported to the TSB.\textsuperscript{187} The TSB then makes recommendations as it deems appropriate.\textsuperscript{188} The TSB’s surveillance function on bilateral restraints helps to ensure the commitment to multilaterality endorsed by the participating countries.\textsuperscript{188} Finally, the categorization of textile products, a much criticized feature of the LTA, must be avoided under Article 5.\textsuperscript{190}

The TSB constitutes a unique institutional innovation in international trade agreements. For the first time in the field of international commercial relations, an independent standing body consisting of nine experts is vested with wide ranging surveillance and conciliatory powers.\textsuperscript{191} It has been said that the TSB “represents a mixture of political and judicial elements.”\textsuperscript{192} Although its members are also official representatives of the main signatory countries, the TSB does in fact operate in an overall objective manner.\textsuperscript{193} Its functions can be summarized as follows: first, to conduct annual reviews and report on all textile restrictions maintained by the MFA members; second, to determine whether restraints or quotas are justified on grounds of market disruption; third, to make recommendations to participating countries in the event of a breakdown or dispute in bilateral negotiations.\textsuperscript{194}

The first function of the TSB primarily concerns reviewing and reporting on specific actions of the participating countries as opposed to that of the Textiles Committee, which mainly conducts general reviews.\textsuperscript{195} The second function of the TSB is to determine on an ex post facto basis, whether Article 3 restraints are in compliance with the provisions of the

\textsuperscript{188} Id. at art. 4(2).
\textsuperscript{187} Id. at art. 4(3).
\textsuperscript{188} Id. at art. 4(4).
\textsuperscript{189} Id. at art. 4(2).
\textsuperscript{190} Id. at art. 5.
\textsuperscript{191} Id. at art. 11.
\textsuperscript{193} Id. The United States, the EEC, and Japan seem to have “de facto” permanent seats. Other seats traditionally are reserved to a cotton exporting country (India, Pakistan, Egypt), a Latin American country, and a Far Eastern country. Perlow, \textit{supra} note 162, at 104.
\textsuperscript{195} Perlow, \textit{supra} note 162, at 105. The Textiles Committee was established in a provisional form first under the STA. Its members are all signatory countries to the Multi-Fibre Arrangement. The Committee operates under GATT auspices and the GATT Director-General serves traditionally as the chairman. \textit{See id.} at 103.
Although the justifications behind bilateral Article 4 restraints were not initially subject to examination, the TSB unilaterally expanded its power by declaring that these bilateral restraints must conform to the Agreement. Neither type of restraint, however, has been found unjustified.

This reluctance may be attributed to the informal character of the TSB's recommendations. The recommendations are usually determined by consensus and lack any legally binding effect. Thus, "[p]articipating countries shall endeavor to accept in full the recommendations of the Textiles Surveillance Body." Nevertheless, the TSB's recommendations have considerable moral influence on governmental decisions.

The only major dispute on the TSB's authority arose under Article 2. The EEC took advantage of Article 2, paragraph 2(i) which provides for special programs in order to phase out previously established quantitative restrictions. The EEC's programs were publicized well after the required deadline and, in addition, they appeared to be in violation of the provisions of Article 2. The TSB recommended that the EEC review these programs with a view toward eliminating the violative restrictions. The EEC retorted by charging the TSB with overstepping its authority and clarified its understanding of the TSB as a conciliatory rather than arbitral or judicial body. This does not correspond with the actual provisions of the MFA, most notably Articles 3 and 4. These provisions require the TSB to review agreements and, in the case of Article 3 restraints, even to investigate their justification. The controversy, however, produced a more cautious TSB and a comparable dispute did not occur again.

To some extent the effectiveness of the supervisory functions of the TSB has been hampered by overdue and inadequate information on important points. In the field of dispute settlement, the TSB avoided playing an active role, and wherever feasible it recommended continued bilateral consultations. This attitude corresponds to the fine balance

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196 Multi-Fibre Arrangement, supra note 161, at arts. 3(4), 5(i) & (iii), 6.
197 See Perlow, supra note 162, at 117.
198 Id. at 117 n.107.
199 Id. at 106.
200 Multi-Fibre Arrangement, supra note 161, at art. 11(8).
201 Sarna, supra note 194, at 361.
202 See Perlow, supra note 162, at 109.
203 Id. at 110.
204 Id.
205 See, e.g., Multi-Fibre Arrangement, supra note 161, at arts. 3(4) & (5) (iii), 4(4); see also Perlow, supra note 162, at 110-11.
206 See Perlow, supra note 162, at 111-12.
207 See id. at 120-21.
208 See id. at 121.
between legal and political credibility which the TSB must accommodate.\textsuperscript{209} The overall performance of the TSB has therefore been regarded as satisfactory.\textsuperscript{210}

Analysis of the operation of the MFA reveals criticism similar to that levied against the LTA.\textsuperscript{211} However, the MFA still represents a multilateral approach to textile trade which is preferred over bilateral solutions. Accordingly, most countries acknowledged at a major review of the Agreement that: "the Arrangement had marked a significant advance in international co-operation in textile trade policy and that it had provided a delicately balanced framework within which the special problems of textiles trade could be discussed and solved. The objectives of the Arrangement remained valid despite some problems regarding its implementation."\textsuperscript{212}

These problems of implementation occur mainly concerning the determination of market disruption, the central part of the MFA framework. With continuing practice of the Arrangement, charges have been made by exporting countries that safeguard measures under Article 3 have been taken by importing countries without the clear evidence of market disruption required by Annex A.\textsuperscript{213} In addition, the measures have fallen short of the minimum mandatory import levels specified in Annex B.\textsuperscript{214} Also it is argued that it was "too often taken for granted that low-priced imports from developing countries are assumed to be disruptive."\textsuperscript{215} Moreover the record revealed a proliferation of bilateral restraint agreements that often concluded under the threat of unilateral restrictions.\textsuperscript{216}

Many countries therefore felt the need to reconsider the legal basis of the Arrangement. The MFA does constitute a deviation from GATT, but they are reconciled by the equivocal declaration in the Preamble of the MFA toward full regard for principles of GATT objectives.\textsuperscript{217}

\footnotesize
\begin{itemize}
  \item \textsuperscript{209} Id. at 123.
  \item \textsuperscript{210} Id. at 131.
  \item \textsuperscript{211} See \textit{supra} notes 152-159 and accompanying text for a review of the criticism levelled against the LTA.
  \item \textsuperscript{212} GATT, BISD, \textit{supra} note 6, 24th Supp. 38 (1978).
  \item \textsuperscript{213} GATT, BISD, \textit{supra} note 6, 23d Supp. 22-23 (1977); GATT, BISD, \textit{supra} note 6, 24th Supp. 34 (1978).
  \item \textsuperscript{214} GATT, BISD, \textit{supra} note 6, 23d Supp. (1977).
  \item \textsuperscript{215} GATT, BISD, \textit{supra} note 6, 24th Supp. 34 (1978).
  \item \textsuperscript{216} GATT, BISD, \textit{supra} note 6, 24th Supp. 35 (1978); \textit{see also} Curzon, \textit{Neo-Protectionism, the MFA and the European Community}, 4 \textit{WORLD ECON.} 251, 255 (1981) (discussing the concept of "reasonable departures" which the European Community advocated during the extension negotiations in 1977).
  \item \textsuperscript{217} Multi-Fibre Arrangement, \textit{supra} note 161, at preamble, consideration 8. The Multi-Fibre Arrangement deviates from GATT principles in two fundamental ways; it embraces discriminatory trade restrictions and allows quotas rather than tariffs to curb imports. See
\end{itemize}
The MFA was extended twice, in 1977 and in 1981 until 1986. The first extension has resulted in a more restrictive agreement by providing more latitude for the developed importing countries to conclude bilateral restraint agreements. Nevertheless, during the 1981 renegotiations the EEC took an even more protectionist stance and since it was subsequently joined by the United States it achieved an accord which appears even more restrictive than the previous one. The restrictive character is exemplified by the provision that an importing country may consider a drop in its domestic production as a reason for implementing quotas on that item. This provision resembles the "recession clause" which was, along with several alternatives to curb imports for domestic reasons, a negotiating objective of the EEC. How restrictive the new MFA will prove to be will depend on the outcome of the renegotiations of various bilateral restraint agreements which have been concluded under the authority of the MFA. In the case of the EEC these negotiations are scheduled for 1982.

2. Circumvention of Article XIX Outside the GATT Framework

The Japanese trade dispute and the operation of the Textile Arrangements prompted various countries to resort to bilateral restraint agreements. Basically, these restraints were requested by the importing country to eliminate the threat of market disruption originating from im-

Curzon, supra note 216, at 259-60.

An interesting case regarding the relation between GATT and the Multi-Fibre Arrangement involved the application of GATT Article XIX by Canada on textile and clothing imports. The Textiles Committee noted that any contracting party signatory to the Multi-Fibre Arrangement retained legal and formal right to invoke GATT articles. There was, however, a divergence of views, first whether safeguard measures under GATT may be used when their application nullifies the objectives of the Multi-Fibre Arrangement, and, second, whether a contracting party must exhaust its rights under the Multi-Fibre Arrangement before resorting to GATT provisions. GATT, BISD, supra note 6, 24th Supp. 44-48 (1978).


Protocol Extending the Arrangement Regarding International Trade in Textiles, supra note 218, at arts. 5(1) & (3). Article 5(3) provides for the jointly agreed "reasonable departures" discussed in Curzon, supra note 155, at 255. See also Perlow, supra note 162, at 113-15.


Id.
ports of developing countries. The exporting countries agreed to the re-
straints to ensure orderly access to the markets of the industrialized
states and limited their exports "voluntarily" beyond the level they could
export under normal competitive conditions.\footnote{See \textit{UNCTAD, Growing Protectionism and the Standstill on Trade Barriers Against Imports from Developing Countries} 5, U.N. Doc. TD/B/C.2/194 (1978) [hereinafter cited as \textit{UNCTAD, Growing Protectionism}].} Indeed, the term "volun-
tary export restraint" is a misnomer since such action is often agreed to
only under the threat of unilateral quotas and these quotas might well
have a more detrimental impact on the exporting country.\footnote{S. METZGER, \textit{Lowering Nontariff Barriers} 145 (1974).} Thus, Hong
Kong, India, Japan, Korea, Malaysia, Pakistan, Poland, Trinidad and To-
bago, and Yugoslavia have filed complaints under GATT about "volun-
tary" export restraints contending that such restrictions are only imple-
mented in order to avoid the imposition of even more stringent unilateral
import restrictions by the countries requesting the restraints.\footnote{See D. ROBERTSON, \textit{supra} note 30, at 26, 53.} Although
these agreements deal with the essential Article XIX issue, they are sub-
ject neither to direct GATT surveillance nor to GATT authority.\footnote{For an overview of bilateral restraint agreements during the 1930's see Metzger, \textit{supra} note 149, at 167-83.}

a. Definitions and Procedural Aspects

Bilateral restraint agreements are usually discussed as "voluntary ex-
port restraints" (VERs) or "orderly marketing agreements" (OMAs).
However, the definition of such agreements may vary. A first and com-
monplace method of distinction rests upon the type of parties concerned.
According to the United Nations Conference on Trade and Development
(UNCTAD), VERs occur essentially as a result of bilateral negotiations
between industries in importing and exporting countries only with the
support of their governments. Their implementation is left to the indus-
try in the exporting country.\footnote{UNCTAD, \textit{Growing Protectionism}, \textit{supra} note 224, at 6.}

In the case of OMAs, however, governmental intervention is explicit
and formal, with specific agreements being negotiated between exporting
and importing countries.\footnote{\textit{Id.} at 9.}

A second distinction derives from their different procedural require-
ments under U.S. law. The Trade Act of 1974 defines OMAs as "orderly
marketing agreements with foreign countries limiting the export from for-
(1976 & Supp. IV 1980)).} They are
treated in the Trade Act as an official import relief measure, along with unilateral quantitative import restrictions.\textsuperscript{231} Accordingly, their negotiation has to be preceded by an affirmative finding of injury to domestic production by the ITC.\textsuperscript{232}

VERs, on the other hand, are not legally authorized import relief measures under U.S. law and thus are considered procedurally inferior. The only statutory reference to VERs relates to the agricultural sector.\textsuperscript{233} They may be negotiated even between the Executive Branch and foreign industries regardless of the provisions of the Trade Act.\textsuperscript{234} Usually, however, they are negotiated on an industry-by-industry basis when the ITC has dismissed an escape clause application or the President has refused to grant import relief despite an affirmative finding by the ITC.\textsuperscript{235}

Strict U.S. legislation played a role in promoting the proliferation of VERs. Up to 1962, only 15 of 134 cases investigated by the Tariff Commission led to the Presidential invocation of U.S. escape clause measures under Article XIX.\textsuperscript{236} Nevertheless, with the Trade Expansion Act of 1962, Congress sharpened the requirements for import relief under U.S. law.\textsuperscript{237} As a result there were no affirmative findings from 1962 to 1969, and the positive findings before the 1974 legislation were few.\textsuperscript{238} Although Congress, under the Trade Act of 1974, liberalized escape clause law,\textsuperscript{239} until 1979 only 3 of 38 applications for import relief resulted in explicit action under Article XIX. OMAs were negotiated in three additional cases.\textsuperscript{240}

\textsuperscript{231} Id. at §2253(b)-(k) (1976 & Supp. IV 1980).
\textsuperscript{232} Id. at §2251(b) (1976 & Supp. IV 1980).
\textsuperscript{234} In Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975), the Court held that, although the Executive Branch was involved in the negotiation of voluntary restraints with Japanese and European steel industries, the negotiations did not constitute regulation of foreign commerce and consequently did not violate the Constitution or the Trade Expansion Act. Id. at 143. See Recent Decision, Presidential Authority to Negotiate Voluntary Export Restraint Arrangements with Foreign Producers—Consumers Union of U.S., Inc. v. Kissinger, 7 LAW & POL’Y INT’L Bus. 905 (1975).
\textsuperscript{235} Bhagwati, supra note 89, at 1000-01. Bhagwati shows, in the case of Japan, how industries which failed to win protection under the U.S. escape clause proceeded to secure VERs on the imports from Japan.
\textsuperscript{236} Id. at 993-97.
\textsuperscript{238} Bhagwati, supra note 89, at 997; 1975 U.S. INT’L TRADE COMM., ANN. REP. 12.
\textsuperscript{240} 1976 U.S. INT’L TRADE COMM’N, ANN. REP. 4-5; 1977 id. at 6-7; 1978 id. 7-8; 1979 id. at 6; GATT, ACTIVITIES IN 1976, at 74 (1977); Proclamation No. 4510, 3 C.F.R. 28 (1977);
b. Economic Implications

VERs and OMAs tend to proliferate, and, more importantly, the volume of trade affected by them has increased.\textsuperscript{241} The fact that they escape any international surveillance enhances their impact on international trade.

One of the most important implications flows from their bilateral character. They can be applied selectively in the sense that they are directed only at those suppliers who are the most competitive, which in many instances are developing countries. Due to the different bargaining power in bilateral negotiations, VERs and OMAs favour the economically stronger industrialized countries over the weaker developing countries.\textsuperscript{242}

Since VERs and OMAs are applied selectively, they cause trade diversion at the expense of the restraining countries. Imports from unrestricted sources are likely to increase rapidly in order to fill the gap left by the self-restraining exporting country. Consequently, third countries benefit from the selective measures at the expense of the countries employing self-restraint. Since these third party beneficiaries sooner or later are also confronted with the request to restrain their exports, VERs and OMAs bear within themselves the seeds of their expansion to other countries.\textsuperscript{243}

Finally, VERs and OMAs lead to the cartelization of markets in both importing and exporting countries. In the importing country’s market they tend to limit competition and raise prices.\textsuperscript{244} In the exporting country VERs are usually administered through some sort of licensing or quota system which diminishes competition among producers of export goods.\textsuperscript{245}

c. Consistency with the Law of GATT

Under the law of GATT, VERs and OMAs raise questions with respect to Articles XI and XIII. Article XI, which is aimed at the general elimination of quantitative restrictions, provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made


\textsuperscript{241} UNCTAD, GROWING PROTECTIONISM, supra note 224, at 6 n.7.

\textsuperscript{242} Id. at 8.

\textsuperscript{243} This self-perpetuation effect attached in the textile market. See id. at 8; Bhagwati, supra note 89, at 1007.

\textsuperscript{244} UNCTAD, GROWING PROTECTIONISM, supra note 224, at 9. The implication of VERs led to the challenge of the steel restraints in Consumers Union of the United States, Inc. v. Kissinger. See supra note 234 and authorities cited therein.

\textsuperscript{245} D. ROBERTSON, supra note 30, at 26-27; Matsushita, Export Control and Export Cartels in Japan, 20 HARV. INT’L L.J. 103 (1979) (discussing Japan’s regulation of exports).
effective through quotas, import or export licenses or other measures, shall be instituted . . . on the importation . . . or on the exportation . . . of any product destined for the territory of any other contracting party." 246 Although the wording of the provision might indicate otherwise, it is questionable whether it covers VERs and OMAs. The exception on export restrictions in section 2(a) of the provision, 247 as well as the interpretative note of the corresponding Article of the Havana Charter, 248 allow the conclusion that exports should not be restricted in cases where the importing country has an interest in the unhampered supply of these export items. 249

In the case of VERs and OMAs, however, it is precisely the importing country which requests the restrictions. Even if Article XI is regarded as the principal provision prohibiting VERs and OMAs under GATT, complaints would be very unlikely since the restrictions are imposed at the request of the importing country. In fact, the importing country would be the one affected by those restrictions. 250

The same reasoning applies to cases under Article XIII which provides for non-discriminatory administration of quantitative restrictions, with respect to exportation as well as importation. 251 Again, since it is the importing country which is principally affected, but explicitly requests the export restraints, complaints are unlikely to occur.

In conclusion, VERs and OMAs may be regarded as "illegal" under GATT, but in any case they appear practically unassailable. 252 Thus, under GATT a quasi-legal distinction arose between "legal" import quotas and "illegal" voluntary restraints, the latter not being subject to GATT negotiations in a formal sense. Attempts to legalize the "illegal"

246 GATT, supra note 6, at XI(1).
247 "The provisions of paragraph 1 of this Article shall not extend to . . . [e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party." GATT, supra note 6, at art. XI(2)(a).
248 The Interpretative Note to Article 20 of the Havana Charter states:

[I]n the case of products which are basic to diet in the exporting country and which are subject to alternate annual shortages and surpluses, the provisions of paragraph 2(a) do not preclude such export prohibitions or restrictions as are necessary to maintain from year to year domestic stocks sufficient to avoid critical shortages.

U.S. Dep't State, Havana Charter for an International Trade Organization, supra note 7, at 63.
249 See J. JACKSON, supra note 8, at 316-17 (discussing the relationship between Article XI(2)(a) and the Havana Charter, Article 20); see also GATT, Analytical Index 51-52 (2d rev. 1966).
250 GATT Provisions on Relief from Injurious Imports, supra note 85, at 125.
251 GATT, supra note 6, at art. XIII(1).
252 Tumlir, supra note 81, at 407.
restrictions by submitting them to Article XIX consultation procedures seem to be rather remote, since these measures were precisely developed to circumvent Article XIX in its present form.\textsuperscript{253} In addition, the formal recognition of bilateral restraint agreements in the framework of the MFA constitutes a justification for their validity.

3. Summary and Conclusions on the Experience with Article XIX

With respect to the utilization of Article XIX, as well as its various methods of circumvention, the deficiencies of the GATT escape clause can be summarized. The first inadequacy lies in the vague determination of the Article XIX requirements, particularly the "serious injury" definition. The definitional problems with the term "market disruption" continued and culminated after various attempts of GATT working parties and the textile arrangements had failed to reach the most detailed definition used by the MFA. But experience under the MFA confirm that a satisfactory definition still has not been reached and this suggests the difficulty in elaborating on an appropriate injury determination within the framework of Article XIX.\textsuperscript{254} In addition, the causal requirements for a safeguard action were virtually abandoned.

A second challenge occurred with growing bilateralism in the solutions to Article XIX cases. With respect to the reasons pertaining to this development, it has been pointed out by a GATT Secretariat member that Article XIX appears at the same time "too exacting" and "too lenient."\textsuperscript{255} The issue is further complicated by the impact of the two basic principles of GATT, the most-favoured-nation treatment and reciprocity.

Article XIX appears "too exacting," because the country invoking the escape clause must pay dearly for the emergency action in the form of either compensatory concessions made to the affected countries or retaliatory trade measures imposed by the affected countries.\textsuperscript{256} Precisely at this point the principles of MFN treatment and reciprocity are involved. As it has been shown, the safeguard measure under Article XIX must be imposed on a non-discriminatory basis.\textsuperscript{257} In other words, all countries according to the MFN principle must be treated equally. This implies that the compensatory concessions themselves have to comply with the MFN principle, just as the safeguard action does.\textsuperscript{258} In brief, all countries being adversely affected must be compensated, thus

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the MFA definition of "market disruption" and the criticisms levelled at it, see supra notes 170-73, 213 and accompanying text.
\item Tumlir, supra note 81, at 106.
\item Id. at 406.
\item See supra note 77 & 78 and accompanying text.
\item Tumlir, supra note 81, at 406; Meier, supra note 85, at 496.
\end{enumerate}
\end{footnotesize}
requiring "substantially equivalent" concessions to be made on the basis of reciprocity.

The impossibility of parties agreeing on extensive equivalent concessions will in many instances cause retaliatory measures imposed by all non-compensated countries on the basis of reciprocity. The problem, however, remains the same: the more countries affected by safeguard restrictions which go uncompensated, the more retaliatory trade measures should be expected by the country invoking Article XIX.

Since the country confronted with serious injury to its industry can foresee and calculate these developments, it will seek a solution to the problem outside the framework of Article XIX and enter into bilateral restraint agreements. These agreements do not usually require any compensation at all, since the countries requesting them are mostly industrialized countries. They are, in terms of bargaining power, much better off in bilateral agreements than the developing countries. Consequently, the implication of MFN treatment and reciprocity on Article XIX actions enhances the proliferation of bilateral restraints in circumvention of the GATT rules.

Often, Article XIX appears "too lenient"; the principle of reciprocity is also involved here. Article XIX authorizes safeguard measures to be maintained "for such time as may be necessary to prevent or remedy such injury." The safeguard measure may be maintained as long as the threatening export capacities exist abroad. Furthermore the settlement procedures of Article XIX constitute a bias in favour of the permanent establishment of the emergency measure. Since compensatory concession or retaliatory withdrawal, made on the basis of reciprocity, settles the dispute, the safeguard restriction remains in existence unsanctioned. Without reciprocal bargaining the import restrictions would probably not be lifted again. In fact reciprocal bargaining is just as unlikely, since the countries already restricted would not accept additional disadvantages in order to have the restriction abolished.

Consequently, the countries which were affected by safeguard actions also preferred external solutions in the form of bilateral restraint agreements. These bilateral agreements required periodic renewal and thus were negotiable with respect to the period of restraint. In addition, they offered bargaining opportunities on the overall level of restraint. For this reason countries threatened by more stringent unilateral safeguard mea-

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258 See supra notes 224-227 and accompanying text.
259 GATT, supra note 4, at art. XIX(1)(a); see Appendix A for the full text of Article XIX.
260 Tumlir, supra note 81, at 406.
261 Id.
sures also preferred the bilateral restraints.263

III. ARTICLE XIX REFORM DURING THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS

Based on the negative experiences with Article XIX, a major reform was in order. A simple collective decision under GATT would not make it possible to reassert the Article XIX rationale as it stood before the Tokyo Round.264 On the contrary, recent economic upheavals made revision of Article XIX more necessary than ever before.265 The constant circumventions of Article XIX revealed a general reluctance of the contracting parties to comply with firm rules of trade law. According to an observer, Article XIX “appears to be more honored in the breach than in the observance.”266 The overall legal “spirit” of GATT affairs “risks being swallowed up by the prevailing anti-legal attitudes.”267 With respect to the Article XIX negotiations the subject was recalled by the then Director-General of GATT when he stressed the need for the “reaffirmation of the rule of law in international trade.”268 In international trade this statement implies the need for greater reliance on firm rules. Essentially all safeguard measures must be subject to international surveillance with mutually agreed upon criteria and procedures.269 In order to eliminate actions outside the GATT, the criteria and procedures of Article XIX had to be redefined. Technically, the reform was achieved through the development of a supplementary code to Article XIX, as was done with respect to other GATT provisions during the Tokyo Round.270 This supplementary code had to cover some specific issues.

At the top of the agenda stood the need for an effective definition of “serious injury.”271 The second and most important issue concerned the question of whether safeguard measures should be applied on a discriminatory or non-discriminatory basis.272 The MFN requirement caused the circumvention of the escape clause through bilateral restraints. Therefore

264 Tumlir, supra note 81, at 405-06.
265 Id. at 406. .
266 Meier, supra note 85, at 499.
267 R. Hudec, supra note 11, at 263.
269 Id. at 258.
270 See 1 O. Long, supra note 2, at 90-95. For a proposal on the form of the “Supplementary code” see D. Robertson, supra note 30, at 61-65.
271 1 O. Long, supra note 2, at 94.
272 Id.
some countries believed that the MFN principle should be eliminated. A third issue concerned the preferential treatment of developing countries under Article XIX actions. One of the developing countries' demands was to be exempted from safeguard measures imposed by industrialized countries.

A further problem was created by proposals concerning mandatory adjustment assistance. Industrialized countries faced demands to shift their less competitive industries into other lines of economic activity. It was essential to the developing countries that safeguard measures be firmly accompanied by adjustment assistance measures. These measures should not be used merely as protectionist devices which only ensure the existence and expansion of non-competitive industries.

In addition, all future cases of emergency protection should be placed on a legal basis. A potential safeguard code must be so comprehensive that it prevents the negotiation of future bilateral restraints and eliminates the already existing "voluntary" export restraints. Finally, procedural questions of multilateral surveillance and dispute settlement under Article XIX had to be solved in order to provide a workable basis for the implementation of future safeguard actions.

Despite the importance of a safeguard code, the first substantial negotiations occurred only at the end of the Tokyo Round. By early 1979, however, the nations' positions on the major problems remained as far apart as ever, particularly those on selectivity and preferential treatment of developing countries. A draft code by the GATT Secretariat also proved unsuccessful in overcoming the deadlock. Finally the planned code on safeguards was eliminated from the whole Tokyo Round package which was passed in May of 1979. The safeguard code was the subject of further negotiations which, as a matter of urgency, should have concluded by mid-July of 1979. An agreement was not reached, however, and the negotiations were postponed to the fall of 1979.

In November of 1979 negotiations resumed at the Annual Trade Talks of the "CONTRACTING PARTIES" and were submitted to a

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272 Id. at 94-95.
273 Id. at 95.
274 Id. at 94.
275 Id.
276 Id. at 92.
277 Id. at 153. The "draft code" was printed under the title Multilateral Trade Negotiations: Group Safeguards, GATT Doc. MTN/SG/N/47 (Apr. 11, 1979) (copy on file at Journal office) [hereinafter cited as Draft Safeguard Code].
newly created committee which had to report on the issue by June 1980. In addition, a subcommittee on the Committee on Trade and Development was set up to examine any future protective actions by developed countries against imports from developing countries. However, one year after the conclusion of the Tokyo Round in Geneva, the safeguard talks were still at a stalemate and were regarded as one of the failures of the Tokyo Round. The importance of a safeguard code was described by the then GATT General-Director, Oliver Long. Long said that "the outcome will colour the final judgment on the Tokyo Round as a whole."

A. The Determination of "Serious Injury"

The determination of "serious injury" was viewed uniformly as a necessity for reform. Early experience had already revealed the deficiencies of the "serious injury" criteria. Subsequently, under the MFA, efforts have been made to substitute the term with "market disruption." The MFA definition of "market disruption" can be regarded as the most useful model for potential Article XIX reform. Nevertheless the "market disruption" definition especially emphasizes, as did all other attempts, the price level of the imports. The developing countries, however, were reluctant to adopt a definition similar to that of the MFA. They were the first targets of safeguard action because their products were simply produced on a lower cost level which in turn created the comparative price advantage. Moreover, the term required clarification of which kind of situation created a threat of serious injury and the criteria to be considered in determining the causal link between imports and injury.

Accordingly, many arguments raised in the MFA negotiations were reiterated. Although the draft code on safeguards included many aspects of the MFA's position, it was liberalized considerably by abandoning price references. According to the draft code the determination of a serious injury must be made on the basis of "positive findings of fact and not mere conjecture, or remote hypothetical possibility." The positive findings of fact should be based on the "examination of

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282 GATT, BISD, supra note 6, 26th Supp. 219 (1980).
283 GATT Press Release, GATT/1237 (May 15, 1979); see generally 1 O. Long, supra note 2, at 90-95.
284 Multi-Fibre Arrangement, supra note 161, at Annex A(II) (ii); see supra note 171 and accompanying text.
285 1 O. Long, supra note 2, at 94.
286 See Draft Safeguard Code, supra note 278, at 4-5.
287 Draft Safeguard Code, supra note 278, at 4. Where serious injury is only threatened, the determination will be made when such injury is "clearly imminent." Id.
objective factors . . . such as: actual and potential decline in output, turnover, market share, profits, exports, utilization of productive capacity, productivity, factors affecting domestic prices, actual and potential negative effects on inventories, domestic employment and wages, and investment." 288 The similarity of these factors to the MFA definition in Annex A, sec. I is striking. 289

With respect to the causal relationship between imports and injury, the draft code abandons the price criterion referred to in the MFA Annex A, sec. II (ii) 290 In fact, the draft code explicitly provides that "no imports shall be discriminated against on the grounds of low costs or low prices." 291

The draft code explicitly refers to the effect of factors other than imports on the domestic producers and provides that such factors may not be attributed to the injury determination. 292 The code lists other factors which include: "competition among domestic producers, contraction in demand due to substitution by other products or changes in consumer tastes, decline in domestic consumption or production, shifts in technology, structural deficiencies or loss of competitive advantage." 293

In spite of these efforts, problems remain. Article XIX was also applicable in cases of relative import increases. This "relative" standard is an extremely protective device, and in the case of a worldwide recession only deepens the economic crisis. 294 If domestic production grows at a lower rate than competitive imports do, the requirement of a relative import increase is satisfied and trade barriers can be imposed. However, the draft code continues to assert the relative standard. 295 Moreover, aggregation of the key economic variables into a conclusive formula would be difficult. This realization must not be understood as disregard for the attempts at clarification, but rather reveals that the determination of serious injury continues to be a matter of statistically based evidence, the evaluation of which is still subject to manipulation and discretionary judgment. 296

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288 Id.
289 See supra note 170 and accompanying text.
291 Draft Safeguard Code, supra note 278, at 11.
292 Id. at 5.
293 Id.
294 See J. JACKSON, supra note 558-59.
295 The Code states: "If in the case of serious injury such a determination shall be made only when imports have increased . . . in such quantities relative to domestic production . . . as to cause serious injury sustained by domestic producers." Draft Safeguard Code, supra note 278, at 4.
296 See D. ROBERTSON, supra note 29, at 56.
The draft code places the burden for conducting the investigation to determine a serious injury or a threat thereof upon the domestic authorities concerned. This inquiry must be conducted in conjunction with the guidelines and criteria specified by a potential safeguard code. Nevertheless, any contracting party may request the Committee on Safeguards to examine any safeguard measure which "is affecting, or is likely to affect, its trade interest." The substantive and procedural similarities of the determination of "serious injury" under the draft code on safeguards and under U.S. law invite some remarks on the U.S. escape clause.

Procedurally, the first step is the filing of a petition for import relief with the International Trade Commission (ITC) which conducts the investigation. The ITC determines, "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." In determining "serious injury" and "substantial cause" the ITC must follow certain guidelines. Factors indicating a "serious injury" include: the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within an industry. Moreover, relatively increased imports fulfill the requirement of "such increased quantities" under the escape clause. Finally, a substantial cause "means a cause which is important and not less than..."
any other cause."^{305}

The statutory criteria of a serious injury under the Trade Act are less detailed than those established by the MFA and the draft GATT safeguard code. However, the causal link between imports and injury must be substantial under U.S. law as opposed to the draft GATT code and the MFA. The draft code only refers to a series of factors which may not be attributed to the impact of imports.^{306} Under U.S. law the ITC considers all causes for the injury and subsequently ranks the imports among these causes. If the increased imports contributed not less than any other cause, it must then be determined whether they constitute an important cause. If the increased imports are only one of several causes of injury, their importance may be doubted. But, if they represent one out of two causes, the increased imports will presumably be deemed "important."^{307}

The U.S. experience reveals the complexity of the determination of a serious injury.^{308} The Commission^{309} elaborated case-by-case criteria akin to those defined by the draft safeguard code for the determination of a serious injury. The criteria developed by the Commissioners include: a decline in output and profits, a decline in the number of firms in the industry, a rise in unemployment in the industry in question, the underutilization of productive capacity, and other pertinent factors.^{310} In spite of the search for more indicative criteria, the investigations have frequently been made on a rather superficial basis.^{311} To some extent these ad hoc decisions stemmed from the "truly fuzzy nature of the injury concept"^{312} which invites policy considerations unrelated to the increased imports. For example, an injury investigation regarding the footwear industry has been described as follows:

[t]he industry is composed of a very large number of small producers who lack adequate financial resources and are otherwise ill equipped to adjust to the rapid proliferation of new styles and material, increased imports from low-wage countries, changing technology, new marketing techniques and a cost-price squeeze of impressive proportions . . . .

Even if footwear supplies from abroad is [sic] ignored, the problems of

^{305} Id. at §2251(b)(4).

^{306} See supra notes 292-293 and accompanying text.

^{307} See Ris, supra note 239, at 306.

^{308} Although there are considerable differences between the U.S. escape clause criteria under the prior and present trade legislation, the fact-finding process remains unchanged.

^{309} The term "Commission" refers to both the Tariff Commission and its successor, the International Trade Commission.


^{311} Id. at 559.

^{312} Id. at 554.
the industry are monumental.313

The critical point is that the smaller firms of the industry appear uncompetitive even in the absence of imports. Their protection from imports can be justified politically, but not economically. Similar policy considerations were involved in the Speciality Steel Case, where the reference data had been taken only from the recession period of 1974 to 1975.314

A second reason for superficial investigation is the Commission's failure to use clear quantitative economic criteria. Data is often hard to obtain. The limited period of time, as well as the lack of trained staff economists, contribute to the problems.315 Nevertheless, the lack of quantitative techniques and empirical analysis in the work of the Commission indicates that problems reach well beyond the definition of serious injury.316

These comments are not directed toward the achievement of clearer definitions under the draft safeguard code, but rather toward a revelation of the difficulties to be expected, particularly in countries which have no experience with the serious injury concept on the domestic level.

B. Distriminatory versus Non-Discriminatory Application of Safeguards under Article XIX

1. The background of the dispute

The question of whether or not safeguard measures should be permitted to apply selectively against the country causing the injury to domestic producers, became the crux of the negotiations on safeguards.317 The dispute involved the European Economic Community which was supported by the Scandinavian countries on one side, with Japan and the export oriented developing countries, such as South Korea, Hong Kong, Taiwan, Singapore, Pakistan, India, Brazil, and Argentina, on the other side.318

313 Id. at 556 (quoting Commissioner Leonard in NONRUBBER FOOTWEAR, T.C. PUB. No. 359, at 47 (Jan. 1971)). The Commission found a threat of serious injury but did not grant import relief. The President, however, did grant relief.

314 Adams & Dirlam, supra note 310, at 556-57. (discussing the Commission’s finding of serious injury in SPECIALITY STEEL, U.S.I.T.C. PUB. No. 756 (Jan. 1976)). The authors question the Commission's finding and the validity of the data on which it was based. Adams & Dirlam, supra note 310, at 557.

315 Adams & Dirlam, supra note 310, at 558-59.

316 Id. at 559-60, 577.


318 Curzon Price, supra note 317, at 313.
The European Community stressed selective safeguard measures and argued that Article XIX should be maintained as it stood since it would not explicitly exclude selective safeguard measures.\(^{319}\) The Community asserted that the provision should only be improved with respect to a better practical application of Article XIX which application should be backed by clearly defined conditions.\(^{320}\)

This interpretation, however, was not acceptable to other contracting parties. Japan and the newly industrializing countries feared that a safeguard clause permitting selective actions would only be applied against their competitive low-cost products.\(^{321}\) That was their experience under the Textile Arrangements and the various bilateral restraint agreements and they wanted to avoid it in the future.\(^{322}\)

Finally, the politically less influential developing countries agreed to selectivity as a further working hypothesis.\(^{323}\) However, aware of the significance of this concession, they demanded as a basic precondition that all selective safeguard action be taken only in agreement with the affected exporting country or, in the absence of such an agreement, only with prior approval of the GATT Committee on Safeguards.\(^{324}\) Furthermore, the Committee should provide the criteria and conditions for a selective action with an ex post facto review immediately thereafter. The developing countries believed that under critical circumstances, delay would cause irreparable damage. Actually this provision proved to be the major sticking point of the Article XIX negotiations.

The EEC, however, went one step further and threatened to apply selective safeguard measures even in the absence of a safeguard code.\(^{325}\) The extent to which the reservations of the developing countries on selective safeguard measures were justified was revealed by the discriminatory safeguard action taken by the EEC against television sets from South Korea in 1977. The EEC notified GATT that the restriction had been imposed for the British market because of a clear threat of serious injury to British producers.\(^{326}\) The majority of GATT members considered the ac-

\(^{319}\) See D. Robertson, supra note 30, at 47-48 (discussing the development of the European Community's position on Article XIX reform); see also S. Golt, The GATT Negotiations, 1973-75: A. Guide to the Issues 59, Appendix B (reprinting the key document stating the European Community position—Development of an Overall Approach to Trade in View of the Coming Multilateral Negotiations in GATT).

\(^{320}\) See D. Robertson, supra note 30, at 48.

\(^{321}\) See R. Kemper, supra note 317, at 21.

\(^{322}\) See supra notes 127-30 and accompanying text.

\(^{323}\) See R. Kemper, supra note 317, at 22.

\(^{324}\) See id. at 22.

\(^{325}\) Curzon Price, supra note 317, at 311; see generally 1 O. Long, supra note 2, at 91, 94.

\(^{326}\) GATT, Activities in 1978 85.
tion to be in violation of Article XIX and were especially concerned that
the measure had been directed against a developing country. In addi-
tion, Korea felt that the EEC had merely speculated upon the probable
situation of market disruption on an assumption that Korean producers
were planning to increase their exports to the United Kingdom. The
dispute was settled by Korea’s agreement to accept voluntary export
restraints.

2. The arguments on the discrimination issue

After a safeguard code permitting discriminatory safeguard action
had been agreed upon by the major negotiating countries as a working
hypothesis, the dispute primarily concentrated on the conditions of such
action. The various arguments behind the selectivity issue were critical,
however, since it was by far the most controversial negotiation topic in
Article XIX and affected the core of GATT itself—the MFN principle
and reciprocity.

A major argument for non-discriminatory safeguard actions was
based upon the notion that the MFN principle, in connection with Article
XIX, constitutes a protective device for the smaller and weaker coun-
tries. Because of its significance as a principle of “fairness” in interna-
tional trade, the MFN principle should ensure “equal” treatment among
sovereign countries of different economic strengths. Technically, the
“equal protection” of the weaker developing countries is assured by the
remedies provided for in Article XIX. If a country imposes trade restric-
tions, it has to offer compensation or face retaliatory measures from the
affected countries.

Suppose that the safeguard measure is imposed in a discriminatory
way on imports from a single country. Since the MFN principle would not
apply under Article XIX, compensation offers would be due, according to
the principle of reciprocity, only to this particular country. Also, retalia-
tory measures could only be expected from this particular country.
Compensatory offers are most likely to occur, however, only if the af-

327 Id. at 86.
328 Id. at 85-86. Korean authorities denied the existence of any such plan. Id. at 85.
329 GATT, Activities in 1979 70. It is interesting to note that under the “selective”
safeguard approach advocated by the European Community, voluntary export restraints of
the kind Korea agreed to would be unnecessary.
330 Bratschi, GATT: Targets for Reform, 7 J. WORLD TRADE L. 393, 395 (1973); Curzon
Price, supra note 317, at 312; MacBean, How to Repair the ‘Safety Net’ of the Interna-
tional Trading System, 2 WORLD ECON. 149. (1978); Tumlir, supra note 81, at 409.
331 Tumlir, supra note 81, at 409; D. ROBERTSON, supra note 30, at 68.
332 See Tumlir, supra note 81, at 408-09 nn. 6 & 7.
333 See Tumlir, supra note 81, at 407; D. ROBERTSON, surpa note 30, at 27.
fected country has an effective retaliatory capacity at its disposal in order to press for adequate compensation. Satisfactory compensation for restricted exports depends, therefore, on the economic strength of the affected country. Only those countries which are sufficiently strong can retaliate effectively and confidently expect to be compensated. Developing countries have reason to fear that a "solution" to a trade dispute with an industrialized country would be imposed by the stronger importing country. As a result, their export interests would not be protected by a selective safeguard code.

On the other hand, a safeguard measure which has to be applied erga omnes according to the MFN principle affects all trading partners. The content of such a non-discriminatory action is open to multilateral negotiation during the consultation process. Since more interests are involved, the combined retaliatory capacity of all countries would ensure adequate compensation which, according to the MFN principle as well as to the principle of reciprocity, must be granted to all countries concerned.

Consequently, the weaker developing countries can also count on adequate compensation or more lenient terms under the safeguard action. They do not risk being subjected to the will of economically stronger countries. Their weak bargaining power is equalized through the influence of collectivity. Procedurally this is achieved by non-discriminatory safeguard actions which form a protective device for the developing countries.

Moreover, restrictions imposed on an MFN basis cause all affected countries to have an interest in a speedy termination of the restriction. In the case of discriminatory action, on the other hand, only one or a few countries have an interest in the revocation of the restriction. Selective safeguard actions tend, therefore, to establish permanent trade barriers. The MFN principle, however, supports temporary relief which is essentially the purpose of an escape clause.

Since selective safeguard actions are less costly to apply as well as to maintain, a steady proliferation of discriminatory actions can be predicted. This trend is evident in bilateral restraint agreements. These agreements have also shown that selective restrictions give third exporting countries the opportunity to increase their market shares by filling the gap created by the restricted country. The importing country would

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334 Tumlir, supra note 81, at 409.
335 Id.
336 GATT, supra note 6, at art. XIX(2).
337 See Tumlir, supra note 81, at 409.
338 Id.; see also Murray & Walter, Quantitative Restrictions, Developing Countries, and GATT, 11 J. World Trade L. 391, 420-21 (1979).
339 See, e.g., G. Patterson, supra note 127, at 299.
be forced to impose safeguard measures on third country imports. Consequently, trade barriers which after great efforts have been lowered at previous GATT rounds can be expected to proliferate easily. World trade threatens to dissolve into bilateralism.\textsuperscript{340}

Selective safeguard measure would also tend to punish the most efficient producer.\textsuperscript{341} Safeguard action is essentially different from antidumping or other remedies against unfair trading practices in that the injury to the domestic industry is caused by the efficiency of the foreign industry.\textsuperscript{342} Although GATT's position is not that of a pure freetrader because it favours the domestic over the foreign producer, through the MFN clause it at least provides exporters with the opportunity to compete on an equal footing. Penalizing only the most efficient producer constitutes a retreat from this fundamental GATT position towards international trade.\textsuperscript{343}

The easier access to a safeguard provision permitting selective action also has political consequences. First, developing countries which are prevented from gaining a foothold in the industrialized markets are virtually forced to question GATT's usefulness in providing a framework for economic development.\textsuperscript{344} Since most developing countries already regard UNCTAD as the principal forum for economic development issues, GATT's reputation as a rich man's club would be buttressed.\textsuperscript{345} Second, the mere possibility of treating countries differently creates friction and discontent and rather than reaffirming the rule of law in providing clear guidance on how to react to trade disputes, selective safeguard actions represent a step backwards to pure power politics.\textsuperscript{346}

These arguments in favour of non-discriminatory safeguard actions are based on a two-step assumption. The first step is that trade restriction are generally regarded as undesirable. The second step is, that inside a collectivity, where trade restrictions have an immediate and direct impact on all other participants, the resort to trade restrictions will be minimized or at least directed into avenues of orderly conduct. The technical instrument which provided for this impact in GATT, however, is the MFN principle in conjunction with Article XIX. This approach reasserts the MFN principle and may be understood to reaffirm the rule of law in

\textsuperscript{340} See Curzon Price, \textit{supra} note 317, at 312. \textit{But see} Tumlir, \textit{supra} note 81, at 409 (suggesting that in certain contexts waiver of the MFN principle will will not lead to "crass bilateralism").

\textsuperscript{341} D. Robertson, \textit{supra} note 30, at 66; MacBean, \textit{supra} note 330, at 157.

\textsuperscript{342} MacBean, \textit{supra} note 330, at 157.

\textsuperscript{343} Curzon Price, \textit{supra} note 317, at 312.

\textsuperscript{344} See Fiallo, \textit{The Negotiation Strategy of Developing Countries in the Field of Trade Liberalization}, 11 \textit{J. World Trade} L. 203, 204-07 (1977).

\textsuperscript{345} Id. at 206, 211.

\textsuperscript{346} Curzon Price, \textit{supra} note 317, at 312-13.
There are persuasive arguments in favour of a code on safeguards permitting discriminatory actions. One of the reasons for the proliferation of emergency actions in circumvention of Article XIX was the costly application of Article XIX. An *erga omnes* imposition of safeguards necessitates either high compensation offers or substantial retaliation measures. Accordingly, the EEC, in pressing for selective safeguards, sought to achieve a "cheaper" application procedure for market safeguards. A safeguard action can be regarded as "cheaper" when the importing country has to face compensation requests or retaliation threats only from the country or countries responsible for the increased imports.

If circumventions of Article XIX became unnecessary, then the amalgamation of the various bilateral restraint agreements could be phased out. These bilateral restraint agreements amounted to selective "safeguard" measures. By providing countries with more discretionary powers, a safeguard code permitting selective action would enhance the chances for the greater degree of legal order in the safeguard system. Countries would then be prepared, in exchange for more discretionary freedom in the application of safeguards, to notify, consult, and justify any emergency action under the body of GATT.

However, the Korea case shows that selective safeguard actions do not necessarily suspend the usage of "voluntary" export restraints. Although the safeguard action on television sets was imposed in a discriminatory fashion only against exports from South Korea, the matter was settled by the negotiation of a "voluntary" export restraint. Escape from multilateral surveillance seemed to be the main reason for the conclusion of the bilateral restraint. Ironically, a selective safeguard action is a more suitable non-discriminatory action than these "voluntary" restraints: a selective action is easier to implement and can be used as an immediate threat for the negotiation of "voluntary" restraints.

Limiting the effect of an emergency action to the source of the imminent or actual injury makes sense. Other countries should not suffer from

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347 See supra note 268 and accompanying text.
348 Curzon Price, supra note 317, at 309.
351 See supra notes 326-29 and accompanying text.
352 GATT, ACTIVITIES IN 1979, at 70.
the irresponsible and excessive export performance of only one or a small number of countries. If non-discriminatory measures are applied, traditional suppliers and new entrants to the import market are likely to be harmed.\textsuperscript{355} Consequently, a selective safeguard mechanism would constitute the true protective device for developing countries. In most cases the newly industrialized countries and Japan are responsible for the market dislocations. Under a non-discriminatory safeguard action, not only these countries but also the least developed among the developing countries are affected by the subsequent restrictions.\textsuperscript{354} Their young economies, which usually concentrate on only a few products, suffer more from trade restrictions than the more developed economies of the "graduates," who can more easily diversify product lines in order to minimize the impact of trade restrictions. Moreover, a major practical problem of determining "just" quotas is created by the MFN requirement, which makes it virtually impossible to preserve this principle in its full integrity.\textsuperscript{355}

The MFN postulate is essentially an instrument of tariff policy.\textsuperscript{356} Article I provides that, with respect to tariffs, any advantages granted by one contracting party to another shall be accorded immediately and unconditionally to all other contracting parties.\textsuperscript{357} In other words, tariff concessions granted to one country must be applied to all countries. For more than a decade, however, quantitative restrictions had a more profound impact on trade than tariffs and are likely to do so in the future.\textsuperscript{358} Ignoring, for a moment, the negative impact of the MFN treatment in the case of raising trade barriers instead of lowering them, the key requirement of a quota determination on MFN basis would read: the quota allocated to one country should be allocated to all countries. This postulate derives from Article XIII, which requires countries to apply quotas on a non-discriminatory basis.\textsuperscript{359} In order to meet this requirement, a global quota for the product would allow all suppliers to compete as previously in the unrestricted prequota market. Seemingly the proper solution.\textsuperscript{360}

In a global quota assignment, however, the competition tends to be tougher than in an unrestricted market. In a case where increased imports originate in only one or a few countries, these dynamic producers

\begin{itemize}
\item \textsuperscript{355} D. Robertson, supra note 30, at 65; see also Curzon Price, supra note 317, at 309-311; Curzon & Curzon, supra note 21, at 224; Solomon, supra note 350, at 280.
\item \textsuperscript{354} Meier, supra note 85, at 511; Meier, The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries, 13 Cornell Int'l L.J. 239 253 (1980).
\item \textsuperscript{356} Tumlir, supra note 81, at 410.
\item \textsuperscript{355} Id.
\item \textsuperscript{357} GATT, supra note 6, at art. I(1).
\item \textsuperscript{358} See generally Murray & Walter, supra note 338.
\item \textsuperscript{359} GATT, supra note 6, at art. XIII(1).
\item \textsuperscript{360} Id. at art. XIII(2)(a).
\end{itemize}
would probably drive other long established suppliers out of the quota—a result which is hardly in the spirit of general MFN treatment, which is intended to ensure equal export opportunities.\textsuperscript{361}

In order to protect the established suppliers, the restricting country might subdivide the global product quota into different product varieties as was done in the LTA.\textsuperscript{362} Again, once their major product line is restrained, the more dynamic producers can be expected to diversify and fill the remaining quotas.\textsuperscript{363}

The last possibility of a fair quota allocation lies in the establishment of individual country quotas.\textsuperscript{364} The restraining country has two alternatives.\textsuperscript{365} First, it can assure all countries an equally limited growth based upon their performance within a certain reference period.\textsuperscript{366} Second, each country can be guaranteed an individual growth rate based upon its record in this reference period, but scaled down proportionately. For example, previous unrestricted individual growth rates of twelve, six, and two percent might be scaled down to restricted growth rates of six, three, and one percent. This alternative exemplifies a quota determination on an MFN basis. Both alternatives, however, have disadvantages in their theoretical nature.

Their implementation requires permanent surveillance of the relative competitiveness of the various exporters in order to keep them in their assigned quotas. Furthermore, full compliance with the MFN principle in its strictest form is, even in the most narrowly defined industry, hard to achieve, since not all countries produce exactly the same products. In other words, an exact MFN based quota system is not operable. Selectively imposed safeguards, on the other hand, would best meet the country's individual requirements. Therefore, discriminatory safeguard actions appear to be the best solution.

Indeed, this argument for selective safeguards in the case of quotas derives originally from Article XIII, which provides for the non-discriminatory administration of quotas. The rigidity of this attempt was already regarded as the formulation of GATT and is illustrated by the indefinite wording of Article XIII, para. 2. The point is, quotas are "inherently discriminatory."\textsuperscript{367} The following dilemma was regarded as one of the rea-

\textsuperscript{361} Murray & Walter, supra note 338, at 394-95.
\textsuperscript{362} See Tumlir, supra note 81, at 410; see also supra note 149 and accompanying text.
\textsuperscript{363} The Long-term Arrangement substantially adopted the categories set out in Appendix B of the Short-term Arrangement. Short-term Arrangement, supra note 132, at App. B.
\textsuperscript{364} See Tumlir, supra note 81, at 411.
\textsuperscript{365} GATT, supra note 6, at art. XIII(2)(d).
\textsuperscript{366} Id.
\textsuperscript{367} The Multi-Fibre Arrangement provides for an equally restricted growth of 6 percent. Multi-Fibre Arrangement, supra note 161, at Annex B(2).
\textsuperscript{368} J. JACKSON, supra note 8, at 322.
sons that quotas were not brought into the general MFN obligation of Article I.\textsuperscript{368}

[M]aintaining historical market shares in the allocation [quota] process discriminates against new exporters while changing market shares is subject to discretionary decision-making. At the same time the decisions taken will be influenced by the bargaining power of the importing country and the actual and potential exporters, respectively, generally favoring larger countries over smaller ones.\textsuperscript{369}

A final argument in favor of selective safeguards concerns the original purpose of the MFN clause, to contribute to the lowering of tariff barriers. Advantages and privileges granted by one country to another should be accorded immediately to all countries concerned.\textsuperscript{370} In the case of a non-discriminatory safeguard action, however, trade restrictions imposed on one country's exports are immediately accorded to all other countries which happen to be exporters of the product affected. Most-favoured-nation treatment becomes most-disfavoured-nation treatment.

MFN is in fact a ready-made instrument for setting in motion a downward spiral in the process of bargaining, once nations begin to adopt an adversary posture towards one another. . . . Assuming that everyone insists on precise reciprocity, there is no end to the series of consequent adjustments that may have to be made.\textsuperscript{371}

The arguments against non-discriminatory safeguards are not concerned with the possible impact of the MFN principle upon the notion of collectivity as a barrier to proliferation and abuse of safeguards. Instead, the arguments are concerned with the actual impact of the MFN principle on the enforcement of safeguards. This also implies a two-step understanding of the issue. First, to a certain extent safeguard actions are generally regarded as necessary and desirable. Second, their implementation must be simplified in order to create an effective and operable safeguard system. This approach compromises the MFN principle. It may be characterized as the "pragmatic" course to solving problems in GATT rather than reaffirming "the rule of law" as advanced by the arguments on the retention of the MFN principle.\textsuperscript{372}

\textsuperscript{368} J. JACKSON, supra note 8, at 323-24.
\textsuperscript{369} Balassa, supra note 2, at 423.
\textsuperscript{370} GATT, supra note 6, at art. I.
\textsuperscript{372} Cf. supra note 347 and accompanying text.
3. The outcome of the dispute

The principle of introducing discriminatory safeguards was agreed to at the end of the Tokyo Round.373 The draft code provides that safeguards may be limited to imports from a particular country only under unusual, exceptional, and unforeseen circumstances. These exist if:

a) a very sharp and substantial increase of imports over a short period of time is taking place from not more than two or three sources,
b) these imports take a significant and rapidly increasing share of the domestic consumption and they significantly displace the domestic production rather than imports from other sources,
c) these imports individually account for a substantial proportion of total imports, and
d) imports from other countries cannot be regarded as a significant factor on the unusual and exceptional unforeseen circumstances.374

The question of ex ante or ex post facto approval of safeguard actions was downgraded in the draft code to a question of notification and consultation. Thus, the draft code provides that "no such measures should be taken without prior notification and consultation."375 Moreover, the prior notification should be made as far in advance as may be "practicable".376 This standard is susceptible to broad interpretation. The prior consultation requirement might be waived, if a delay could cause irreparable damage.377

The tentative outcome of the negotiations on selectivity reveals a typical feature of the GATT practice involving dispute resolution. On one hand, the GATT has been considered pragmatic and flexible and not likely to dissolve in the face of legal technicalities.378 On the other hand, the necessity for the "reaffirmation of the rule of law"379 and the legally binding character of GATT rules have been emphasized.380 In the case of selective safeguards it appeared appropriate to take a pragmatic course on the MFN principle. A strictly interpreted MFN principle was not enforceable. More importantly, the major trading bloc of the EEC and the Scandinavian countries was not prepared to accept an MFN based

373 See supra notes 323-324 and accompanying text; see also 1 O. Long, supra note 2, at 14-15.
374 Draft Safeguard Code, supra note 278, at 10-11 (footnotes omitted).
375 Id. at 11 n.3.
376 Id. at 19.
377 Id.
378 J. JACKSON, supra note 8, at 755.
379 Long, supra note 268, at 257.
380 K. DAM, supra note 11, at 3-4; R. HUDEC, supra note 11, at 268; J. JACKSON, supra note 8, at 755; Hudec, supra note 192, at 157.
solution.\textsuperscript{381}

The pragmatic course of compromising on the MFN principle should foster the achievement of a legally binding multilateral approval and surveillance of safeguard actions. Two of the basic functions of the MFN principle in the context of Article XIX, the protective impact upon developing countries and the inherent control mechanism against the proliferation and the abuse of safeguards, are consistent with the principle of multilaterality. This principle, distinct from MFN, stands for ”common responsibilities, joint decisions and surveillance, a continuous presence of a concerned forum in which a country can complain, and seek mediation for its grievance against another country, or even seek adjudication.”\textsuperscript{382}

Experience with the rarely invoked MFN safeguards revealed the necessity of making emergency actions subject to GATT surveillance. In the case of safeguards, the principle of multilaterality proved to be more important than the MFN principle. The approach of ”compromising with the MFN principle without sacrificing multilaterality”\textsuperscript{383} enables the elimination of actions taken outside of GATT and the subjection of all safeguard actions to the commonly agreed upon GATT rules. For this purpose, however, the Article XIX requirements, such as the injury determination and the surveillance procedures, need improvement.

C. Differential and More Favourable Treatment for Developing Countries

The issue of differential and more favourable treatment for developing countries can be traced throughout the Tokyo Round negotiations. Under GATT, the legal basis for differential and more favourable treatment derives from the impact of the MFN treatment on countries at different stages of economic development. The GATT rules, especially the MFN principle and reciprocity, which were enacted in a homogeneous international economic community, proved to be inadequate to deal with the growing diversity of the GATT membership.\textsuperscript{384}

Equal treatment of unequals, as provided by the unconditional MFN principle, promotes continuous inequality. This is cause for concern with respect to efforts to combat underdevelopment through international trade. Therefore, the MFN principle had to be converted into a ”real” equality principle, where unequals are treated unequally.\textsuperscript{385}

\textsuperscript{381} See supra note 317 and accompanying text.
\textsuperscript{382} Tumlir, supra note 81, at 409-10.
\textsuperscript{383} Id. at 410.
\textsuperscript{384} Approximately two-thirds of the countries participating in the Tokyo Round negotiations were developing countries. See 1 O. Long, supra note 2, at Annex A.
\textsuperscript{385} Yusuf, ”Differential and More Favourable Treatment”: The GATT Enabling Clause, 14 J. World Trade L. 488, 492 (1980). See also Gros Espiell, supra note 21, at 37;
In fact, the idea of differential treatment of the disadvantaged countries has been discussed under international law for the past two decades. Several approaches to legal entitlement for differential treatment have been postulated. They focus primarily on either a “Double Standard,” which advocates different legal standards for different groups of states, analogously with the modern welfare state, within which the special needs of the disadvantaged subjects “entitle” them to preferential treatment.

During the mid-1970’s, the idea of preferential treatment for developing countries was included in virtually every important U.N. statement on international economic relations. Although these resolutions and declarations do not establish any legal obligations, they nevertheless raise the expectation that states will abide by the principles of these resolutions and declarations. Even if one cannot speak of a legal entitlement or obligation of preferential treatment, the idea of differential and more favourable treatment has been generally accepted. In practice, preferential trade schemes for developing countries have been implemented by the major industrialized countries since the early 1970’s. This scheme is


Schachter, *supra* note 385, at 10. Professor Schachter refers to the “premises of the modern welfare state” as the rationale for preferential treatment for specially disadvantaged countries, such as land-locked states and former colonies, which have special needs that entitle them to such treatment. See also B. Rüling, *International Law in an Expanded World* 83-86 (1960); W. Friedman, *The Changing Structure of International Law* 68 (1964) (referring to the “growing number of fields in which nations cooperate for purposes of international welfare”).


frequently referred to as the Generalized System of Preference (GSP). Initiated by the UNCTAD, this system can be summarily described as one of "non-reciprocal general tariff reductions on the manufactured and semi-manufactured imports from developing countries.\textsuperscript{90,91}

1. Differential and more favourable treatment in GATT

Prior to the Tokyo Round, attempts to include preferential provisions for the benefit of developing countries occurred when Part IV on Trade and Development was negotiated in 1964.\textsuperscript{92} Concrete results, however, could not be reached. Along with their soft language, the Part VI provisions were voluntary rather than mandatory. Later in 1971, the General System of Preferences was brought to GATT. In order to grant trade preference to developing countries, the authorization of GATT members to disregard the general MFN requirement took the form of waivers instead of being directly implemented into the GATT framework.\textsuperscript{93} However, with the Tokyo Round results, differential and more favourable treatment became an integral part of the GATT legal system and waivers were no longer required.\textsuperscript{94}

In addition to the Generalized System of Preferences, differential and more favourable treatment refers to the non-tariff measures negotiated during the Tokyo Round.\textsuperscript{95} Consequently, the issue of differential and more favourable treatment also includes negotiations on a safeguard code.

2. Differential and more favourable treatment under Article XIX

a. The Economic Background

Before discussing the actual issues under Article XIX the economic implications of safeguard restrictions imposed on the exports of developing countries must be explored.

First, the notion has to be abandoned that a developing country which exports to an industrialized country is at fault when these exports cause dislocation in the market of the developed country. On the contrary, a country should reasonably expect to improve its economic performance through exports at a comparative advantage.\textsuperscript{96}

This view is especially relevant for developing countries in the early

\textsuperscript{90} Behnam, \textit{supra} note 390, at 244.
\textsuperscript{91} GATT, BISD, \textit{supra} note 6, 13th Supp. 2 (1965).
\textsuperscript{92} See GATT, BISD, \textit{supra} note 6, 18th Supp. 24 (1972); GATT, BISD, \textit{supra} note 6, 18th Supp. 26 (1972).
\textsuperscript{93} GATT, BISD, \textit{supra} note 6, 26th Supp. 203 (1980).
\textsuperscript{94} See 1 O. Long, \textit{supra} note 2, at 96-99.
\textsuperscript{95} Meier, \textit{supra} note 85, at 519.
stages of industrialization which pursue their international trade at an infant industry level. Other GATT provisions already relate to the preferential treatment of developing countries with respect to infant trade. In terms of export market disruption, the damage caused by safeguard restrictions to countries like Japan, South Korea, Taiwan, and Singapore might well be reduced by quotas guaranteed by the MFA, which permit a growth factor of six percent. However, during the early stages of development, infant industries depend on growth factors that far exceed the level of the MFA. Differential and more favourable treatment of these countries is inevitable if severe damage to their economic development is to be avoided.

In practice, safeguard restrictions burden developing countries more than industrialized countries. First, the export earnings of developing countries are often concentrated in a few product groups. For some developing countries, the economic hardship which is caused by quantitative restrictions on their exports, may often exceed the advantage gained by an industrialized country in protecting its ailing industry. Second, in industrialized nations the sudden imposition of quantitative restrictions releases productive factors which are usually unemployed for only a short period before they are absorbed by other sectors of the economy. The situation in developing countries is not nearly as flexible. Their economic structure is not sufficiently pliant to afford the necessary alternatives. Their resources are much more bound to one industry and less transferable than those in developed countries. Therefore, underutilized productive factors cause an immediate decrease in productivity. Additional losses have to be expected from consequential costs, such as welfare expenditures to the unemployed.

b. The Issues

The developing countries proposed that as a general rule they should be excluded from safeguard restrictions imposed by developed countries. An alternative way of accomplishing more favourable treatment

397 GATT, supra note 6, at arts. XVIII(2), (3), (13) & XXXVI.
399 Murray & Walter, supra note 338, at 403.
400 Id.
401 Id.
402 Meier, supra note 85, at 519.
403 Murray & Walter, supra note 338, at 403. The mere threat of protectionist restrictions by the importing country may cause a welfare loss in the exporting country. See Bhagwati, supra note 89, at 1007.
404 1 O. LONG, supra note 2, at 93.
lies in mandatory compensation payments made to a less developed exporting country in order to offset damages to its export trade. Mandatory compensation is suggested because developing countries do not possess the retaliatory power to press for appropriate compensation under Article XIX.405

The developing countries' proposal to be exempted from safeguard restrictions imposed by developed countries would result in a partial removal of the unconditional MFN treatment under Article XIX.406 As might be recalled from the discussion on selectivity, the developed countries favoured the elimination of the MFN principle with regard to safeguard actions, whereas the developing countries were in favour of its retention.407 In advocating non-discriminating safeguards, the developing countries would not be handicapped. Now the issue was to gain preferential treatment. The developing countries demanded that the discrimination against their exports should be converted into discrimination in favour of their exports.408

In fact, before the Tokyo Round negotiations actually started, the suggestion that developing countries be exempted from safeguard actions by developed countries was subject to discussions in the GATT Committee on Trade and Development. The exemption demand was based upon Part IV of GATT, particularly Article XXXVII.409 The developed countries did not consider this recommendatory provision as being designed to weaken their access to Article XIX. However, they were prepared to consider the interests of developing countries and to refrain from emergency actions in particular cases.410

From the outset of this proposal, a complete exemption from safeguard measures, especially with respect to the growing importance of several developing countries as main suppliers of certain manufactures, was from the outset of this proposal very unlikely and accordingly rejected by the developed countries during the Tokyo Round.411 Subsequent discus-

405 R. Kemper, supra note 317, at 21; Meier, supra note 85, at 520; Bhagwati, supra note 69, 1007-09.

406 It has to be recalled that the MFN principle has not been maintained in its strict unconditional sense. The GSP, as well as the exceptions for customs unions under GATT Article XXIV, may be taken as examples. With respect to Article XIX, however, the MFN principle was still in its unconditional form prior to the Tokyo Round. See Krämer, Changing Principles Governing International Trade, 8 J. WORLD TRADE L. 227, 228-35 (1974).

407 See supra notes 317-321 and accompanying text.


409 GATT, BISD, supra note 6, 18th Supp. 68 (1972); GATT, BISD, supra note 6, 19th Supp. 30 (1973).

410 GATT, BISD, supra note 6, 18th Supp. 68 (1972); GATT, BISD, supra note 6, 19th Supp. 30 (1973).

411 Tumlir, supra note 81, at 411.
sions on the exemption issue focussed on the so-called graduation clause.

The developed countries favoured an approach which divided developing countries into different classes of entitlement according to their level of development.\textsuperscript{412} Such a compromise on the MFN principle was reasonable since the least developed and negligibly competitive countries need not be penalized. Differential and more favourable treatment could be withheld from the developing countries which have become internationally competitive in the trade of the product in question. On the other hand, the least developed countries could be exempted from safeguard measures by developed countries.\textsuperscript{415}

This type of “graduation clause” originated in the context of the enabling clause, in which the developing countries agreed that “with the progressive development of their economies and improvement in their trade situation they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.”\textsuperscript{414}

The clause was heavily criticized by the developing countries. They maintained that there was no uniform basis for such categorization and that the concept would permit developed countries to discriminate among developing countries in an arbitrary and unilateral manner.\textsuperscript{416} However, the underlying necessity of this clause cannot be denied. A two-tier approach in regard to differential treatment of developed and developing countries\textsuperscript{416} is not immutable. Experience proves that countries actually “graduate” to higher levels of economic development.\textsuperscript{417} Along with this graduation process the economic conditions of developing countries improve and the justification for preferential treatment decreases. Accordingly, the exemption from safeguard measures is a variable issue.\textsuperscript{418} An agreement on this topic has not been reached and the subsequent discussions concentrated on the selectivity issue.\textsuperscript{419}

In the context of Article XIX, no agreement could be reached concerning the topic of differential and more favourable treatment for developing countries.\textsuperscript{420}

\textsuperscript{412} See Meier, supra note 354, at 251-52.
\textsuperscript{413} For commentary on “graduation” clauses see Balassa, supra note 1, at 433; Balassa, The Tokyo Round and the Developing Countries, 14 J. WORLD TRADE L. 93, 117 (1980); Frank, supra note 398, at 296-97 (discussing the established “graduation” concept of the World Bank and the IMF); Meier, supra note 354, at 254; Murray & Walter, supra note 338, at 416; Tumlir, supra note 81, at 411.
\textsuperscript{414} See GATT, BISD, supra note 6, at 203 (1980).
\textsuperscript{416} See supra notes 385-387 and accompanying text.
\textsuperscript{417} Balassa, supra note 413, at 115.
\textsuperscript{418} Id.
\textsuperscript{419} See 1 O. LONG, supra note 2, at 93; Draft Safeguard Code, supra note 278, at 31.
\textsuperscript{420} Draft Safeguard Code, supra note 278, at 31.
Mandatory compensation, the second alternative for differential and more favourable treatment, affects the principle of reciprocity. According to the Article XIX mechanism, a country imposing safeguard restrictions usually offers compensation to offset the detrimental effect on the exporting country. These compensations are negotiated in the consultations required by Article XIX.\textsuperscript{421} They are largely agreed upon by the invoking country in order to avoid retaliatory measures imposed by the affected countries.\textsuperscript{422} Developing countries, however, do not possess the retaliatory capacity to press for equitable compensation. Consequently, in the view of developing countries, the principle of reciprocity under Article XIX is tied to economic strength and enables developed countries to take arbitrary actions.

To offset their weaker bargaining position, developing countries claimed financial compensation as a matter of right instead of threat.\textsuperscript{423} The claim differs from the actual Article XIX practice where compensation usually takes the form of a tariff concession.\textsuperscript{424} However, with regard to the above mentioned impact of safeguards on the weak economies of some developing countries,\textsuperscript{425} obviously tariff concessions in another field will not cure the immediate damage to the particular exporting industry.

The question of financial compensation was not a concept entirely new to GATT.\textsuperscript{426} As early as 1961 various developing countries proposed that compensations be made by developed countries for their violations of the GATT. An ad hoc Committee on Legal Amendments, however, referred to the practical difficulties in evaluating the actual loss incurred by a country in its export opportunities in money terms.\textsuperscript{427} Moreover, the enforcement payments would remain a problem and, in addition, it would be inconceivable that national legislatures would vote for the budgetary provisions for these purposes.\textsuperscript{428} The arguments have not changed in the present stage of international trade organization. Nations remain unwilling to submit the issue to an international tribunal for the determination of mandatory compensation payments.

On the contrary, one of the reasons governments circumvented Article XIX was because of its link to reciprocity. Governments taking such action under Article XIX had a hard time explaining to their constituents that they had to compensate for emergency actions which appeared to be

\textsuperscript{421} See GATT, supra note 6, at art. XIX(2).
\textsuperscript{422} GATT, supra note 6, at art. XIX(3)(a).
\textsuperscript{423} See R. Kemper, supra note 317, at 21.
\textsuperscript{424} But see Bhagwati, supra note 89, at 1008-09, 1013-14 (discussing the U.S. payments to Turkey as compensation for losses due to the ban on poppy production).
\textsuperscript{425} See supra notes 396-403 and accompanying text.
\textsuperscript{426} See Meier, supra note 85, at 520.
\textsuperscript{427} See id. at 520-21.
\textsuperscript{428} Meier, supra note 85, at 520-21.
nothing more than rightful actions. Consequently, during the Tokyo Round, negotiations concentrated on a partial removal of the principle of reciprocity from Article XIX. The preliminary draft of a safeguard code provided that the affected exporting country should “normally refrain from exercising its rights under Article XIX: 3(a),” if the requirements of a rightful safeguard section had been met. Thus, the demands made by the developing countries for mandatory financial compensation have not been accepted.

D. Adjustment Assistance to Safeguarded Industries

In general, there are three methods by which import competition may ease disruptive of its domestic industry. First, it can install trade barriers to keep the imports out. Second, it can grant adjustment assistance to its non-competitive industry in an effort to diversify or reestablish it in other fields of the economy. Third, a country can combine both of these methods and impose safeguards which would provide a gradual phasing out of its non-competitive industries and their gradual redevelopment in other fields.

The issue of adjustment assistance has been stressed by developing countries for several years. They argued that an intensified restructuring of industrial production in developed countries is simply a necessary response to growing industrialization in developing countries. This interdependent viewpoint is especially relevant in the production of products for which the long-term comparative advantage lies in favour of the developing countries. Domestic adjustment measures of developed countries would contribute to the development process of the developing countries, and would result in more efficient utilization of economic resources both nationally and internationally.

Indeed, the need for structural adjustment can be regarded as widely understood by various countries regardless of their stage of economic development. The two major reports of the western industrialized countries for the Tokyo Round, the “Rey Report” and the “Williams Report,” both stressed the need for structural adjustment as the “prime objective” of safeguard actions. However, in spite of this consensus, governments of

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429 See MacBean, supra note 330, at 155-56; Tumlir, supra note 81, at 408.
430 Draft Safeguard Code, supra note 278, at 29.
431 See generally J. Jackson, supra note 8, at 567-68.
432 Id. at 568-70.
433 This is precisely how Article XIX has operated. See id. at 570.
435 Id.
436 OECD, HIGH LEVEL GROUP ON TRADE AND RELATED PROBLEMS, POLICY PERSPECTIVES...
developed countries proved to be reluctant in providing the necessary adjustment assistance and resorted instead to permanent trade barriers.

These protectionist activities were, in fact, facilitated by Article XIX, which did not impose any time limits on safeguard measures. One of the reasons for imposing import restrictions instead of adjustment assistance lies in the direct monetary costs the latter imposes on the taxpayer. Import restrictions may actually raise fiscal revenues if applied as tariff increases. Adjustment assistance costs are immediately visible and therefore may threaten the short-term political survival of the legislators implementing them. Import restrictions also prevent temporary unemployment in the affected import industry and are consequently favoured by influential labour groups and trade unions. However, governments of free market economies appear strictly opposed to massive governmental interventions which subsidize industries directly or indirectly. Such programs would only create similar demands from non-subsidized industries thereby jeopardizing the whole free market system. Mandatory adjustment assistance measures would almost certainly be considered by these governments as threats to their sovereignty. The shortsightedness of such policies is obvious. Only steady adjustment ensures growth and development. Although the costs of meeting the adjustment necessities may appear high, the costs of not doing so could be much higher.

Moreover, charges by the developing countries are particularly disruptive has not been empirically verified. With respect to the "job displacement argument,"—politically appealing, but lacking empirical support—evidence showed that imports from developing countries have had only a very small effect on employment changes in developed countries.

It has been estimated that from 1970 to 1975 the job penetration in the

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437 See supra note 260-263 and accompanying text.
438 See WILLIAMS REPORT, supra note 149, at 48; UNCTAD, Adjustment Assistance Measures, supra note 434, at 4; Curzon Price, supra note 317, at 314.
439 See UNCTAD, Adjustment Assistance Measures, supra note 434, at 4-5; see also S. GOLT, supra note 319, at x-xii (comments of labor officials D.R. Montgomery, J. Morris, and J. Sheinkman). For a discussion of the goals and biases of policymakers in the trade barrier context, see C. KINDLEBERGER, INTERNATIONAL ECONOMICS ch. 12 (1978).
440 See D. ROBERTSON, supra note 30, at 57.
441 UNCTAD, Adjustment Assistance Measures, supra note 434, at 6; D. ROBERTSON, supra note 30, at 57; Rastello, The Tokyo Round: Trade Issues at Stake, 2 EUROPEAN NEWS AGENCY 358 (1975).
444 See D. ROBERTSON, supra note 30, at 57 n. 80.
U.K. footwear industry amounted only to four tenths percent of the industry's labour force and to one and seven tenths percent in the clothing industry. Instead, the decreased production in sensitive sectors, such as textiles, electronics, and footwear, was caused by a deteriorated export performance. In addition, technological progress played a dominant role as a job displacement factor in some labour-intensive industries. Similar observations were made in other developed countries.

During the Tokyo Round negotiations the developing countries demanded that safeguards under Article XIX be tied to domestic adjustment assistance measures for the protected industry. For various reasons, most of which have been outlined above, the developed countries rejected this proposal. The draft code only provided that "appropriate policy measures shall be taken to encourage the adjustment of domestic producers to import competition." How far away a potential safeguard code is from mandatory adjustment assistance can be implied from a recent statement of the GATT Director-General:

The "problem of adjustment" tends to be viewed almost exclusively as one of physical, industrial structures. Yet it cannot be solved if the financial structures are not sound, flexible and resilient—and we all know that these structures are under considerable strain at present.

Another reformative proposal relates to the indefinite wording of Article XIX which permits safeguard restrictions "to the extent and for such time as may be necessary to prevent or remedy such injury." Stricter conditions should prevent safeguards from becoming permanent trade restrictions by encouraging the necessary adjustment without mandating it.

Pending a final agreement, the draft code revealed the feasibility of stricter conditions. Initially, safeguard measures should not exceed 18 months, but subject to extension, could total up to five years. Moreover, no safeguard measure should be imposed on any product which was subject to a safeguard measure within the preceding two years. Where feasible, safeguard measures should be progressively liberalized and

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446 See Balassa, supra note 1, at 427.
447 Id.
448 Id.
449 See, e.g., D. Robertson, supra note 30, at 57-58.
450 1 O: Long, supra note 2, at 95.
451 UNCTAD, Multilateral Trade Negotiations, supra note 408, at 26.
452 Draft Safeguard Code, supra note 278, at 9 (emphasis added).
454 GATT, supra note 6, at art. XIX(1)(a).
455 Draft Safeguard Code, supra note 278, at 8.
456 Id.
should not reduce the level of imports below the stage of the latest 12-month period.\textsuperscript{456} Similar to the MFA, the over-categorization of products should be avoided.\textsuperscript{467}

E. Surveillance and Dispute Settlement

The foregoing discussion of an Article XIX reform reveals the necessity of improved surveillance and dispute settlement techniques. Assuming that agreement can be reached on the selectivity issue, an international body for the approval or review of safeguard actions is necessary. Moreover, if differential and more favourable treatment were granted on the basis of a graduation clause, an international body would have to determine a country’s proper treatment in contested cases. In order to ensure a fair and comprehensive interpretation of data regarding the determination of a serious injury, an international body is necessary. Should Article XIX reform in fact render the practice of bilateral restraints unnecessary, the existing VERs and OMAs could be phased out under the surveillance of the international body as provided for under the MFA.\textsuperscript{458} Under the draft code, a Committee on Safeguard Measures composed of representatives from each of the contracting parties should principally perform the necessary surveillance and dispute settlement tasks.\textsuperscript{459}

When a country announces its intent to impose selective safeguard measures, the draft code provides for consultations between the affected countries as a first step.\textsuperscript{460} If an agreement cannot be reached within 60 days, the matter may be referred to the Committee which determines whether the intended measure is “consistent with the obligations, conditions, criteria and procedures established under [the code].”\textsuperscript{461} In specially defined critical circumstances the procedures may be shortened. In these situations, “where even a short delay would cause damage difficult to repair,” the importing country may seek urgent consultations, striving to reach an interim agreement.\textsuperscript{462} If the consultations do not result in such an agreement within 10 days, the importing country may take provisional action subject to the prompt review of the Committee.\textsuperscript{463} Unless the Committee determines that the measure is unjustified, the importing country may proceed to apply the selective safeguard restriction.\textsuperscript{464}

\textsuperscript{456} Id. at 9.
\textsuperscript{457} Compare id. with Multi-Fibre Arrangement, supra note 161, at art. 5.
\textsuperscript{458} Multi-Fibre Arrangement, supra note 161, at art. 2(10).
\textsuperscript{459} Draft Safeguard Code, supra note 278, at 22.
\textsuperscript{460} Id. at 12.
\textsuperscript{461} Id. at 12-13.
\textsuperscript{462} Id. at 13-14.
\textsuperscript{463} Id. at 14.
\textsuperscript{464} Id. at 15.
guard measures on a MFN basis are to be approved and reviewed by the Committee in a similar manner. All enforceable safeguard measures are subject to the Committee's annual review.

In the field of dispute settlement the Committee is responsible for the investigation of and appropriate recommendations in regard to complaints initiated by a contracting party who considers its rights under the Agreement nullified or impaired by the safeguard action of another party. Should the matter remain unresolved, the code calls for the traditional means of dispute settlement under GATT, the establishment of panels. A panel is established only for a specific issue and only for a limited period of time. It is to deliver its findings 60 days after its establishment. The panel's three to five members are selected from a list of qualified governmental and non-official persons and serve in their individual capacities and not as government representatives.

The panel is entitled to seek information and technical advice from any individual or body which it deems appropriate provided it informs the government of the state having jurisdiction over that individual or body. Each country is to respond promptly and fully to any request for information by the panel. Confidential information may not be revealed by the panel without the authorization of the country providing it.

The panel reports its findings to the Committee in cases where a settlement of the dispute cannot be reached. The Committee considers the report and makes appropriate recommendations to the countries concerned. In cases where these recommendations are not being followed, the Committee may, if it considers the circumstances serious enough, authorize the suspension of rights or obligations under the code. Also, it may recommend that the "CONTRACTING PARTIES" authorize the suspension of rights or obligations under the General Agreement pursuant to Article XXIII, para. 2.

These traditional procedures for the settlement of disputes have been

465 Id. at 19.
466 Id. at 23.
467 Id.
468 Id. at 24. For a detailed analysis of the GATT panel procedure, see R. HUDEC, supra note 11, at 66-182.
469 Draft Safeguard Code, supra note 278, at 24.
470 Id. at 25.
471 Id. at 22.
472 Id. at 26. The term "promptly" has been defined as "within thirty days, or sooner if possible". Id. at 22 n. 1.
473 Id. at 26.
474 Id. at 26-27.
475 Id. at 27.
476 Id.
477 Id. at 17.
subject to increasing criticism in recent years. While in the early years of GATT the establishment of ad hoc panels proved to be a successful technique, over the years it became more difficult to obtain the services of adequately qualified and independent panelists.\textsuperscript{478} Usually these persons serve simultaneously as representatives of their governments to GATT. The impartiality of the panel members is not necessarily guaranteed by the exclusion of nationals of the concerned parties from the panel procedure. As long as the panelists are only temporarily released from their duties as governmental officials, it is unlikely that they will function independently from the overall foreign policy considerations of their governments.\textsuperscript{479}

The more important objection against the panel procedure, however, is concerned with its leverage in influencing country's compliance with the legal rules. The panels may play the role of conciliators between the parties at dispute.\textsuperscript{480} Consequently, they urge the parties to reach an agreement on the issue instead of determining whether and to what extent previously accepted rules apply to the situation. The conciliatory technique favours a settlement of the dispute on the basis of the political and economic strength of the parties reaching an agreement.\textsuperscript{481} The arbitration or judicial method, on the other hand, begins by determining whether a certain legal rule favours one party over the other.\textsuperscript{482} Since the panel members are not free from the influence of their governments, they are likely to prefer the conciliatory approach. To be sure, even strict arbitration panels have to be sensitive to political and economic power relations. The point, however, is that the panels should not be too subservient to powerful nations.\textsuperscript{483}

Especially in the case of the GATT which works on the provisional and rather narrow basis of political consensus unlike other international

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\textsuperscript{478} Jackson, Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 J. WORLD TRADE L. 1,6 (1979) [hereinafter cited as Jackson, Governmental Disputes].


\textsuperscript{480} Jackson, Birth of the GATT-MTN, supra note 479, at 42.

\textsuperscript{481} See Jackson, The Crumbling Institutions of the Liberal Trade System, 12 J. WORLD TRADE L. 93, 98-101 (1978) [hereinafter cited as Jackson, The Crumbling Institutions]. Jackson has developed an analysis which distinguishes between "power oriented" and "rule oriented" diplomacy. His analytical framework pervades the following discussion of the GATT dispute settlement mechanics.

\textsuperscript{482} Id.; See also Jackson, Governmental Disputes, supra note 478, at 3-4; Jackson, Birth of the GATT-MTN, supra note 479, at 27-28.

\textsuperscript{483} Perlow, supra note 162, at 106 n. 60 (arguing that a panel which combines substantive legal and political consensus is more effective than a purely adjudicative body).
\end{flushleft}
organizations, the regulatory structure has never been very coercive. Consequently, GATT panels have avoided assuming adjudicatory roles and have not stressed the obligatory character of the GATT rules. This attitude corresponds generally with the dispute settlement procedures under GATT. The fact that decisions are usually made by the “Contracting Parties” (or the Committee which consists of representatives of the entire GATT membership) gives the dispute settlement process necessarily more political than judicial character.

As an alternative to the ad hoc establishment of panels, it was suggested that a permanent body of experts in addition to the Committee on Safeguards be established for continuing surveillance as well as dispute settlement purposes.

The need for some kind of permanent international review and surveillance commission with respect to Article XIX actions has been referred to for some time, and the similarity of such a proposed permanent body to the Textiles Surveillance Body of the MFA has been emphasized. To the extent that the members of a permanent body such as the TSB are recruited for a longer period than members of an ad hoc panel, their impartiality might in fact be better guaranteed than under the panel system. However, it remains unlikely that governments would abide by the findings of an independent international body. The dispute between the EEC and the TSB concerning the latter’s competence is illustrative of this attitude. The main advantage of an institution like the TSB, however, is its permanent character with regard to its surveillance function. A permanent surveillance body, which is small enough to deal effectively with the necessary matters, unlike the slow machinery of a committee composed of representatives of all member countries, applies continuous pressure on governments to comply with the rules. A permanent surveillance body may prevent the non-compliance of governments with the rules in question a priori, whereas an ad hoc panel is only effective ex post facto; after a member does not comply with the rules. A permanent body in a small, efficient, and independent form appears most useful for a safeguard system where so much depends on effective surveillance. Accordingly, the TSB concept, which prevents conflicts through its effective usage of informal enforcement pressure, seemed prima facie suit-

484 Hudec, supra note 192, at 150.
485 Id.
486 1 O. Long, supra note 2, at 94.
487 See D. Robertson, supra note 30, at 62-64; Meier, supra note 85, at 509; Tumlir, supra note 81, at 412.
488 See Hudec, supra note 192, at 168; MacBean, supra note 330, at 158.
489 See supra notes 202-206 and accompanying text.
490 Hudec, supra note 192, at 168-69.

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able for a safeguard code. However, the remarkable success of the TSB did not provide a precedent for wider use because governments seem reluctant to bequeath national responsibilities to the authority of an independent international body.

IV. Conclusion

It can be concluded from the preceding discussion that the following major points might be favorably implemented into a supplementary code linked to the safeguard provision of Article XIX:

1) A more detailed determination of the “serious injury” criteria, similar to the MFA definition but stripped of the price criterion, can be expected.
2) Safeguards will most likely be permitted to apply in a discriminatory manner under certain conditions. In order to avoid possible abuse a strong system of multilateral surveillance will be introduced. Briefly, the MFN principle will be compromised and the principle of multilaterality will be strengthened.
3) The code will probably include differential and more favorable treatment for developing countries according to the graduation clause. This implies compromises on the MFN principle as well as on the principle of reciprocity.
4) Mandatory adjustment assistance measures are not likely to be adopted. Stricter conditions, however, on the duration and liberalization of safeguard restrictions are feasible, which in turn will make adjustment assistance inevitable.
5) An enhanced surveillance and dispute settlement procedure under Article XIX is far from being established. The failure to agree upon a standing independent surveillance body will render the practical enforcement of the results of the foregoing issues most uncertain.

With respect to the outcome of the Tokyo Round negotiations on Article XIX, a few concluding words on the abandonment or weakening of legal trade principles, such as the effect of safeguards on the MFN principle, seem appropriate. Pragmatism and flexibility must prevail in adjusting the GATT rules to meet new economic exigencies. This pragmatism and flexibility can reflect, in extreme cases, open non-compliance with the GATT provisions.

If these departures from the GATT rules become customary activities, and if they are tolerated in spite of their inconsistency with generally

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491 Id.; see also Perlow, supra note 162, at 118-30 (discussing the effectiveness of the TSB).
492 J. Jackson, supra note 8, at 755-57.
accepted principles, the custom of departing from a few legal rules may encourage departures from other legal rules.\textsuperscript{493} Therefore the most dangerous and difficult problems to solve are those in which non-compliance with GATT principles is tolerated "because the parties at fault have sufficient economic and political strength that it is impracticable to obtain compliance from them when they are determined not to comply.\textsuperscript{494}

Indeed, in the Tokyo Round many countries felt that a formally approved deviation from the MFN principle on safeguards would undermine many other elements of the General Agreement.\textsuperscript{495} An expert on GATT pointed out that a departure from an international norm like the MFN principle "may be justified, but it has costs and those costs should be recognized."\textsuperscript{496}

Regarding the issues of serious injury as well as surveillance and dispute settlement, it should not be assumed that trade disputes will be resolved more easily merely in the presence of sufficient data and better defined terminology. In most cases the data will be inadequate if a solution based exclusively on scientific scrutiny is attempted.\textsuperscript{497} In some instances, such as the issue concerning the diversification of product mixes, data simply cannot be obtained. As regards issues such as the causal relationship between imports and injury, it is extremely difficult to provide conclusive data.\textsuperscript{498} Thus, a more precise injury definition and more effective data collection do not necessarily guarantee a solution to the dispute.

Better data and precise definitions may result in better founded decisions by the working panel as more data from extrapolations, regressions, and other scientific means of gathering information are made available.\textsuperscript{499} Nevertheless, it remains that the acquisition of better data and definitions is not the definitive factor in dispute resolution. The problem involves more than just data and definitions. The parties must indeed sincerely want the dispute to be settled by the panel.\textsuperscript{500} They must be prepared to accept imperfect data and to negotiate accordingly without searching for loopholes.\textsuperscript{501}

It has been predicted that many of the negotiated codes on NTB's will not prove to be effective because of the generally weak surveillance

\textsuperscript{493} Jackson, The Crumbling Institutions, supra note 481, at 97.
\textsuperscript{494} J. JACKSON, supra note 8, at 758.
\textsuperscript{495} See S. Golz, supra note 439, at 44. The European Community and Scandinavian countries did not share this view.
\textsuperscript{496} J. JACKSON, supra note 8, at 762-63.
\textsuperscript{497} R. HUDEC, supra note 11, at 158.
\textsuperscript{498} \textit{Id.}
\textsuperscript{499} \textit{Id.}
\textsuperscript{500} \textit{Id.}
\textsuperscript{501} \textit{Id.} at 159.
and dispute settlement procedures.\textsuperscript{502} In this regard, the failure to reach an agreement on a permanent surveillance and dispute settlement body which could provide the necessary independent framework for effective conciliation, appears to be the biggest disappointment of the Article XIX negotiations. Moreover, the principle of multilaterality as a substitution for the MFN principle regarding selective safeguards and preferential treatment for developing countries will be weakened from the beginning. Establishment of the necessary procedural foundation for the formation of such an independent and permanent review institution has not yet been achieved.

\textsuperscript{502} R. Baldwin, \textit{supra} note 340, at 5-7.
Appendix A

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 the 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 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 PAR-
TIES, 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.
Appendix B

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.