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New EEC Safeguard Measures: Regulation 288/82

by Selma M. Lussenburg*

I. INTRODUCTION

The current global economic recession and relative economic success of the newly industrialized countries and Japan has greatly affected the trade policy of most western nations. Due to the economic downturn and concomitant internal political, social and economic pressures, trade liberalization initiatives have largely come to a standstill. Increasingly, statesmen are seeking to respond to domestic pressures through the imposition of protectionist trade measures. The number of orderly marketing arrangements (OMA's), voluntary export restraints (VER's) and other measures which restrict imports, has increased exponentially over the past decade.1 Proponents of such restrictions have justified their use by pointing to the inability of the General Agreement on Tariffs and Trade (GATT)2 to effectively counter the influx into their economies of highly competitive goods from new sources.3

One of the GATT provisions which has been subject to particularly

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1 See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), GROWING PROTECTIONISM AND THE STANDSTILL ON TRADE BARRIERS AGAINST IMPORTS FROM DEVELOPING COUNTRIES, U.N. Doc. TD/B/C.2/194 (Mar. 21, 1978) [hereinafter cited as UNCTAD, GROWING PROTECTIONISM]; see also Hindley, Voluntary Export Restraints and the GATT's Main Escape Clause, 3 WORLD ECONOMY 313, 316 (1980) (suggesting that the GATT estimate that three to five percent of world trade is affected by VER's or OMA's substantially understates the incidence of such protective measures).

Although the terms VER and OMA are at times used interchangeably, a distinction is usually drawn between the two on the basis of negotiating parties. VER's are usually the result of negotiations between the industries within the exporting and importing countries, or between the exporting industry and the importing government. OMA's are normally government to government agreements. See UNCTAD, GROWING PROTECTIONISM, supra, at 6; Orderly Marketing Arrangements, 1978 AM. SOC'y INT'L L. 1 (proceedings of the 72d annual meeting) (remarks of the chairman, J. Jackson).


3 D. ROBERTSON, FAIL SAFE SYSTEMS FOR TRADE LIBERALISATION 7-9 (1977); Hindley, supra note 1, at 328-37.
heavy criticism is the principal safeguard clause, article XIX. In the event of a sudden increase in imports causing serious injury, article XIX authorizes emergency action through the withdrawal of tariff concessions or the imposition of quantitative restrictions on a non-discriminatory basis. Contracting Parties adversely affected by such measures are permitted to take retaliatory action. The fear of retaliation has meant that article XIX has lost its appeal for many countries. Thus, major trading nations which are able to economically threaten their trading partners with unilateral action have instead proceeded to persuade their counterparts to enter into "voluntary" restrictive measures.

Over the past several years, reform of article XIX and other safeguard measures has consistently been on the GATT agenda; however, to date, neither amendments nor even a separate Safeguards Code has met with the approval of the Contracting Parties. The inability of the participants at the Tokyo Round to agree to a Safeguards Code has led to further independent protectionist action and circumvention of the GATT.
On February 5, 1982, the Council of the European Communities enacted Regulation 288/82 on common rules for imports. This regulation is the principal European Economic Community (EEC) instrument dealing with safeguards, and in some respects appears to be very similar to the GATT article XIX. The regulation represents an innovative and highly protective safeguard mechanism which may, however, undermine the GATT through the introduction of investigation procedures, the use of deterrent as well as actual safeguards, and selective application of safeguards. At the same time, the regulation suffers from many of the weaknesses which are found in article XIX.

The author will examine the new EEC protective measure, its application to date, the relation to GATT, and the broader implications which the measure raises for the GATT and international trade. However, to analyze this regulation without a comparative standard or reference point is of limited value. Thus, the regulation will be examined in light of the purported shortcomings of article XIX of the GATT.

II. ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

A. General

Article XIX is one of the most controversial escape clauses in the GATT. Unlike other GATT provisions such as article XII (quantitative restrictions), the criteria which permit article XIX emergency action are less defined and considerably more subjective.

The inclusion of article XIX in the GATT reflects political reality; that is, the need to make any international trade agreement acceptable to all of the Contracting Parties and their constituencies. Parties must be able to free themselves from negotiated tariff bindings which, due to a change in circumstances, threaten to disrupt domestic production of a particular product. Article XIX safeguard action has been compared to the international law principle of rebus sic stantibus because the article is only supposed to be applied when circumstances arise that are fundamentally different from those in existence at the time the tariff binding was concluded. Safeguard action should apply to unforeseen developments not taken into account in the initial negotiations. The justification

Supp. 1978-79); Notification and Surveillances, Mar. 26, 1980, GATT, BISD 20 (37th Supp. 1979-80). At present, the major Contracting Parties are unwilling to do anything more than provide information. At a minimum, this will provide data upon which criticisms of safeguard actions may be founded.


See infra notes 44-45 and accompanying text.

for the inclusion of safeguard measures has been that such safeguards ensure an increased participation in the GATT and permit the development of global or regional trade regimes.\textsuperscript{16}

Examination of article XIX is facilitated by first analyzing the conditions for application and then reviewing the substantive measures which may be invoked once these conditions have been established.

B. Prerequisites to the Application of Article XIX

Article XIX cannot be resorted to indiscriminately. Emergency protective action is only authorized when the following prerequisites are established:\textsuperscript{16}

(i) that there is actual or threatened serious injury to a domestic industry;

(ii) that such injury "stems from a tariff reduction, and precisely from the tariff reduction that the importing country seeks to withdraw";\textsuperscript{17}

(iii) that it is a result of developments not foreseen at the time the concession was made;\textsuperscript{18}

\textsuperscript{16} K. Dam, \textit{supra} note 14, at 99, 107.

\textsuperscript{16} The full text of GATT Article XIX(1) is as follows:

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


\textsuperscript{17} Merciai, \textit{supra} note 11, at 44.

\textsuperscript{18} The \textit{Hatters' Fur Case} clarifies this point. In that case, it was noted that while the United States could have anticipated a change in women's hat fashions, it could not be expected to know which way the fashions would change. Such unforeseen developments, while hypothetically possible, were not specifically foreseeable. Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT, Sales No. GATT/1951-3 (Nov. 1951), \textit{cited in part in} J. Jackson, \textit{Legal Problems of International
(iv) that the injury is caused by an increase in imports relative to domestic production of the same product.\textsuperscript{19}

Each of these four conditions and their interpretation will be considered briefly.

Article XIX is to apply only in instances of serious injury. Serious injury, however, is not defined. This lack of definition leaves a great deal of discretion to the party invoking or desiring to invoke the article. This may lead to its unwarranted application. It is sufficient that the injury be threatened; it need not actually exist.

It has been suggested that to "cause or threaten to cause serious injury," the injury sustained or sustainable must be more severe than the level of injury found in article VI (anti-dumping and countervailing duties).\textsuperscript{20} This provides a comparative standard for assessment, but does not resolve the issue. Article XIX applications have usually been dealt with on a case by case basis. The lack of criteria specifying what constitutes serious injury has been a source of controversy.\textsuperscript{21} The problem of defining injury or market disruption has been debated within the GATT since 1959.\textsuperscript{22} Importing states hold that the application of a high standard, or a restrictive interpretation of the article XIX "serious injury" standard, will serve to encourage Contracting Parties to introduce measures that fall outside the scope of the GATT. Thus, a liberal interpretation of the article XIX provision (i.e., a lower standard) is meant to ensure that parties will abide by GATT provisions, and that they will not resort to measures outside the GATT which would otherwise undermine it. Despite such a liberal interpretation, Contracting Parties have felt a need to resort to measures outside the GATT. The proliferation of OMA's, VER's,\textsuperscript{23} and the enactment of regulations such as the EEC's Regulation 288/82,\textsuperscript{24} demonstrate that the logic of this rationale is questionable.

Article XIX provides that an increase in imports must be the result

\begin{footnotesize}
\begin{itemize}
\item{20} E. McGovern, International Trade Regulation: GATT, the United States and the European Economic Community 230 (1982) (citing Lowenfield, Fair or Unfair Trade: Does it Matter, 13 Cornell Int'l L.J. 205 (1980)).
\item{21} J. Jackson, supra note 19, at 561-63.
\item{22} See Avoidance of Market Disruption, GATT, BISD 22 (8th Supp. 1960).
\item{24} Regulation 288/82, supra note 12.
\end{itemize}
\end{footnotesize}
of both GATT obligations and unforeseen developments. Although there has been substantial discussion over what constitutes a GATT obligation, the language has generally been resolved to mean both tariff concessions granted, and the withdrawal, elimination or reduction of quantitative restrictions. This precondition clearly establishes that a tariff concession can only be withdrawn, or have its value impaired by the imposition of a quota, when the tariff concession is the source of injury. There must be a direct causal link between the concession granted, the goods imported in increased quantities, and the injury sustained; it cannot be an indirect injury which results from a concession on other products.

A larger problem has been and continues to be determining what constitutes an unforeseen development. The Hatters' Fur Case sets a precedent providing for a broad interpretation of the phrase. The GATT Working Party decided that it was the degree of "unforeseeability" that was relevant: "[s]uch developments might appear as hypothetical at the time of agreement, but could not be foreseeable in concreto." The prerequisite that imports have increased is the least subjective criterion found in the article. Import statistics are normally readily available, and thus such developments can be more objectively assessed than the other article XIX conditions. It is sufficient that there be a relative increase in imports; an absolute increase is not necessary. A price difference between domestic and imported goods is also not required.

The fourth condition is that the invocation of article XIX is not available as a safeguard measure to protect a recently established producer or a totally new industry. This falls under the article XXVIII provisions. The injured domestic product must already be on the market. Article XIX measures are thus not available to deal with the problems facing producers deprived of future access to markets.

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25 J. Jackson, supra note 19, at 557-59.
26 Id. This does not cover every conceivable situation. For example, to establish a tariff quota is not to withdraw a concession in terms of a rate of duty because the quota only affects quantity. The Contracting Parties may take measures which do not constitute GATT obligations, and thus Article XIX may have no application. See also infra note 42 and accompanying text.
27 See supra note 18.
28 Merciai, supra note 11, at 44 n.13.
29 J. Jackson, supra note 19, at 557-58. At Havana, the word "relatively" was inserted before "increased." This was not incorporated into the main text. However, the second GATT session in 1948 made clear that this was the proper interpretation.
30 Id.
31 J. Jackson, supra note 19, at 561-63; Merciai, supra note 11, at 44.
32 See supra note 31.
C. The Nature of Permitted Safeguard Action

Once the above prerequisites are met, an injured party may impose quantitative import restrictions or suspend, withdraw or modify the negotiated concession applicable to the domestic product.\(^{33}\)

The escape clause action provided for in article XIX is meant to be temporary in nature. Article XIX was included to allow specific industries which have been adversely affected by sudden increases in competition to shelter behind temporary protective measures while the industry adjusts and improves production.\(^{34}\) The understanding that these should be interim measures is not expressly stipulated in the article. It can be logically deduced, but it is not an enforceable obligation. Further, there is no requirement that remedial action be taken by the invoking party, thus the status quo may be maintained. Notice and consultation with trading partners affected by the safeguard measures is required, however, and this adds a degree of permanency to the agreement concluded and the measures imposed.\(^{35}\)

One of the most controversial points in the application of article XIX has been whether the basic GATT most favored nation (MFN) or non-discriminatory treatment standard applies. Indeed, it was on this issue of selectivity the multilateral trade negotiation's Safeguard Code foun-dered.\(^{36}\) A departure from the GATT MFN was a precondition to EEC negotiation of a safeguard code.\(^{37}\) It is generally agreed\(^{38}\) that measures taken under this article are subject to the rules of non-discrimination found in articles I, II and XIII of the GATT. Thus, there is an implicit prohibition of selective measures in the original system, in conformity with the established GATT principle of equality of treatment.\(^{39}\) The action taken must conform to the MFN rule and thus there are likely to be a number of aggrieved parties seeking compensation or who are able to invoke retaliatory measures. The non-discrimination policy requires a Contracting Party taking article XIX action to negotiate with all export-

\(^{33}\) Specific action is not stipulated within article XIX. However, some support does exist for this premise. See K. Dam, supra note 14, at 105-06; J. Jackson, supra note 19, at 564-66; Merciai, supra note 11, at 45.

\(^{34}\) For further discussion, see D. Robertson, supra note 3, at 20.

\(^{35}\) Id.

\(^{36}\) See generally Sauermilch, supra note 8, at 125-35.

\(^{37}\) C. Bergsten & W. Cline, Trade Policy in the 1980's, at 35 (1982); Curzon-Price, Surplus Capacity and What the Tokyo Round Failed to Settle, 2 World Economy 305, 311 (1979); Sauermilch, supra note 8, at 126.


\(^{39}\) Merciai, supra note 11, at 45 n.21.
ers of that product. The importing state may offer compensation in the form of MFN concessions on individual products exported by affected parties; however, it is frequently difficult to come to an agreement with all concerned parties. This situation must be contrasted with the application of VER's where the importing country will normally deal with only one exporter. Thus, compensation must only be made to one party, or not at all.

As it is often difficult to reach a compensatory settlement with all concerned, a Contracting Party invoking article XIX may be faced with retaliatory action such as the withdrawal of a concession, or the imposition of import quotas on its products. This makes the application of article XIX less attractive and the option of resorting to measures outside the GATT framework very appealing, particularly when the source of disruption can be readily identified. Similarly, it makes the selective application of safeguard provisions seem very desirable; an example is the withdrawal of lesser developed country (LDC) preferences by Australia.

Furthermore, there is no provision in article XIX which requires the invoking country to limit the measure taken to ensure that the pre-safeguard level of imports will at least be maintained. The importing country is not prohibited from reducing its imports to a level below that which was previously in existence. The only constraint on such action is the fear of retaliation or the cost of compensation. The major sanction of article XIX can thus be found in the principle of balanced advantages. The importer wishing to invoke article XIX may quickly be dissuaded from this remedy once the cost of retaliation or compensation is considered.

Apart from the relatively subjective criteria used to invoke article XIX, one of the major shortcomings of the article is that it does not require the invoking party to take remedial action to address the cause of its domestic difficulties. Therefore, it permits a restraint which decreases trade and overall global productivity without imposing a concomitant obligation to address the structural problems within the economy.

Another controversy associated with the application of article XIX relates to both the use of selective criteria and the use of VER's and OMA's. In essence, the issue is whether such measures may be taken on

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40 GATT, supra note 2, at A59, T.I.A.S. No. 1700 at 55, 55 U.N.T.S. at 260 (article XIX(2)).

41 For example, in Oct. 1983, Australia withdrew the developing country tariff preference accorded imports of certain iron or steel stranded wire, cables, cordage and ropes from the Republic of Korea. Imports of these items from Korea are now subject to a 20 percent duty while imports from other developing countries remain duty free. Joint Statement by Hon. Lionel Bowen, Deputy Prime Minister and Minister for Trade, and Senator John Button, Minister for Industry and Commerce (Oct. 4, 1983) (media release); see also Industries Assistance Commission Report, Stranded Wire, Cables, Cordage, Ropes, etc., of Iron or Steel Wire (Developing Country Preferences) 14-16 (Apr. 22, 1983).
the basis that article XIX simply does not cover the fact situations in which these measures are invoked.\textsuperscript{42} There is no doubt that GATT members are resorting to these measures,\textsuperscript{43} but such state practice does not resolve the question of their legality under GATT.

\textbf{D. Summary Critique of Article XIX}

There are four major criticisms which can be levied against the formula laid down in article XIX.\textsuperscript{44} First, it fails to define what constitutes a serious injury. This permits a broad interpretation and does not ensure that article XIX is only invoked when necessary. Second, although it is apparent that article XIX was perceived as a temporary measure, there is no provision that makes such temporary application mandatory, hence measures may be applied for lengthy periods of time. Third, there is no guarantee that once measures are imposed that imports from affected parties will be maintained at least at the level achieved prior to the application of article XIX. Moreover, from the proliferation of arrangements operating outside of the GATT today, it is evident that governments are increasingly hesitant to apply article XIX because it is likely to be a costly proposition. The importing country will have to negotiate with the affected trade partners and offer compensation in the form of equivalent concessions or else face the withdrawal of concessions previously made by its trading partners. Last, there is no guarantee that the importing state will ensure that the affected domestic industry will take action to improve production efficiency, or that the importing state will relocate. In effect, the status quo ante will be maintained at considerable cost to both exporters and the importing country.

Insofar as article XIX is incapable of coping effectively with large increases in imports, states have turned to VER's and OMA's. The EEC and individual Member States have not only used VER's and OMA's to protect their markets,\textsuperscript{45} but the EEC has also enacted Regulation 288/82

\textsuperscript{42} Flory, Commerce, 24 ANNuaIRE FRANCAIS DE DROIT INTERNATIONAL 613, 619 (1978). Flory asserts that VER's and OMA's fall outside the scope of GATT. However, because the GATT allows such an obvious OMA as the Multi-Fiber Arrangement, infra note 63, it is arguable that such arrangements fall within GATT. Thus, not only should such arrangements be notified to the Contracting Parties, they should also be approved by the Contracting Parties in order to avoid a violation of GATT norms.

\textsuperscript{43} See generally Green, supra note 23, at 5-7; Sauermilch, supra note 8, at 112-17.

\textsuperscript{44} These criticisms are largely derived from D. Robertson, supra note 3, at 55-56; and MacBean, supra note 4, at 155-56.

\textsuperscript{45} For example, such restrictions have been imposed on: (1) footwear imports from Korea to the United Kingdom and Ireland (1978-82); (2) flatwear from Japan to the Benelux, Germany and the United Kingdom (1978-82); (3) black-and-white televisions from Japan to the United Kingdom (1980-82); and (4) manioc and tapioca from Thailand to the EEC in general (1982-86). GENERAL AGREEMENT ON TARIFFS AND TRADE, NOTIFICATION, CONSULTA-
to control imports and restrict trade. The following sections will analyze this regulation and test it for potential violations of EEC obligations under the GATT.

III. EEC Council Regulation on Common Rules for Imports: Regulation 288/82

A. Background

In February of 1982, the EEC promulgated Regulation 288/82,46 entitled "Common Rules for Imports." This Regulation establishes a new EEC regime for the application of protective measures such as import surveillance and safeguards. The enactment of this Regulation shortly after the termination of the multilateral trade negotiations (MTN) is significant in light of the failure of the Contracting Parties at those negotiations to agree either to a reform of article XIX or to a safeguards code.47 One of the principle issues at the Tokyo Round was whether selective application of safeguards should be permitted, and under what conditions.48 At the Tokyo Round, the EEC position favored a departure from the GATT MFN principle. Indeed, it has been suggested that the EEC considered this an absolute precondition to the establishment of a Safeguards Code.49 The U.S. position was less rigid. Although the United States was initially against a departure from the MFN principle, the United States may have been willing to consider selectivity on certain conditions.50 Developing countries were understandably opposed to a selective application of safeguards on the basis that they would likely be the parties most directly affected by such measures.51 Japan was similarly opposed to a selective application of safeguards.52 However, to say that the issue of selectivity was the sole stumbling block in the safeguard negotiations at the Tokyo Round is misleading. Other controversial issues were the establishment of a set of rules to separate fair imports from other imports and the definitions of serious injury, market share, toler-

46 Regulation 288/82, supra note 12.
47 Sauermilch, supra note 8, at 120-21.
48 Id. at 125.
49 C. BERGSTEN & W. CLINE, supra note 37.
50 Id. at 35-36; see also Sauermilch, supra note 8, at 125-26 (discussion of the positions taken by the Contracting Parties at the Tokyo Round).
51 Merciai, supra note 11, at 56.
52 See Sauermilch, supra note 8, at 126.
ance for imports, etc. These are all matters that the Contracting Parties have been unwilling to deal with substantively, except on an ad hoc basis.

The inability to agree on a safeguards code or on a reform of article XIX has meant that the Contracting Parties have been left with the status quo. The failure of the Tokyo Round negotiations prompted the EEC to enact its own safeguards legislation in the form of Regulation 288/82. The EEC no doubt carefully considered its options prior to promulgating Regulation 288/82. However, faced with increasing competition in its own markets, the continuing economic recession and internal political pressures, the EEC decided to amend its policy on imports.

The Regulation was enacted pursuant to article 113 of the Treaty of Rome, and forms part of a larger framework of a common export and import policy for the EEC. It also purports to transpose into community law the Agreement on Import Licensing Procedures signed within the GATT framework. The safeguard provisions are in many respects similar to article XIX. However, there are a number of provisions that distinguish it. The Regulation establishes a system of community investigation, surveillance and safeguard measures on imports. The latter are applied when products are imported in "such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products." Regulation 288/82 is comprehensive legislation which focuses on imports from non-state trading countries. The point of departure is that all imported products are free to enter the community, that is, they are not subject to quantitative restrictions. This is substantially qualified by

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53 Id. at 119-20.
54 See generally Lowenfield, Fair or Unfair Trade: Does it Matter, 13 CORNELL INT'L L.J. 205, 210-11 (1980).
58 Regulation 288/82, supra note 12, at 2 (preamble). Analysis of the preamble suggests this was a secondary objective rather than the primary focus of the drafters.
59 Id. at 3-8 (arts. 6-18).
60 Id. at 6-7 (arts. 15-16).
62 Regulation 228/82, supra note 12, at 2 (art. 1(2)).
providing that these products are subject to investigation, surveillance and safeguard measures, and that national quota restrictions are maintained.\(^6\)

The drafters of Regulation 288/82 were faced with a dilemma: how should they respond to protectionist measures in Europe while pursuing a free trade policy for exports? Undoubtedly, Regulation 288/82 is a protective measure which restricts free trade. The potential effect on global trade is serious. The EEC constitutes one of the world’s largest markets. Evidently, as a result, EEC commercial policies have a significant impact on the global trade community. For this reason, Regulation 288/82 demands attention.

An examination of the Regulation shows that legitimate areas of international concern are: (1) the consultation mechanism and the investigation procedure; (2) the implications that the surveillance system has for products entering the EEC; (3) the basis for invoking safeguards under the Regulation; and, (4) the compatibility of the Regulation with the EEC’s GATT obligations.

**B. Consultation Procedure**

The system of Community consultation, investigation and surveillance provided for in Titles II, III and IV of Regulation 288/82 is intended to alert the Commission of the European Economic Community (Commission) to adverse trends in imports and to provide a framework for the application of protective measures under Title V.

Title II provides for a community information and consultation procedure. The procedure is activated when a Member State informs the Commission that a particular trend of imports calls for measures of surveillance and/or protection.\(^6\) Consultations are to be held within eight working days of such notification.\(^6\) It is mandatory that such consultations be held prior to the application of surveillance or safeguard measures.\(^6\) Consultation is undertaken by an advisory committee composed

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\(^6\) *Id*. Although textiles "subject to specific common import rules" are excluded, they are also subject to surveillance measures. *Id.* (art. 1). Such import rules include the Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7340 [hereinafter cited as Multi-Fiber Arrangement].

\(^6\) Regulation 288/82, *supra* note 12, at 2 (art. 3). Article 3 provides:

The Commission shall be informed by the Member States should trends in imports appear to call for surveillance or protective measures. This information shall contain the available evidence on the basis of the criteria laid down in Article 9. The Commission shall pass on this information to all the Member States forthwith.

The article 9 criteria are discussed *infra* notes 122-31 and accompanying text.

\(^6\) Regulation 288/82, *supra* note 12, at 2-3 (art. 4):

\(^6\) *Id*.
of representatives of each Member State, with a Commission representa-
tive as chairman. Consultations may be in writing. When consultations
are held in writing, Member States may request oral consultations. During
such consultations the terms and conditions of importation, the eco-

nomic and commercial situation, and possible measures must all be con-

sidered. Upon the termination of the consultation between Member
States, a decision must be made whether to take investigatory steps, ap-

ply surveillance or safeguard measures, or maintain the status quo.

The time frame permitted for these consultations and the conse-

quences thereof should be focused on briefly. In essence, Title II permits
the application of surveillance or safeguard measures subsequent to con-
sultation among Member States. As consultations must be held within
eight working days of notification, measures may in effect be imple-
mented almost immediately. Consultations are purely an internal mat-
der between EEC Member State representatives and a Commission repre-
sentative. No provision is made for representation of private importers
from within the Community, or for representation from outside the Com-
munity (i.e., non-EEC exporting states). Thus, Title II provides for uni-
lateral decisions to impose surveillance or safeguard measures subsequent
to brief consultation within the Community.

Article 7(4) of Regulation 288/82 makes it clear that it is not
mandatory for the Commission to proceed to the more extensive informa-
tion gathering process provided for in Title III (investigation procedure)
before applying surveillance or safeguard measures. Since Title II does
not provide for outside consultation and requires that a decision be made
by the Commission within eight working days, both the quality and the

equity of the decisions are questionable. The very essence of safeguard
action is that it stems from a perceived or actual threat to imports. Thus,
the EEC must be able to take action quickly. However, what distin-
guishes the Regulation 288/82 provisions from other international trade
provisions is that the opportunity to question the correctness of the per-
ceived or actual emergency is limited. The opportunity for external par-

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67 Id. at 3 (art. 5(1)).
68 Id. (art. 5(4)).
69 Id. (art. 5(3)).
70 Id. (art. 7).
71 Id. (art. 5).
72 Id. at 2-3 (art. 4).
73 Id. at 3 (art. 5(1)).
74 Id. (art. 7). Article 7(4) provides: "The provisions of this Title [investigation proce-
dures] shall not preclude the taking, at any time, of surveillance measures in accordance
with Articles 10 to 14 or, in an emergency, protective measures in accordance with Articles
15 to 17."
75 See infra text accompanying notes 84-94.
ties to have input into a decision to apply protective measures is virtually non-existent; as a result, safeguard measures may be applied in circumstances that would otherwise not be acceptable in international trade.

C. Investigation Procedure

Title III is "new legislation" insofar as an investigation procedure was not provided for in the predecessor regulation.\(^7\) When Title II consultations have not led to the application of safeguards or surveillance and the Commission believes that there is sufficient evidence to justify an investigation, then under Title III an investigation will commence.\(^7\) The level of potential injury required to justify an investigation is not defined. Article 6 provides that, subsequent to the decision to investigate, "the Commission shall announce the opening of an investigation in the Official Journal of the European Communities."\(^7\) This announcement is to be supported by a summary of the information received, a request for further information, and the announcement must establish a time frame for interested parties to make their views known to the Commission.\(^7\) Article 6 also stipulates that members are to cooperate with the investigation, and that information is to be verified if possible.\(^8\) Affected Member States are to provide all possible information on market developments regarding the product under investigation.\(^8\) The Regulation does not expressly provide a time frame for the investigation; it neither stipulates a minimum or maximum period for submissions from interested parties, nor does it state a time for the commencement of the investigation. In two instances in which these provisions have been invoked the Commission has allowed a thirty-day period for the presentation of views by interested parties.\(^8\) As this is a new regulation whose application has been limited,\(^8\) it is inappropriate to generalize and to assume that this will always be the case. The provision of an adequate period of time to respond to the investigation procedure is of paramount importance, for the failure to apply in writing in time implies that the right to a possible hearing or oral presentation is lost.

\(^{7}\) Id. (art. 6(1)(a)).
\(^{7}\) Id.
\(^{8}\) Id. (arts. 6(1)(b), 6(2)).
\(^{8}\) Id. (arts. 6(2), 6(3)).
\(^{8}\) See supra text accompanying notes 203-60 for a discussion of the application of Regulation 288/82 to date.
In carrying out the investigation, the Commission may hear both natural and legal persons.\(^4\) To be heard, such persons must satisfy three conditions. First, there must be an application in writing within the time stipulated in the Official Journal announcement.\(^5\) Second, parties must be able to show that they are actually or likely to be affected by the outcome of the investigation.\(^6\) Third, the parties must show that there are special reasons for an oral hearing.\(^7\) The basic rule appears to be that there is no right to an oral hearing unless the parties have actually been affected or are likely to be affected and have “special reasons.” A “special reason” is not defined; presumably the standard is established by the Commission.

Only Member States have a right to question the decisions taken by the Commission under this regulation.\(^8\) This right does not encompass a review of the investigation procedure or the decision itself. The right is limited to a referral to the EEC Council of decisions made pursuant to article 15 (application of emergency safeguards).\(^9\) Upon such a referral the Council must, by a qualified majority, either confirm, amend or revoke the Commission decision.\(^10\) If the Council fails to consider the matter within three months, the Commission decision is automatically deemed revoked.\(^11\) Referral to the Council of other decisions taken pursuant to the Regulation is not envisaged. It may, however, be possible to appeal decisions taken under this Regulation to the European Court of Justice (ECJ).\(^12\) Interested parties such as Community importers and exporters may have standing to bring a claim before the Court because they have been “directly affected” by the Commission or Council decision.\(^13\) This, however, does not provide non-Member States with an opportunity to be heard, as such states do not have standing before the ECJ.\(^14\)

\(^{4}\) Regulation 288/82, supra note 12, at 3 (art. 6(4)).
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id. at 7 (art. 15(5)).
\(^{9}\) Id. at 7 (art. 15(5)).
\(^{11}\) Regulation 288/82, supra note 12, at 7 (art. 15(6)).
\(^{12}\) Id.
\(^{13}\) Pursuant to article 173 of the Treaty of Rome, supra note 55, an individual has the right to appeal or question a regulation which has a direct effect. When a decision has a direct effect, even though it is not cast in terms of direct applicability, an individual will have standing to appeal the decision before the European Court of Justice. See Winter, Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law, 9 COMMON MKT. L. REV. 425, 432-34 (1972).
\(^{14}\) Treaty of Rome, supra note 55, 298 U.N.T.S. at 75-76 (article 173).
\(^{14}\) Id.
Although consultation under Title II is mandatory, an investigation is not prescribed prior to the application of safeguard or surveillance measures. Article 7(4) provides that safeguard measures, temporary or permanent, or surveillance measures, may be applied without a Title III investigation.\textsuperscript{96} Indeed, where safeguard action is taken under article 15, the Commission must decide within a maximum of five working days whether to maintain the safeguards or surveillance imposed.\textsuperscript{96} This leaves little time for affected parties to prepare a convincing case either in support of, or opposed to further measures. Title III does provide for an ex post facto investigation where Title IV (surveillance) or Title V (protective) measures have been taken without prior investigation. Article 7(4) states that the “Commission shall immediately take the investigation measures it considers to be still necessary.”\textsuperscript{97} Results are to be used to re-examine decisions or measures taken previously.\textsuperscript{98} The article leaves it open to the Commission to decide that an investigation is not required; the provision does not make an investigation mandatory. This implies that, in some instances, even the already limited right to a hearing may effectively be non-existent or denied. After Title IV (surveillance) or Title V (protective) measures are taken pursuant to the Title II consultations within the “eight working days” provision or “five working days” provision of article 15, it is conceivable that there will be no reconsideration of the measures.

In summary, the rights granted to outside parties under the investigation procedure are limited. The structure of the legislation is such that oral representations, and thus an opportunity to refute, deny, etc., are the exception rather than the rule. Notice in the \textit{Official Journal} may not be sufficient to alert foreign exporters or non-Member States. There is no guarantee that those who will be most affected will be aware of such a “hearing.”\textsuperscript{99}

The right to a hearing is only available to natural and legal persons. There is no reference in the legislation to states other than Member States. Do non-Member States have a right to be heard under Title III? It would appear that this is not contemplated by the provisions. When safeguards are applied and fall under the GATT article XIX, then clearly states will have recourse through the normal article XIX mechanisms.

\textsuperscript{96} Regulation 288/82, \textit{supra} note 12, at 4 (art. 7(4)). However, where protective measures are taken pursuant to articles 15, 16 or 17, then “the Commission shall immediately take the investigation measures it considers to still be necessary.” \textit{Id.}

\textsuperscript{97} \textit{Id.} at 6-7 (art. 15(4)).

\textsuperscript{98} \textit{Id.} at 4 (art. 7(4)).

\textsuperscript{99} \textit{Id.}

\textsuperscript{99} On the other hand, it must be assumed that importers who are aware of Regulation 288/82 will be closely watching the notifications published in the \textit{Official Journal} pursuant to article 6.
However, Regulation 288/82 does not require that injury be caused by GATT obligations or concessions. Thus, protective measures may be applied under the Regulation in circumstances that do not attract GATT article XIX obligations.\textsuperscript{100} The Regulation, then, does not afford non-Member States an adequate opportunity to be heard. It is apparent that the quality of the investigation procedure, whether initiated prior or subsequent to the imposition of protective measures, is of questionable merit.

Regulation 288/82 does not impose an obligation on the Commission to publicly report all of the findings or to disclose the basis of decision under Title III. The Commission need only publish the decision itself and major findings.\textsuperscript{101} Subject to the comments made above pertaining to the application for review by Member States of article 15 decisions,\textsuperscript{102} there appears to be no opportunity to request a review of the findings or the decision taken.

The issues raised above are important, for subsequent to the initial investigation, the Commission must submit a report to the Advisory Committee composed of Member States. This Committee will decide on the basis of the information submitted whether safeguard or surveillance measures will be applied or re-examined.\textsuperscript{103}

It is instructive to contrast the Regulation 288/82 provisions with the investigation procedure found in analogous EEC legislation, namely EEC Regulation 3017/79 on dumping and subsidies enacted pursuant to the revised GATT code.\textsuperscript{104} Regulation 3017/79 not only requires \textit{Official Journal} publication upon the initiation of procedures, but also requires separate notification to concerned exporters and importers, representatives of exporting countries and the complainants.\textsuperscript{105} Further, Regulation 3017/79 requires an in-depth examination, including investigation in a third country if necessary.\textsuperscript{106} This Regulation provides for the inspection of information collected by parties to the investigation,\textsuperscript{107} and provides that,

\textsuperscript{100} The Regulation provides specific criteria for safeguard application which are different from the conditions for invoking GATT article XIX. The Regulation’s lower threshold for injury demonstrates the potential for increased application of safeguards. \textit{See infra} text accompanying note 122. Already there are large numbers of controls and measures that fall outside article XIX and which are deliberately utilized to avoid the article XIX consultation procedure. \textit{See UNCTAD}, \textit{Growing Protectionism}, \textit{supra} note 1; \textit{see also} Bronckers, \textit{supra} note 38, at 43, 45.

\textsuperscript{101} Regulation 288/82, \textit{supra} note 12, at 4 (art. 7(2)).

\textsuperscript{102} \textit{See supra} notes 88-94 and accompanying text.

\textsuperscript{103} Regulation 288/82, \textit{supra} note 12, at 4 (art. 7(1)(3)).


\textsuperscript{105} \textit{Id.} at 7 (art. 7(1)).

\textsuperscript{106} \textit{Id.} at 8 (art. 7(2)(b)).

\textsuperscript{107} \textit{Id.} at 7 (art. 7(2)(a)).
upon request, the concerned parties meet in order that "opposing views may be presented and any rebuttal, argument [be] put forward." The obligations found in Regulation 3017/79, that parties known to be affected by the investigation be contacted, that information upon which the decision is based be made public, and that the parties be given an opportunity to rebut, are all noticeably lacking in Regulation 288/82. Clearly, when enacting Regulation 288/82 the EEC was not required to comply with an internationally agreed upon code of conduct, as it was in the case of Regulation 3017/79. However, even if one looks to the revised GATT code as supplying a high international standard, it is still apparent that Regulation 288/82 falls short of any minimum standard, domestic or international, in providing affected parties with a reasonable opportunity to present their case.

D. Surveillance

Title IV of Regulation 288/82 deals with Community surveillance and is intended to provide information on which to base decisions to introduce safeguard measures under Title V. Surveillance may be invoked "[w]here developments on the market in respect of a product originating in a third country . . . threaten to cause injury to Community producers of like or directly competing products." While safeguard measures may only be applied where "substantial" or "serious" injury is threatened or caused, surveillance measures may be applied where market developments "threaten to cause injury." This points to a lower threshold injury for surveillance measures and thus facilitates the application of such measures without extensive investigation.

Where surveillance is introduced concurrently with the liberalization of imports of the product in question, the decision is to be made by the Council instead of the Commission. This is a precautionary measure to oversee such liberalization of imports.

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108 Id. at 8 (art. 7(6)).
109 Id. at 8 (art. 7(6)).
110 Regulation 288/82, supra note 12, at 4 (art. 10(1)).
111 Id.
112 See, e.g., id. at 4-5, 6-7 (arts. 10, 15, 16).
113 EEC imports are either liberalized or not liberalized. The distinction reflects the applicability of quantitative restrictions to the product in question. The rule is somewhat arbitrary, however, for it merely relates to whether any Member State had restrictions on those goods when the common imports regime was finalized. A. Parry & J. Dinnage, EEC Law 449 (1981).
Surveillance may be prior or retrospective surveillance. Subject to provisions to the contrary, surveillance measures are to be of limited duration. Prior surveillance is applied before a decision is taken to apply safeguards, and implies that goods can only be imported and put into free circulation if an import document is produced. Such import documents are not meant to constitute a trade barrier, and must be freely issued when the importer provides certain basic information. The import documentation is, however, only of limited duration, and may make importation more difficult because of the recurring need to supply such information to obtain a license.

It is apparent from Regulation 288/82 that the "country of origin" of products is a concern to the EEC in enacting import controls. Provision is made in the Regulation to require importers to provide certificates of origin. This provision ensures that attempts to reroute goods to avoid or circumvent licensing provisions will not be successful.

National prior surveillance may be applied where a member has notified the Commission of a potential situation requiring surveillance or protective measures and where no decision has been taken within eight working days by the Commission. The form of surveillance is essentially the same as Community surveillance. This highlights the fact that one of the Regulation’s objectives is to provide a procedure for quick safeguard action.

The comments made above pertaining to the article 3 time frame for action, and the relatively low threshold for initiating safeguard or surveillance measures must be kept in mind when assessing the surveillance provisions. Surveillance measures constitute a valuable tool to protect the economy. They permit and facilitate a careful monitoring of the market and can be activated almost immediately. They represent a barrier to an increase in imports, for surveillance acts as a warning to those who might otherwise contemplate an increase in their exports to the EEC. It can almost be considered a measure which forces states to undertake a truly "voluntary" export restraint, out of the fear of having either a restraint or a Regulation 288/82 safeguard measure imposed. For this reason, the surveillance procedure may be considered tantamount to a deterrent safeguard.

114 Regulation 288/82, supra note 12, at 4 (art. 10(1)(a)(b)).
115 Id. at 5 (art. 10(2)(3)).
116 Id. (art. 11).
117 Id. This provision reflects the requirements found in article 2 of the Agreement on Import Licensing Procedures, supra note 57, at 171.
118 Regulation 288/82, supra note 12, at 5 (art. 11).
119 Id. (art. 12).
120 See supra text accompanying notes 64-75.
121 Id.
E. The Grounds Required to Invoke Regulation 288/82

A significant inclusion in the Title III (investigation) provisions is article 9, which establishes the indicia that determine whether there has been a substantial injury or threat of substantial injury. The factors to be considered under article 9(1) include:

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

The list of criteria enumerated in article 9 is not exhaustive; examination of the criteria listed by the Commission is a mandatory and minimal requirement. This requirement must be considered within the context of the article 6(5) provision, namely that where information is not provided within a reasonable time, or where the investigation is significantly impeded, findings may be made on the facts available.

What constitutes a "reasonable time," or what is meant by the investigation being "significantly impeded," is not defined. This leaves a wide margin of discretion to the Commission, and leaves open the question to what extent the indicia are applied in actual practice.

Moreover, article 9(2) provides that where "threat of serious injury" is alleged under Title IV (surveillance), the Commission must also examine whether it is likely to develop into actual injury. Factors to be taken into account include "the rate of increase of exports to the Community," current and possible future export capacity in the country of origin,

122 Regulation 288/82, supra note 12, at 4; see also infra notes 133-64 and accompanying text.
123 Regulation 288/82, supra note 12, at 4.
124 Id. Article 9(1) provides, inter alia: "The examination of the trend of imports... shall cover in particular the following factors..." The terminology employed appears to indicate that, although the factors enumerated must be considered, others may also be taken into account.
125 Id. at 3 (art. 6(5)). The full text of this article provides: "Where the information requested by the Commission is not supplied within a reasonable period, or if the investigation is significantly impeded, findings may be made on the basis of the facts available."
126 Id. at 4 (art. 9(2)). In contrast, article XIX of the GATT does not require a consideration of such development; the potential for injury is sufficient to trigger its operation.
and the likelihood of the resulting exports going to the Community.\textsuperscript{127}

Article 9 establishes substantive criteria for import controls in the EEC.\textsuperscript{128} The comprehensive list of criteria provided, and the requirement that development into actual injury be examined,\textsuperscript{129} make this article unique. One of the criticisms levied against article XIX of the GATT has been that the vague wording of the article makes its application very subjective, and permits use in situations where safeguard action would not otherwise be warranted.\textsuperscript{130} Article 9 of Regulation 288/82 attempts to address this problem. At the same time, however, it must be noted that the large number of factors which are to be considered by the Commission permit an easy justification for the application of Title IV (surveillance) or Title V (protective) measures. This is not to say that the enumeration of such criteria is not an improvement, for it does set some limits on the factors which may form the basis for a Regulation 288/82 decision. Determinations made under Regulation 288/82 appear to have taken at least some of the criteria into account.\textsuperscript{131}

Nonetheless, complainants are still faced with a problem similar to the one found in article XIX—there is no definition of key terms such as “substantial injury or threat of substantial injury.”\textsuperscript{132} The “substantial injury” standard found in the Regulation is wider and more easily applicable than its GATT counterpart of “serious injury.” Although it is difficult to establish a dividing line between a “substantial” and a “serious” injury, each sets a separate standard. Even if the difference is only one of degree, the nature and ramifications of safeguard action make the discrepancy significant. An injury may be substantial but fall short of being a serious injury. The EEC standard facilitates the application of safeguards more readily than its GATT counterpart. If the Regulation’s threshold was higher, then there would be no need for concern. But in light of the EEC’s economic strength and commitments to the GATT, such a derogation from the GATT standard has significant trade implications.

F. Protective Measures

Under Title V there are two major safeguard provisions—articles 15 and 16.\textsuperscript{133} Article 15(1) permits the Commission to take interim emer-

\textsuperscript{127} Regulation 288/82, supra note 12, at 4 (art. 9(2)).
\textsuperscript{128} See supra note 123 and accompanying text.
\textsuperscript{129} Regulation 288/82, supra note 12, at 4 (art. 9(2)).
\textsuperscript{130} Sauermilch, supra note 8, at 117-18.
\textsuperscript{131} See infra notes 207-60 and accompanying text.
\textsuperscript{132} Regulation 288/82, supra note 12, at 4 (art. 9(1)).
\textsuperscript{133} The full text of articles 15 and 16 of Regulation 288/82 supra note 12, at 6-7, are as follows:
Article 15
1. Where a product is imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products, and where a critical situation, in which any delay would cause injury which it would be difficult to remedy, calls for immediate intervention in order to safeguard the interests of the Community, the Commission may, acting at the request of a Member State or on its own initiative:
   (a) limit the period of validity of import documents within the meaning of Article 11 to be issued or endorsed after the entry into force of this measure;
   (b) alter the import rules for the product in question by providing that it may be put into free circulation only on production of an import authorization, the granting of which shall be governed by such provisions and subject to such limits as the Commission shall lay down pending action, if any, by the Council under Article 16.

The measures referred to in (a) and (b) shall take effect immediately.

2. Where the establishment of a quota constitutes a withdrawal of liberalization, account shall be taken in particular of:
   — the desirability of maintaining, as far as possible, traditional trade flows,
   — the volume of goods exported under contracts concluded on normal terms and conditions before the entry into force of a protective measure within the meaning of this Title, where such contracts have been notified to the Commission by the Member State concerned,
   — the need to avoid jeopardizing achievement of the aim pursued in establishing the quota.

3. (a) The measures referred to in this Article shall apply to every product which is put into free circulation after their entry into force. They may be limited to imports intended for certain regions of the Community.
   (b) However, such measures shall not prevent the putting into free circulation of products already on their way to the Community provided that the destination of such products cannot be changed and that those products which, under Articles 10 and 11 may be put into free circulation only on production of an import document are in fact accompanied by such a document.

4. Where intervention by the Commission has been requested by a Member State, the Commission shall take a decision within a maximum of five working days of receipt of such request.

5. Any decision taken by the Commission under this Article shall be communicated to the Council and to the Member States. Any Member State may, within one month following the day of communication, refer such decision to the Council.

6. If a Member State refers the decision taken by the Commission to the Council, the Council shall, by a qualified majority, confirm, amend or revoke the decision of the Commission.

   If within three months of the referral of the matter to the Council, the latter has not given a decision, the measure taken by the Commission shall be deemed revoked.

Article 16
1. Where the interests of the Community so require, the Council may, acting by a qualified majority on a proposal from the Commission, adopt appropriate measures:
   (a) to prevent a product being imported into the Community in such greatly
more permanent safeguard or protective measures which are instituted by Council and are thus tantamount to community laws.

Protective measures may be applied "[w]here a product is imported into the Community in such greatly increased quantities and/or on such terms and conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products." This standard applies to both article 15 and article 16. Measures may be taken at the Community level, nationally or regionally.

Under article 15, when importation leads to a situation which may be deemed "critical" and which would be "difficult to remedy," immediate protective measures may be taken by the Commission. Such measures include a limitation on the validity of import documentation, or an alteration of the import rules for the product in question. The former may be achieved by making free circulation of the product subject to an import authorization of such other provisions and regulations as set out by the Commission. The latter gives the Commission authority to take any measures that it deems appropriate, including, for example, a ban or severe restriction on the import of a particular product. Although article 15 is supposed to be an interim measure until article 16 action is taken, no time limit is placed on the validity of such action. The article 15 provision seems broader than the GATT rules which allow immediate action only where prior consultation is not possible or when circumstances are critical. Although the GATT requirement of a "critical situation" is an apparent prerequisite to article 15 action, the EEC conditions to such invocation are less onerous, as is the substantive test of injury. A Commission decision to act under article 15 must be forthcoming within five working days. This provides for quick action. It must also raise questions as to whether an adequate data base is available for such a decision.

increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products;

(b) to allow the rights and obligations of the Community or of all its Members States to be exercised and fulfilled at international level, in particular those relating to trade in primary products.

2. Article 15 (2) and (3) shall apply.

134 *Id.* at 6 (art. 15(1)).
135 *Id.*
136 *Id.*
137 *Id.* (art. 15(1)(b)).
138 *Id.*
139 GATT, supra note 2, at A59, T.I.A.S. No. 1700 at 55, 55 U.N.T.S. at 260 (art. XIX(2)).
140 See infra notes 207-60 and accompanying text.
141 Regulation 288/82, supra note 12, at 6-7 (art. 15(4)).
The threshold for what constitutes a "critical" injury (article 15(1)), as opposed to what is "substantial" injury (article 16), is not defined. The former is evidently a higher standard, but how much higher is not clear. When article 15 measures are applied by the Commission, there is no guarantee that an investigation will be held.\footnote{See supra notes 95-98 and accompanying text.} Thus, safeguard measures may be applied with very little investigation and possibly with little justification.

Article 16 provides for substantive and long term action by the Council upon the recommendation of the Commission. Like GATT article XIX, no time limit is placed on the duration of the measures taken. Article 16(1)(a) provides that, where Community interests require, the Council may adopt appropriate measures "to prevent a product [from] being imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products."\footnote{Regulation 288/82, supra note 12, at 7 (art. 16(1)(a)).}

Articles 15(1), 16(1)(a) and 16(1)(b) are all subject to article 15(2) and 15(3) provisions.\footnote{Id. at 6 (art. 15(3)(3)). Article 16(1)(b) is discussed infra notes 183-90 and accompanying text.} Pursuant to article 15(3), protective measures taken under articles 15 or 16 apply prospectively. Goods already enroute to the EEC which cannot be intercepted and rerouted may enter the community on pre-safeguard terms.\footnote{Regulation 288/82, supra note 12, at 6 (art. 15(3)(b)).} Goods may also be limited to certain regions within the community.\footnote{Id. (art. 15(2)).} The provision which permits goods already in transit to enter the community is important because it gives both exporters and importers at least some degree of certainty and avoids an abrupt cutoff in supply.

Pursuant to article 15(2),\footnote{Id. (art. 15(2)).} where an article 15 or 16 protective "measure" constitutes a "withdrawal of liberalization," additional factors must be taken into account. These include: "[T]he desirability of maintaining . . . traditional trade flows, the volume of goods exported under contracts concluded on normal terms and conditions before the entry into force of a protective measure [and] the need to avoid jeopardizing achievement of the aim pursued in establishing the quota."\footnote{Id. (art. 15(3)(a)).} The potential impact of this provision should not be underestimated, and it is noteworthy that the provision applies to both article 15 (emergency) and article 16 (permanent or semi-permanent) measures. Article 15(2) reflects the EEC's desire not to upset established trade flow volumes in its applica-
The article also points up the EEC's position at the Tokyo Round on the selective application of safeguards. The article reflects the EEC's need to prevent market disruption by overly efficient producers from outside the Community. The problems of justifying such selective safeguards are numerous, and have been discussed elsewhere at great length. Thus, only a few points will be raised in this regard.

The issue of selective safeguards touches the very core of GATT by calling into question two key GATT concepts, namely, reciprocity and MFN treatment. As discussed above, one reason that resort to article XIX has been considered unpalatable is that the GATT principles require all states affected by the withdrawal or alteration of a GATT obligation to be compensated. Selectivity runs counter to this MFN principle by implying that safeguards will only be applied to one state, and presumably to the most disruptive state. As a result, it will only be necessary to compensate one state instead of a host of states and therefore will be less costly for the invoking party.

States which are most likely to be faced with selective safeguard action are developing or newly industrialized countries which have gained a comparative advantage in labor intensive industries. Selective safeguards permit less efficient producers of the same product to enter the market. The argument in support of non-discriminatory treatment is that it protects the economically weak or smaller states by requiring the invoking state to compensate all states adversely affected, thereby discouraging resort to safeguards. In light of their relative lack of economic strength in global trade, such states do not have the bargaining power to demand compensation when faced with selective safeguards. Compensation is unlikely to be offered if the affected state has no capacity to retaliate. Further, GATT MFN principles not only make states reluctant to impose safeguards due to the greater number of states likely to be affected, but also ensure that there will be greater interest in, and hence pressure exerted upon, the invoking state to revoke the restrictions imposed.

The Regulation 288/82 provision that "traditional trade flows and volume" be respected implies that safeguards are to be applied to new entrants into the market. Practice substantiates this implication. In

150 Id.
151 See supra note 37 and accompanying text.
152 C. Bergsten & W. Cline, supra note 37, at 35-37; Curzon-Price, supra note 37, at 311-12; Sauermilch, supra note 8, at 127-35.
153 See supra notes 33-41 and accompanying text.
154 Sauermilch, supra note 8, at 129.
155 Id. at 128.
156 Regulation 288/82, supra note 12, at 6 (art. 15(2)).
157 See infra notes 233-60 and accompanying text.
economic terms, products from old and new markets may be substituted. There is no economic reason for distinguishing between the two. The result of such discrimination against new sources is more severe than the imposition of quantitative restrictions. It has been suggested that "export markets can... be viewed as [an] international commons," and that when this "[international] commons becomes overcrowded, there is no reason for the traditional suppliers to have prior claim... at the expense of new suppliers." Regulation 288/82 impedes new supplier access to the EEC market, and thus runs counter to the free trade philosophy of comparative advantage. The Regulation also runs counter to the recognition under the GATT of the claims of developing countries to an equitable share of world trade. Nor does it sit happily with the EEC's own policies under its Common Agricultural Policy (CAP), which assumes that the EEC has a right to a share of markets traditionally the preserve of other less powerful countries.

It would be incorrect to blame the EEC alone for the global increase in protectionist mechanisms. However, there is no doubt that given the size of the EEC market, any disruption of normal market forces by the EEC increases the pressure on third country markets. This in turn will cause a protectionist reaction and claims of market disruption or dumping by the target countries. It can also be argued that selective safeguards give third exporting countries an opportunity to expand their share of the EEC market by filling the vacuum left by the restricted country. It will only be a matter of time before such exporting countries will be faced with safeguard measures, VER's or OMA's. This will lead to a further downward spiralling of trade.

1. The Compatibility of Regulation 288/82 Protective Measures with GATT Obligations

The selective application of safeguards permitted by Regulation 288/82 raises important interlocking issues. Those who oppose selective safeguards claim they run counter to the GATT MFN principle, and as a
result, the EEC is potentially in breach of GATT obligations. This view must be tested against the argument that, if the "substantial injury" is not caused by GATT tariff concessions or other obligations, then article XIX does not apply and selective safeguards, OMA's and VER's are permissible.

The second viewpoint cannot be maintained. The GATT does not permit the invocation of safeguards in situations unrelated to specific GATT obligations, or in a selective manner, or on the basis of a "substantial" injury test. In this respect, EEC regulation 288/22 constitutes a significant derogation from GATT obligations. It can be argued that the EEC, by enacting Regulation 288/82, has unilaterally altered its obligations under a multilateral treaty. Regulation 288/82 changes the standard for safeguard application, permits protective measures to be applied selectively, and fails to provide adequate consultation procedures before or after the imposition of such measures. It is a generally accepted norm of customary international law that where treaty modifications are introduced by signatories, there should be notification and consultation. This norm has most recently been expressed in the Vienna Convention on the Law of Treaties. Thus, Regulation 288/22 constitutes a substantial change in the article XIX obligations that the Community has undertaken.

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165 To facilitate this analysis it is assumed that the EEC is bound by GATT obligations. Such an assumption is based on the Member States' delegation of their commercial powers to the EEC under article 113 of the Treaty of Rome, supra note 55. The EEC may be considered to have succeeded to the obligations of individual Member States by a process of subrogation. This transfer of powers has been supported in practice both within and outside of the GATT. In this regard, the EEC participated in the Dillon, Kennedy and Tokyo Rounds of negotiation. Although not technically a member of the GATT, over time the EEC has attained a separate status within the GATT, and can be bound by GATT obligations de facto if not de jure. In support of this assumption, see Agreement on Technical Barriers to Trade, GATT, BISD 8, 27 (26th Supp. 1978-79); Agreement on Government Procurement, GATT, BISD 33, 52 (26th Supp. 1978-79); Agreement on Import Licensing Procedures, GATT, BISD 154, 160 (26th Supp. 1978-79); and Arrangement Regarding Bovine Meat, GATT, BISD 84, 89 (26th Supp. 1978-79) which define the term "governments" to include the competent authorities of the EEC. See also International Fruit Company NV v. Productkschap voor Groenten en Fruit, 1972 E. Comm. Ct. J. Rep. 1219, 1227 (by conferring powers inherent in trade policy on the EEC, Member States showed desire to have EEC bound by GATT obligations); Kapteyn, The "Domestic" Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules, 8 Int'l L. 74, 74-77 (1974).

166 See supra notes 42-43 and accompanying text.

167 See supra notes 16-40 and accompanying text.

168 Regulation 288/82, supra note 12, at 6-7 (art. 15).

169 Id.

170 Id. at 8 (art. 18).

The extent of this unilateral shift from GATT article XIX can be measured both by the criteria adopted in the body of Regulation 288/82 and by a brief examination of Regulation 288/82 to date.

2. Comparison of GATT Article XIX with Regulation 288/82

Criteria

Article 16(1)(a) is the main safeguard provision found within Regulation 288/82. Article 15 focuses on temporary emergency action, while article 16 indicates that more permanent measures are envisaged.172

Despite the long list of criteria enumerated in article 9 to determine injury,173 the terminology of article 16 suffers from the same difficulties as article XIX.174 What constitutes “substantial injury” is not defined. In addition, this provision is applicable not only where substantial injury is caused, but also where it is “threatened to [be] caused.”175 The EEC provision does attempt to set a standard and provide criteria for establishing injury. By providing a more objective standard, article 16 is a significant improvement over the GATT provision. At the same time, the Regulation’s threshold for injury is lower than the GATT threshold.

Attention must be drawn to the fact that article 9 makes separate provision for a “threat of serious injury.” The likelihood that the threatened injury will develop into actual injury must be considered by the Commission, as must the rate of increase in imports, export capacity, and the likelihood that the products will be sent to the EEC.176 This provision tends to tighten the article 9 criteria; it also reinforces the point that the regulation envisages a particular country as the source of the increased imports.177

One important point which must be raised when comparing article XIX to articles 15, 16, and the article 9 criteria, is that the right to invoke safeguard measures under Regulation 288/82 is not linked to the prior trade preferences granted.178 Therefore, the Regulation has a broader base for application. Safeguard action under Regulation 288/82 does not imply that a negotiated concession is the cause of the increase in imports nor that it will be withdrawn. The Regulation refers solely to the imposi-

172 Regulation 288/82, supra note 12, at 7 (art. 16(1)) (the Council may adopt appropriate measures).
173 For an enumeration of the article 9 criteria, see supra note 122 and accompanying text.
174 See supra notes 44-45 and accompanying text.
175 Regulation 288/82, supra note 12, at 7 (art. 16(1)(a)).
176 Id. at 4 (art. 9(2)).
177 See supra notes 61-63 and accompanying text.
178 See supra notes 133-34 and accompanying text.
tion of quantitative restrictions.\textsuperscript{179} Trade liberalization measures and the withdrawal of quantitative restrictions also fall under the purview of GATT obligations under article XIX.\textsuperscript{180} Any analogy is, however, limited to quantitative restrictions in the form of quotas as Regulation 288/82 does not appear to contemplate tariff concessions.\textsuperscript{181} Although the Regulation envisages safeguard action inter alia by way of quantitative restrictions, it does not require that those same quantitative restrictions be the cause of injury.\textsuperscript{182} This supports the contention that the standard for invoking article XIX is substantially higher than that required for safeguard action under article 16 or article 15.

G. Other Title V Protective Measures

Article 16(1)(b) provides as follows:

1. Where the interests of the Community so require, the Council may, . . . adopt appropriate measures:

\begin{itemize}
  \item (b) to allow the rights and obligations of the Community or of all its Member States to be exercised and fulfilled at [the] international level, in particular those relating to trade in primary products.\textsuperscript{183}
\end{itemize}

This article is also subject to 15(2) and 15(3) discussed above.\textsuperscript{184} There are two possible interpretations which may be given to the 16(1)(b) provision. Both interpretations may have been envisaged by the drafters of the Regulation since they are not mutually exclusive. The first and most straightforward construction of this provision is that it refers to bilateral and multilateral treaties which have been concluded by the EEC with other states, and in particular to those which relate to primary commodities.\textsuperscript{185} Article 16(1)(b) would permit the EEC to amend these treaties and presumably to conclude other agreements of this nature in the future.\textsuperscript{186}

\textsuperscript{179} Regulation 288/82, supra note 12, at 6 (art. 15(1)(a)(b)).

\textsuperscript{180} GATT, supra note 2, at A58-59, T.I.A.S. No. 1700 at 54-55, 55 U.N.T.S. at 258-60 (art. XIX(a)(b)).

\textsuperscript{181} See infra note 191 and accompanying text.

\textsuperscript{182} Regulation 288/82, supra note 12, at 6-7 (art. 15).

\textsuperscript{183} Id. at 7 (art. 16(1)(b)).

\textsuperscript{184} See supra notes 145-52 and accompanying text.

\textsuperscript{185} Examples of such treaties are the EEC's arrangement with Argentina regarding trade in mutton and lamb, 23 O.J. EUR. COMM. (No. L 275) 14 (1980), and the EEC's fisheries agreement with Norway, 23 O.J. EUR. COMM. (No. L 226) 47 (1980).

\textsuperscript{186} Regulation 288/82, supra note 12, at 7 (art. 16(1)(b)). This interpretation is supported indirectly by article 17(1)(b), which provides that interim protective measures may be taken by a Member State when this is provided for in a bilateral agreement with a third country. Id. at 7.
A second interpretation is provided by Edmund McGovern.\(^\text{187}\) He suggests that article 16(1)(b) enables the EEC to take retaliatory action under article XIX(3) of the GATT.\(^\text{188}\) That is, if the EEC is faced with safeguard measures pursuant to article XIX then it can retaliate either through the imposition of quantitative restrictions or via the withdrawal of a tariff concession. Such action may also be taken by the EEC under articles 113 and 114 of the Treaty of Rome.\(^\text{189}\) Measures to compensate parties adversely affected by EEC safeguard action will also be negotiated under these articles of the Treaty of Rome. That the latter points are valid cannot be disputed; however, it is valuable to consider McGovern's proposition that 16(1)(b) provides a basis for retaliation pursuant to XIX(3), and that such measures include not only quantitative restrictions but also the withdrawal of tariff concessions.\(^\text{190}\)

An examination of Regulation 288/82 in its entirety strongly suggests that the only safeguard measures contemplated thereunder are quantitative restrictions.\(^\text{191}\) In particular, articles 15(1), 16(1)(a) and 16(2), the main safeguard provisions, refer to quotas rather than tariff concessions. Furthermore, surveillance procedures consist of import licensing.\(^\text{192}\) There is no doubt article XIX provides for the withdrawal of tariff concessions as a retaliatory measure. In addition, the EEC has authority to take such measures under articles 113 and 114 of the Treaty of Rome. But whether such measures are sanctioned by 16(1)(b) of Regulation 288/82 is not clear. EEC practice to date has not dealt with the issue under this Regulation. Thus it will be necessary to look at future practice to see how this issue will be resolved. In the interim, the first construction is a viable one, as is the McGovern construction limiting retaliation under XIX(3) to quantitative restrictions.

Article 17(1)(a) allows a Member State, instead of the Commission, to take interim protective measures unilaterally. A Member State may require that a product has an import licence prior to being put into free circulation.\(^\text{193}\) Such action may be taken if the article 15 conditions have been met or if such action is justified by a protective clause in a bilateral agreement.\(^\text{194}\) In both instances a Member invoking article 17 must notify the Commission.\(^\text{195}\) Thereafter, the Commission must make a decision to

\(^{187}\) E. McGovern, supra note 20, at 243.
\(^{188}\) Id. at 243.
\(^{189}\) Treaty of Rome, supra note 55, 298 U.N.T.S. at 60.
\(^{190}\) E. McGovern, supra note 20, at 244.
\(^{191}\) Regulation 288/82, supra note 12, at 2 (art. 1(2)), at 4 (art. 9), at 6 (art. 15(2)(3)), at 7 (art. 16), at 9 (art. 20(4)). But see id. at 5 (art. 11(2)).
\(^{192}\) Id. at 5 (art. 11(1)).
\(^{193}\) Id. at 7 (art. 17(1)).
\(^{194}\) Id. (art. 17(1)(a)(b)).
\(^{195}\) Id. (art. 17(2)(a)).
continue the measure or to adopt other measures pursuant to article 15 within five working days.196 The Commission's decision overrides the Member's decision; the state has a right of appeal to the Council.197 The article 17 provisions permit a state to bypass the article 3 consultation procedure in the first instance where the increase in imports will cause or is likely to cause a "critical situation." This is the same standard found in article 15.

There is one final safeguard provision in the Regulation which will be touched on briefly. Article 20 applies to products subject to national restrictions, and provides that a Member State, in "cases of extreme urgency," may act unilaterally and without consultation to alter the national restrictions listed in Annex 1.198 The state may do so by decreasing the quota, or refusing entry of the product.199 Alternatively, the state may increase quota allocations.200 Subsequent to such action, the Member State must notify the Commission and participate in consultation.201 Barring a situation of "extreme urgency," the normal procedure under article 20 for altering quotas is to proceed via a consultation procedure similar to the one found in article 3.202 There is no indication in the provision to clarify what constitutes a situation of "extreme urgency." Thus, like article 17, it appears to provide a quick means of unilaterally changing trade agreements which have been negotiated previously.

IV. APPLICATION OF COMMON RULES FOR IMPORTS: REGULATION 288/82

In order to evaluate whether Regulation 288/82 constitutes yet another barrier to free trade, and to better understand its operative effects, it is important to look at its application to date. The Regulation has been used as a protectionist tool to block excessive imports or overly competitive goods through the use of safeguards, and also as an instrument to discourage particular trading partners from considering an increase in their imports into the EEC.

The Regulation was promulgated in early February of 1982. Since then surveillance measures have been invoked ten times.203 Actual safe-

imposed were removed and replaced by an agreement tantamount to a voluntary export restraint. All measures have been imposed subsequent to September 1982. Although no distinct pattern can be ascertained, it is fair to say that the parties most affected by these measures have been Japan, Taiwan and South Korea. It should be noted that the latter two countries may be considered newly industrialized countries, while Japan is considered one of the most competitive exporters of manufactured goods in the world market.

A. Surveillance Measures

In September of 1982, the Commission introduced retrospective surveillance on the importation of certain steel products pursuant to articles 10 and 14 of Regulation 288/82. The decision to impose surveillance was supported by statistical documentation provided by the Member States. The date established that the market share of the import in question had increased either nationally or within the Community, and that production or sale of like products decreased within the affected Member State and/or Community. These figures point to the use of the article 9 criteria, and in particular to the provision to consider “the volume of imports . . . where there has been a significant increase either in absolute terms or relative to production or consumption in the Community.” The Regulation then concluded that “the imports . . . threaten to cause injury to Community producers of like products and it is in the Community’s interest to introduce Community surveillance.”

The terminology employed here is noteworthy. Had the Regulation provided that the imports threatened to cause “serious” injury the Commission, pursuant to article 9(2) of Regulation 288/82, would have been obliged to consider both the rate of increase of exports coming into the Community and the export capacity of the country of origin. The latter is difficult to establish. The avoidance of the use of the term “serious” injury, or even “substantial” injury (the article 9(1) standard), points to the

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205 Regulation 873/83, supra note 204.
206 See supra notes 203-04 and accompanying text.
207 Regulation 2303/82, supra note 203.
208 Id. at 7-8 (preamble).
210 Regulation 288/82, supra note 12, at 4 (art. 9(1)(a)).
211 Regulation 2303/82, supra note 203, at 8 (preamble).
difficulty the Commission would encounter in establishing this condition. Although article 9(1) speaks of "substantial" injury, the Regulation imposing retrospective surveillance speaks only of "injury." This affirms that the threshold level of injury for the application of surveillance, as opposed to safeguard measures, is lower. That the goods in question are steel imports accents the protected status that the European steel industry enjoys.

In September of 1982, the Commission also introduced retrospective surveillance pursuant to articles 10 and 14 of Regulation 288/82 on imports of certain textile producers originating in Tunisia and Morocco.212 The Regulation refers to consultations between Tunisia, Morocco and the Community to stabilize the market, and the need to monitor and stabilize the import of certain textile products in the "interests of security of production and trade between the parties."213 No statistical data is presented in the Regulation in support of the decision to impose surveillance measures. The Regulation fails to acknowledge that an OMA has been concluded between the parties, and that, as a result, retrospective surveillance is being imposed. Nevertheless, the Annex214 attached to the Regulation would point to such an Agreement's existence. Governments rarely publicize such agreements. The Annex stipulates specific quantities of products that are under surveillance. Neither the annexes attached to Regulation 288/82 which extend pre-existing surveillance measures and quantitative restrictions, nor other surveillance measures enacted pursuant to Regulation 288/82, provide such figures. Thus, this particular Regulation appears to have been introduced to implement an OMA between the parties. Further, the lack of statistical documentation establishing that injury has been sustained by the Community or the Member States suggests that the Commission does not feel obligated to consider the article 9 criteria or to substantiate or assert claims of injury prior to applying Regulation 288/82 surveillance measures. Whether this is merely an exceptional instance, or foreshadows future similar unsubstantiated decisions, is difficult to assess. In contrast, subsequent surveillance decisions have indeed been supported by "proof" of injury sustained.215

In December of 1982, under article 10, retrospective surveillance of the following Japanese products was imposed: certain motor vehicles, machine tools, color television reception apparatuses, cathode ray tubes for

212 Regulation 2417/82, supra note 203.
213 Id. at 8 (preamble).
214 Id. at 9-10 (Annex).
215 See, e.g., Regulation 3543/82, supra note 203 (imports of Japanese motorcycles rising to 91 percent market share); Regulation 3544/82, supra note 203 (imports of light commercial vehicles reaching market shares between 60 and 80 percent in some Member States); Regulation 3543, supra note 203 (imports of video tape recorders reaching an 80.5 percent market level during the first half of 1982).
color television receivers, video tape recorders, light commercial vehicles and certain motorcycles.\(^{216}\) This surveillance was extended and amplified to include quartz watches, forklift trucks and high fidelity equipment in March 1983.\(^{217}\) In each instance surveillance was justified on the basis that the imports were made "at relatively low prices, thereby depressing the price levels and financial results of the Community industry, and thereby threatening to cause injury to the Community producers of similar and competing products."\(^{218}\) Surveillance was also made on the basis that the market share of the exporter had increased over a particular period of time.\(^{219}\) These criteria fall under the indicia found in article 9,\(^{220}\) and point to their usage and application to establish injury. Further, the products affected are precisely those in which Japan enjoys a competitive advantage,\(^{221}\) and which are arguably produced most efficiently.

Argentinian textiles were placed under prior surveillance in January 1983.\(^{222}\) The reason for such surveillance was that the EEC's agreement monitoring and limiting textiles had expired and was not being replaced.\(^{223}\) Stating that there was "a threat that imports of textile products . . . will cause injury" to Community producers, and asserting a need to adhere to non-discriminatory treatment, the Commission imposed comprehensive surveillance procedures pursuant to articles 11 and 14.\(^{224}\) The reference to equal treatment\(^{225}\) refers to the fact that the EEC had put other suppliers under a special import regime (Multi-Fiber Arrangement).\(^{226}\) Surveillance was initially imposed for six months, and was extended for another six months on the basis that the threat continued to persist.\(^{227}\)

The other two surveillance measures deal with phosphates without regard to source,\(^{228}\) and with footwear from the People's Republic of China.\(^{229}\) Both extend surveillance measures already in existence.\(^{230}\) Con-
continued surveillance is founded on "considerable pressure exercised by imports into the Community . . . and the resultant threat of injury to the Community producers of like or directly competing products."

These latter surveillance measures, invoked because of threat of injury, do not use any substantive criteria to justify their application. There is no data provided or alluded to that would substantiate a claim of potential injury. Surveillance as applied to Tunisian, Moroccan and Argentinian textiles, Chinese footwear and to steel products and phosphates generally, may appear relatively harmless from a protectionist perspective. But such surveillance does constitute a barrier to free trade. That the justification for the application of surveillance in these circumstances is not always substantiated suggests that such measures can be applied almost indiscriminately and with frequency.

The surveillance of the steel products and Japanese products reflects the concern felt by the EEC and many other western trading nations that domestic production is threatened by the more efficient Japanese producers. This surveillance constitutes a warning or a deterrent safeguard to Japan and other efficient producers to stop increasing exports or they will face the risk of article 16 or 15 safeguard action. These measures, of course, do not support the free trade rhetoric so frequently espoused by the EEC and other major trading nations. Surveillance can be said to constitute a psychological or implied barrier to trade.

B. Protective Measures

Relatively little use has been made of the Regulation's safeguard measures. However, the promulgation of Regulation 288/82 does not imply a prohibition on the use of VER's or OMA's under articles 113 and 114 of the EEC Treaty. Thus, while safeguards may not have been applied, other agreements restricting trade may well have been negotiated or imposed by the EEC. It is common knowledge that many such agreements exist between the EEC and its trading partners. Many of these arrangements, however, are not publicized. Thus, as a result, the number and extent of such agreements is difficult to ascertain. Additionally EEC Member States have negotiated individually various "undertakings" in areas such as motor vehicles, footwear and electronics.


231 Regulation 3386/82, supra note 203, at 15 (preamble); Regulation 3384/82, supra note 203, at 13 (preamble).

232 Green, supra note 23, at 2, 5, 6.

233 See supra notes 45 and 212-13 and accompanying text.

234 See supra note 45 and accompanying text.

235 E. McGovern, supra note 20, at 244; Bronckers, supra note 23, at 674-79; Green,
Pursuant to article 16, the Council has regulated Taiwanese imports of textiles.\textsuperscript{236} The Council has provided for quantitative import quotas with annual increases, and focused on the problem of goods being re-routed or transshipped in circumvention of the Regulation.\textsuperscript{237} Although the original base for the annual quota levels was to be 125 percent of the preceding calendar year's level of imports, this was subsequently modified and changed to a permanent base year of 1980 for the length of the Regulation (1983-86).\textsuperscript{238} This modification effectively decreased the level of allowable imports. The object of the Regulation is to "ensure the expansion and orderly development of trade in textiles and gradual adjustment to the supply needs of the markets."\textsuperscript{239} Clearly, the aim is to limit Taiwanese imports significantly.

The scope of the provision is far-reaching, for not only does it regulate specific enumerated categories of textiles, but it also permits the application of quantitative limits on other groups of textile products where the annual increase of permitted imports is exceeded (permitted increases vary between 0.2 and 3 percent).\textsuperscript{240} This does not allow a great deal of variation. Further, there is provision for a refusal of imports where imports exceed the allowable level by 10 percent.\textsuperscript{241} This Regulation, then, establishes a comprehensive framework for the regulation of Taiwanese textiles.

It should be noted that this determination represents a continuation of import arrangements in force prior to December of 1982;\textsuperscript{242} there are, however, substantive changes in the import allocations and presumably in their application.\textsuperscript{243} This continuation explains why no mention is made of a threat to cause substantial injury to Community producers of like or directly competing products. The provision does not specify whether it was enacted under article 16(1)(a) or (b). It would seem logical, in light of the lack of justification of injury or threat thereof, and because it represents a continuation of a pre-existing agreement, that the provision falls

\textsuperscript{236} Regulation 3587/82, supra note 204. Taiwan is not a signatory to the Multi-Fiber Arrangement, supra note 63.

\textsuperscript{237} Regulation 3587/82, supra note 204, at 2-3 (arts. 1-2) (establishing quotas); \textit{id.} at 4 (art. 6) (dealing with goods re-routed in circumvention of the regulation).

\textsuperscript{238} Regulation 853/83, supra note 63.

\textsuperscript{239} Regulation 3587/82, supra note 204, at 2 (art. 2).

\textsuperscript{240} \textit{Id.} at 3 (art. 3(1)).

\textsuperscript{241} \textit{Id.} at 4 (art. 5).


\textsuperscript{243} See Regulation 3587/82, supra note 204.
under article 16(1)(b).

In December 1982, the Commission also introduced safeguard measures pursuant to article 15(1) on "tableware and other articles of a kind commonly used for domestic or toilet purposes of stoneware" entering France and the United Kingdom.\(^{244}\) This safeguard was subsequently revoked and replaced by a voluntary export restraint agreement with South Korea.\(^{245}\) The preambular wording of the Commission Regulation clearly indicates that particular countries, including South Korea and Taiwan, were the major source of market disruption.\(^{246}\) It is asserted in the Commission Regulation that the EEC must respect its international obligations, and therefore the measures imposed should apply to all imports equally.\(^{247}\) The Commission rejected South Korea's offer to negotiate a voluntary restraint undertaking with the two most affected EEC countries on the ground that such an undertaking cuts across the exclusive Community competence in matters falling within Regulation 288/82.\(^{248}\)

The Commission consulted extensively with Member States, exporters and importers.\(^{249}\) This action would seem to remove some of the fears expressed earlier about the consultation procedure laid down in Regulation 288/82.\(^{250}\) No evidence of "material injury" was established in the case of pottery, but a positive finding was made in the case of stoneware imported into France and the United Kingdom and quantitative restrictions were imposed for a period of three years.\(^{251}\) The decision was communicated to GATT under article XIX.\(^{252}\) An increase in imports and a resultant surge in market share of imports, combined with consequent employment effects in France and the United Kingdom, were the justification for a finding of material injury.\(^{253}\)

Evidently, article 9 criteria have been utilized to ascertain the nature of injury sustained.\(^{254}\) However, in April 1983 this Commission Regulation was revoked and replaced by an agreement equivalent to a voluntary export restraint agreement between the EEC and South Korea.\(^{255}\) This lat-

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\(^{244}\) Regulation 3528/82, supra note 204.
\(^{245}\) Regulation 873/83, supra note 204.
\(^{246}\) Regulation 3528/82, supra note 204, at 27 (preamble).
\(^{247}\) Id. at 29 (preamble).
\(^{248}\) Id.
\(^{249}\) Id. at 27 (preamble).
\(^{250}\) See supra notes 64-75 and accompanying text.
\(^{251}\) Regulation 3528/82, supra note 204, at 28 (preamble); id. at 29 (art. 3).
\(^{253}\) Regulation 3528/82, supra note 204, at 28-29 (preamble).
\(^{254}\) Regulation 288/82, supra note 12, at 4 (art. 9).
\(^{255}\) Regulation 873/83, supra note 204.
ter agreement was subsequently challenged by a Member State, but reaffirmed by a Council decision. The preamble of the Commission Regulation revoking the EEC quotas stipulates the quota level agreed to by South Korea and states that the products in question will be subject to export licenses in Korea and to a system of automatic import authorization within the United Kingdom and France. The preamble also provides for import authorization and procedures. The original regulation is repealed in its entirety. No reference is made to Taiwan or the desirability of maintaining non-discrimination vis-à-vis such imports.

This example demonstrates that, where safeguards are applied, the supplier may have no choice but to negotiate a VER in order to preserve at least a small but guaranteed share of the EEC market. This highlights the protective nature of Regulation 288/82 and the difficulty that the newly industrialized countries face when they are successful in penetrating the EEC market. Also, the EEC’s enactment of Regulation 288/82 does not mean that resort will no longer be made to VER’s. Clearly, both are contemplated by the EEC.

The third application of safeguard measures was on certain categories of wood imported into France. This safeguard represents a deviation from Regulation 288/82 in that it was invoked on the basis of a natural disaster in France. Due to the disaster, there was an excess of wood that had to be cut and that could not be left on the ground. It cannot truly be seen as a trade strategy to protect domestic producers from more efficient foreign suppliers. The measure was of limited duration, expiring in December 1983.

The fourth application under Title V was based upon article 17, when Italy took unilateral action to protect tube and pipe fittings. This action was overturned by the Commission, and Italy appealed to the Council. Pending a Council decision, the Italian measures restricting such imports were validated, and have been extended until a Council decision is made. The ground for invoking safeguard measures was that “damage had been sustained.” No further justification was documented in the Council decision to maintain the restrictions.

In neither of these latter two circumstances has a case been made to support the finding of injury. It is difficult to draw conclusions on the basis of such limited application; but as the former two applications drew

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256 Regulation 2050/83, supra note 89.
257 Regulation 873/83, supra note 204, at 8 (preamble). This agreement is similar to those allowed by GATT under the anti-dumping and countervailing duty provisions in article VI.
258 Id. at 8 (preamble).
259 Regulation 169/83, supra note 204.
260 Council Decision, supra note 204.
upon article 9 and the latter did not, it may be that the Commission and Council are not strictly constrained by these criteria, as they appear to disregard them when it is expedient to do so.

C. Overview of the Application of Regulation 288/82

An examination of the overall application of Regulation 288/82 to date shows that there have been three direct applications of safeguard measures (one of which may be considered a continuation of a pre-existing bilateral agreement under article 16(1)(b)) and ten surveillance measures. When viewed over a period of eighteen months, this does not seem to be an excessive application of the Regulation. However, the application of Regulation 288/82 should be placed within the larger framework of EEC actions. As noted above, it is difficult to ascertain what voluntary restraint measures have been taken during the same time period. Regulation 288/82 must be seen as only one of several tools that are available to the EEC to restrict the entry of goods into markets. Thus, the limited application of the Regulation does not reflect a larger policy oriented towards EEC liberalization of trade. On the contrary, the mere existence of the Regulation and an awareness of its potential effects may well constitute a substantial barrier to trade.

What has the EEC added to international trade practice and legislation by enacting Regulation 288/82? As noted earlier, it is clearly a protective measure. However, rather than just providing substantive safeguards measures, the regulation also provides preventive or deterrent safeguards through surveillance and investigative procedures. The latter two measures tend to discourage what might be termed by the EEC as “disruptive” imports, while the former prohibits or limits the entry of products once a threshold level of injury is reached.

There are several provisions which make the Regulation unique and controversial. First, the Regulation obviously provides a mechanism for Member States, or the Commission, to act quickly and unilaterally to implement interim, temporary or permanent safeguards. The actual forms of the safeguards, quantitative restrictions and import licencing are not controversial. The regulation appears to be restricted to these measures and does not contemplate the withdrawal or suspension of tariff concessions as a safeguard measure. This clearly distinguishes it from its GATT counterpart, as does the fact that the actual cause of the injury

261 See supra notes 203-05.
262 See supra notes 233-35 and accompanying text.
263 See supra notes 61-63 and accompanying text.
264 See supra notes 76-121 and accompanying text.
265 Regulation 288/82, supra note 12, at 6-8 (arts. 15, 17).
266 See supra note 191 and accompanying text.
does not have to be linked to the granting of a tariff concession, or trade liberalization measure.\textsuperscript{267}

The fact that the Regulation provides certain criteria for determining whether injury has been sustained by domestic procedures\textsuperscript{268} is a welcome and significant addition. These criteria are not without some difficulty in application.\textsuperscript{269} They may represent a trend towards a better definition of damage, and hopefully towards better standards for the application of safeguard measures.

The safeguard provisions, however, appear to implicitly deviate from the GATT non-discrimination norm and tend to favor or permit selective action against importers. With the exception of the preamble,\textsuperscript{270} there is no indication that the Regulation contemplates equal treatment for all importers. There is no de facto obligation to do so. An obligation may, however, be implied. At the same time, the formulation of Regulation 288/82 is such that a conclusion of selectivity in the application of safeguards can certainly be drawn.\textsuperscript{271} Such a conclusion does not preclude the application of safeguards on a universal basis.

The investigation procedure provided for in the Regulation is novel and raises serious questions as to whether those most seriously affected by the application of safeguard provisions, namely importers, exporting states and their industries, are allowed an opportunity to be heard.\textsuperscript{272} The fact that these provisions are clearly set out as a procedure, thereby limiting what otherwise might be implied, is clearly damaging to those who export to the EEC. The consultation procedure applies only to EEC Member States. This consultation, however, is the basis for application of surveillance or safeguard measures.\textsuperscript{273} Thus the traders are not provided with a significant opportunity to defend their case before restrictive measures are applied. The ability to take quick action is fundamental to the whole framework of the Regulation.\textsuperscript{274} Safeguard action must be readily available or severe damage may be sustained; however, it may not be necessary to move quite as quickly as the Regulation envisages in order to protect industry.

V. CONCLUSION

While Regulation 288/82 is in many respects similar to the GATT

\textsuperscript{267} See supra notes 134-41 and accompanying text.
\textsuperscript{268} Regulation 288/82, supra note 12, at 4 (art. 9).
\textsuperscript{269} See supra notes 131-32 and accompanying text.
\textsuperscript{270} Regulation 288/82, supra note 12, at 1 (preamble).
\textsuperscript{271} See supra notes 153-64 and accompanying text.
\textsuperscript{272} See supra notes 84-94 and accompanying text.
\textsuperscript{273} Regulation 288/82, supra note 12, at 2 (art. 3).
\textsuperscript{274} See supra note 142 and accompanying text.
safeguard provision found in article XIX, there are important differences between the two. This can in part be attributed to their different objectives. The GATT provision forms part of a larger trade framework and is generally considered to be an escape clause which will encourage greater subscription to the GATT while permitting the Contracting Parties to be released from their obligations in extenuating circumstances. The Regulation, on the other hand, forms part of the EEC's commercial policy, and has been drafted with the protection of domestic industry in mind as a priority. The Regulation does not envisage the liberalization of trade as an objective per se. That is not to say that this may not be an EEC objective, but it is an objective which is not found within Regulation 288/82.

Although a discussion of reform measures for article XIX falls outside the scope of this Article, it is of value to examine whether Regulation 288/82 addresses some of the flaws of article XIX, and whether the application of Regulation 288/82 safeguards is inconsistent with the safeguard provisions of the GATT.

The standard of injury required to implement safeguard action under the GATT is more onerous than that which is required in Title V (protective measures), despite the fact that the Regulation provides criteria for the assessment of injury. The GATT provision requires "serious injury," while the Regulation only requires "substantial injury." Further, the large number of criteria, the short time period allocated for decision making and the fact that such information may not be available and thus may be disregarded, all mitigate against a higher standard being applied in the Regulation than in the GATT. The Regulation provides a broader basis upon which justification for such action may be based. One of the indicia enumerated may provide a sufficient reason to apply safeguards. Thus, safeguards may be invoked more frequently than they would be under the GATT provision. For a safeguard measure to be applied under article XIX the increase in imports must stem from a GATT obligation, such as a tariff concession or other trade liberalization measure. Although the remedy provided under the Regulation is limited to quantitative restrictions, the basis for invoking such measures is not restricted to this. Safeguards invoked under the Regulation may not meet the "serious injury" or the conditions required to justify the application of article XIX measures. As such, the EEC may find itself in breach of GATT when invoking safeguard measures under Regulation 288/82. Similarly, it appears that Regulation 288/82 contemplates selective safeguards, and this, too, would constitute a breach of GATT. In fact, it would be a breach of one of the GATT's most fundamental principles.

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27 For a discussion of these measures, see D. Robertson, supra note 3, at 60-69; Hindley, supra note 1, at 337-38; MacBean, supra note 4, at 156-61; Merciai, supra note 11, at 49-55; Tumlir, supra note 4, at 412-17.
The issue of retaliation and the cost of invoking safeguard measures is not directly dealt with under the Regulation. The EEC will remain liable to compensate under the GATT, whether or not the application of safeguard measures is justified on the basis of article XIX conditions and the substantive test. It may constitute an unwarranted invocation of GATT safeguard measures; and thus the obligation to compensate may still exist. There is no mention in the Regulation of a duty to consult or negotiate outside the initial consultation and advisory committee. The duty may be implied due to GATT obligations. However, one of the reasons why the EEC favors selective safeguards is because they will not have to compensate all exporters affected by the safeguard measures. Rather, the EEC will be obliged to compensate or negotiate with only one or perhaps a few exporters.

Both the EEC and the GATT provisions suffer the same flaws. There is no limit on the duration of the safeguard measure imposed, nor is remedial action required to address the problems of the affected industry. As a result, the status quo is maintained. Further, structural adjustments are not being made to remedy the internal problems. Thus, emergency situations are prolonged and are resolved through the application of long term safeguard measures.

The investigation and surveillance procedures distinguish the Regulation from its GATT counterpart. Both of these procedures discourage trade in the EEC market, or at a minimum cause exporters to carefully watch their markets to see whether such measures have been or will be taken by the EEC. These measures can best be likened to deterrent or preventive safeguards. They are certainly not contrary to the GATT, for these measures can be considered an internal procedure to monitor imports. However, because the results of the investigation procedure and surveillance may ultimately lead to the application of safeguards, the nature of the consultation and investigation procedure becomes important. These procedures provide for quick action and do not afford an opportunity to be heard to parties which are likely to be affected by safeguard action. The procedures may be seen as a trade barrier which makes it increasingly difficult for foreign imports to penetrate the EEC market. This point, together with the highly protective nature of Regulation 288/82, suggests that the EEC market has been placed one step farther from the grasp of exporters.