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The Safeguard Measure/VER Dilemma: The Jekyll and Hyde of Trade Protection

*Ernesto M. Hizon**

I. INTRODUCTION AND OVERVIEW

The safeguard measure, or the escape clause mechanism provided in Article XIX of GATT 1947 has always been the “ugly duckling” in the palette of attractive defensive trade options available to states who wish to withdraw from the Article XI obligation of the 1947 Agreement prohibiting quantitative restrictions on imports. But unlike the antidumping and countervailing duty option which targets “unfair trade,” Article XIX deals not with the inherent “fairness” of the onslaught of imports, but merely furnishes a temporary escape hatch for domestic producers to adapt to serious competition from foreign manufacturers.

Safeguard measures are thus viewed as “emergency” procedures, allowing a party to deal with an exceptional situation (arising from “unforeseen developments”) which causes or threatens “serious injury” to domestic producers of like or competing products. Under Article XIX(1) of GATT 1947, the party may take protective action in the form of, among others, quantitative restrictions or tariff increases with respect to the product causing the injury, but only “to the extent and for such time as may be necessary to prevent or remedy such in-

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jury.”¹ The escape clause provision is considered an important aspect in the implementation of the General Agreement because it allows affected local producers a “margin of manoeuvre” to respond to a changing economic situation, when necessary.²

The continuing decline in the relatively small number of safeguard measures is inversely proportional to the almost established use of the Voluntary Export Restraints (VERs), either unilaterally administered by the thriving exporter, or through inter-state bilateral Voluntary Restraint Agreements (VRAs) or Voluntary Import Expansion agreements (VIEs) and Orderly Marketing Arrangements (OMAs),³ or voluntary undertakings arising from antidumping proceedings—all of which do not ostensibly conform to the basic GATT principles of multilateralism, nondiscrimination, undistorted competition and transparency.⁴ These “gray area” trade measures, although blatantly violative of GATT, are the favored option over Article XIX⁵ because they

¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7 T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948), art. XIX(1) [hereinafter GATT 1947].

² OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 57 (1985).

³ The OECD Committee on Competition Law and Policy have neatly categorized the types of action that fall under the rubric of VERs. They are the following:

1. Direct agreements or understandings between governments regarding the volume of exports. If these are formal agreements they are classified as Orderly Marketing Agreements (OMAs). These types of agreements are not truly “voluntary” insofar as they cannot be unilaterally eliminated or modified by the government of the exporting country. Voluntary restraint arrangements (VRAs) are a form of OMAs that include industry participation.

2. Government sponsored arrangements among exporting firms that constrain exports below a predetermined ceiling. An arrangement of this kind sponsored by the government of the exporting country is a classic example of a voluntary export restraint agreement (VER);

3. Agreements or arrangements among exporting firms to limit exports undertaken without government involvement, albeit most likely under the pressure of the importing (or exporting) country’s government. See OECD, OBSTACLES TO TRADE AND COMPETITION 17 (1993).

Kostecki adds more informal agreements to this list, which do not have any “formal pre-commitments” as to the volume of imports but whose presence affect the competitive conditions for trade. In this list, Kostecki includes “export forecasts,” “consultation arrangements,” and “prudent marketing arrangements.” Kostecki, *infra* note 25, at 425-26.

⁴ The objective of Article XI of the GATT is the general elimination of quantitative restrictions. VERs, are in effect, forms of quantitative restrictions which limit the volume of imports and/or control their prices in the importing state because they restrict the normal flow of goods from one country to another and disrupt the effect of market forces on trade. They violate the principle of non-discrimination enshrined in Article I of the GATT since they are targeted selectively at the producers of a particular country, and Article XIII:1 which provides that all quantitative restrictions should be applied on a non-discriminatory basis.

⁵ For a systematic appraisal of the distinction between Article XIX and the VER, See Reinhard Quick, *Exportselbstbeschränkungen und Artikel XIX GATT*, in Studien Zum Internationalen Wirtschaftsrecht und Atomenergierrecht, Institut für Völkerrecht der Universität Göttingen, (1983). Basically, the difference between the VER and the safeguard measure is that the proce-

are purportedly "voluntary" and more diplomatic; less complicated and bureaucratic; swiftly satisfy the injured producers; and efficiently avoid the numerous international and domestic legal obligations which prevent immediate action.⁶ VERs are, in effect, selective trade policy instruments that are primarily directed against developing countries. They are considered inefficient forms of protection and "remove the stimulus to restructure sunset industries."⁷ There is also a tendency for these bilateral agreements to proliferate, as in the case of the Multi-Fibre Arrangement, an exceptional VER regime removed from the GATT's ambit,⁸ as well as agreements covering steel, footwear, automobiles and electronics.⁹

The thesis of this article is that the safeguard measure and the bilateral/unilateral VER are actually different sides of the same coin—one within, the other without the GATT framework; they are industrial policy twins, one legitimate, the other illegitimate, the Jekyll and Hyde of trade protectionism. They are Yin and Yang, both with the same purpose. Formal considerations merely mask their unusual kinship.

dural safeguards in Article XIX and the requirement for non-discrimination need not be complied with.

⁶ Ernst-Ulrich Petersmann, *Grey Area Trade Policy and the Rule of Law*, 22 J. WORLD TRADE L., Apr. 1988, at 23, 27.

⁷ K.A. Koekkoek, *The Developing Countries in The New GATT Round: Safeguards Revisited*, 1 INT'L TRADE J. 319, 328 (1987).

⁸ The international trade in textiles and clothing is regulated by the Multi-Fibre Arrangement (MFA), practically a VER regime exempted from the GATT system. Sampson describes the MFA in the following manner: "The MFA is a multilaterally-negotiated arrangement whose terms and conditions are to be respected by the signatory governments when negotiating bilaterally (on a government-to-government basis) volumes of trade in specific textile and clothing products. The individual bilateral agreements contain conditions relating to the products (for example, the base volumes of trade to which annual rates of growth are applied). The terms of the agreements are notified to the Textile Surveillance Body (TSB) whose role it is to ensure that the provisions of the multilateral arrangement are respected. The MFA is the *only* multilateral arrangement in which governments agree to pursue policies to encourage internationally-uncompetitive business to move into viable lines of production and to provide access to their markets. See Gary P. Sampson, *Pseudo-economics of the MFA—a Proposal for Reform*, 10 WORLD ECON. 455, 456-57 (1987).

⁹ A complete discussion of the VERs in these other areas can be found in MICHAEL J. TREBILCOCK ET AL., *TRADE AND TRANSITIONS: A COMPARATIVE ANALYSIS OF ADJUSTMENT POLICIES* 42-76 (1990). The authors have this to say about the empirical evidence of the effects of VERs, which they characterize as yielding "a very negative economic assessment": VERs that restrict the number of units of imports in a given sector create incentives for foreign producers to move up-market to higher value-added, more profitable export lines. This has the perverse effect of leaving the domestic industry with a share of the product market where its comparative disadvantage is greatest and induces greater import competition in product markets where its comparative disadvantage is smallest. This trend has been evident in textiles, footwear and automobiles. It can only be countered by ever more detailed import restrictions. *Id.* at 70.

After a brief foray into the reasons why the VER is the preferred mode of protection over the Article XIX emergency action provision, the discussion in the article proceeds to the central portion of the essay, which seeks to demythologize the GATT and propose a pragmatic approach to the safeguard measure/VER dichotomy. Appropriately argued to be purely hypothetical is the gulf that separates the "rule-oriented" and "power-oriented" schools of thought in the GATT debate. Dysfunctionality within the GATT system is analyzed in the context of the escape clause of GATT 1947. The third part of the article analyzes the provisions of the new "Agreement of Safeguards found in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations," and makes prognostications of its consequences on the fate of the safeguard measure/VER problem.

II. SAFEGUARD MEASURES UNDER GATT 1947

With respect to the intended thrust of the escape clause in the original GATT, there is little controversy: (1) it offers short-term protection; (2) it is a *rebus sic stantibus* provision, because it applies to circumstances unforeseen at the time of the agreement and which could not have been predicted at that time;¹⁰ (3) it is a provisional response to a change in the economic environment, both external and internal;¹¹ and (4) it is supposed to enable a government to aid a local industry which cannot successfully compete against certain imports. Although not explicitly stated in Article XIX, it is generally accepted that the suspension or withdrawal of obligations or concessions should be applied on a nondiscriminatory basis.¹² There are arguments, though, that appear to justify selective safeguard measures.¹³

¹⁰ KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 99 (1970).

¹¹ See OLIVIER LONG, *supra* note 2, at 59.

¹² JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL RELATIONS* (1989); Mark Koulen, *The Non-Discriminatory Interpretation of Article XIX GATT, A Reply*, 9 *LEGAL ISSUES OF EUR. INTEGRATION* 87 (1983).

¹³ See MARCO C.E.J. BRONCKERS, *SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS* 245 (1985). The main thrust of the argument in favor of selectivity in the application of Article XIX lies in the contention that the importing country has the right to contain "market disruption," and hence, can zero in on those suppliers who perform this "disruptive" action, without regard to the exporting country. For a full discussion of this justification, See Brian Hindley, *Voluntary Export Restraints and Article XIX of the GATT*, in *CURRENT ISSUES IN COMMERCIAL POLICY AND DIPLOMACY* (John Black & Brian Hindley, eds. 1979). In the Tokyo Round negotiations, the European Community member advocated the concept of "selective safeguards," i.e., the right to take emergency protective action against particular suppliers, which would have violated the GATT's philosophy of non-discrimination. The develop-

In a nutshell, the safeguard provision postpones the immediate effect of the entry of competing products, granting the local producers some leeway to adjust to the new situation from the structural point of view, i.e., improve the competitiveness of their products during the existence of the safeguard measure, or allow them a grace period during which they can permanently shift production to products where they have a better chance in the domestic market.¹⁴ The presumption prevails that the imports that have become the subject of concern are still "fair," but their increasing quantities cause "serious injury" to the affected domestic producers.

Unlike antidumping legislation which targets "unfair" trade practices arising from price discrepancies in the exporter's home and export markets, safeguard measures are primarily "designed to deal with exceptional situations," where the lower price of imports in question "may merely reflect comparative advantage."¹⁵ Because of the higher threshold of "serious injury" required to justify use of the escape clause, as compared to antidumping's "material injury" standard,¹⁶ the safeguard measure at the outset appears to offer a lower standard of protection. Moreover, antidumping measures, by their very nature, can pinpoint particular countries or suppliers who practice "injurious" dumping. In contrast, the safeguard action should be applied in a non-discriminatory manner.

Until the late seventies, a total of ninety-five safeguard actions were recorded.¹⁷ As of December 1, 1993, only 150 actions under Article XIX were reported to the GATT Secretariat, many of which have already been terminated.¹⁸ Generally, the value of trade affected by such actions is relatively low.¹⁹ Since then, the safeguard clause has been invoked with less and less frequency. Article XIX actions from the European Community, for instance, have remained relatively rare. In December 1992, only two Article XIX actions at the European Community level remained (relating to dried grapes and processed

ing countries vehemently opposed the EEC proposal, and because of the impasse, no agreement on an improved Safeguards Code could be reached.

¹⁴ See JACKSON, *supra* note 12, at 150.

¹⁵ J.F. BESELER, & A.N. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY: THE EUROPEAN COMMUNITIES* 50 (1986).

¹⁶ *Id.*

¹⁷ *Modalities of Application of Art. XIX: Note by the Secretariat*, GATT Doc. L/4679 at 10 (July 5, 1978).

¹⁸ GATT Secretariat, *Analytical Index: Guide to GATT Law and Practice* 500 (1994).

¹⁹ IRVING B. KRAVIS, *DOMESTIC INTERESTS AND INTERNATIONAL OBLIGATIONS* 65 (1975).

cherries), which was a reduction from the seven that existed in 1991.²⁰ As of 1994, the United States had no Article XIX actions in effect.²¹

III. THE VER: PREFERRED MODE OF PROTECTION

In the 1984 Report by the OECD Committee of Experts on Restrictive Business Practices, five inherent "efficiency-reducing" problems were noted in VERs and OMAs: (1) exporters are discriminated against, usually at the expense of the most competitive exporter; (2) the adjustment process in the importing state is distorted; (3) the "cartelization" of exports is encouraged, in effect reducing competition in both exporting and importing states; (4) resources may be transferred from the importing to exporting country "when minimum price provisions form part of the arrangement;" (5) consumers in the importing country suffer the burden.²²

Voluntary Export Restraints are usually agreed to by the affected supplier/exporter when they are threatened with import relief measures in Article XIX, antidumping, countervailing duties, or unilateral actions like the United States' Section 301 provisions. VERs are preferred because they appear to offer "better deals" and give the exporters at least some "bargaining leverage."²³ Part of the inducement for the exporting country to conform to a VER is the possibility that the exporting industry might be able to increase the price of its products in the restricted market.²⁴

VERs, although not strictly "voluntary,"²⁵ as they are usually instigated at the initiative of the importing country, nevertheless furnish advantages to the erstwhile established exporters. Both the exporter,

²⁰ 1 TRADE POLICY REVIEW: EUROPEAN COMMUNITIES 69-70 (General Agreement on Tariffs and Trade ed., 1993).

²¹ GATT SECRETARIAT, TRADE POLICY REVIEW: UNITED STATES 73 (1994). The last reported Article XIX import relief action of the United States, on speciality steel, was terminated in 1989. Safeguard actions in the United States are covered by the Section 201 family of provisions of the 1974 Trade Act, as amended. The requirements under this mechanism tend to be more stringent than those under United States antidumping and countervailing regulations.

²² OECD, COMPETITION AND TRADE POLICIES: THEIR INTERACTION 12 (1984).

²³ See Jan Tumlrir, *Emergency Protection Against Sharp Increases in Imports*, in IN SEARCH OF A NEW WORLD ECONOMIC ORDER 260 (H. Corbet & R. Jackson eds., 1990).

²⁴ See DAVID GREENAWAY & BRIAN HINDLEY, WHAT BRITAIN PAYS FOR VOLUNTARY EXPORT RESTRAINTS (Trade Policy Research Centre, Thames Essay No. 43, 1985).

²⁵ Kostecki, in his authoritative article on VERs, differentiates the VERs from traditional unilateral or bilateral import quotas by describing their "voluntary" nature in this manner: (1) the exporting country has the right to withdraw from, or modify the VER on their own volition; (2) the VER is basically controlled and enforced at the exporting country's border. See Michael Kostecki, *Export Restraint Arrangements and Trade Liberalization*, 10 WORLD ECON. 425-26 (1987).

and their respective foreign government, gain from the distribution of rents that would have gone to the importing government had a tariff been imposed, provided they agree to limit exports.²⁶ It is actually a *quid pro quo* arrangement: on the one hand, the importing state is assured that only a limited number of products will enter their markets without having to worry about the GATT rules on quantitative restrictions,²⁷ and on the other, the exporter is assured that a certain quantity of his or her product will be sold in that particular market. Not only does this “informal” agreement “avoid open confrontations” possible with the GATT system of multilateral tariffs and quotas, but it also encourages collusion and eliminates the need for retaliation from both sides.²⁸ Since the foreign government and exporting firms “voluntarily”²⁹ participate in the process, they are not likely to contest the VER on the ground that it violates the GATT.³⁰

A perfect example of this “collaborative environment” that actually backfired on the instigating country were the 1981 Japanese voluntary restrictions on its automobile exports to the United States, which benefited both the Japanese and United States automobile industries.³¹ Apart from the GATT and United States antitrust violations the VER engendered, the automobile VER prejudiced United States consumers by causing an increase in the price of all new cars, and gave American and foreign automobile makers billions of dollars in unearned profits. But this VER led to a chain reaction that drew other states to implement more VERs. Due to the limited number of cars the Japanese could export, they opted to sell higher-priced cars to the upper end of the United States market for better profit margins.

²⁶ Edward John Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285, 307 (1987).

²⁷ See GATT 1947, *supra* note 1, arts. XI, XII, and XIII.

²⁸ Ray, *supra* note 26, at 307.

²⁹ A VER may be treated as “voluntary” in the sense that the established exporter would rather be able to maintain a certain share of the importing country’s export market than to be completely shut out by Article XIX restrictions. But it can likewise be argued that exporters do not restrain the volume of their exports “voluntarily,” but are actually “coerced” to do so under the threat of the cumbersome Article XIX procedure or other GATT-legal measures such as antidumping and countervailing duties, which are applied with impunity by some contracting parties. The VER thus becomes a “better-than-nothing” alternative to the exporter. The other point to consider is that the two parties who enter into a VER usually do not do so from the same position of strength; one party usually has most of the cards stacked in its favor. To characterize the weaker party’s “self-administration” of its own exports as “voluntary” is like wringing a second confession from an innocent party.

³⁰ OECD, *supra* note 22, at 21.

³¹ See Michael William Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARVARD INT'L LAW J. 99, 150.

This allowed the Japanese to penetrate a segment of the market heretofore closed to them. Furthermore, the Japanese firms diverted their excess production capacity to other markets where they sold their automobiles more competitively,³² causing other states, such as member states of the European Community, to seek similar import restraints.³³ The cartelization of VERs, as demonstrated in this particular example, may actually improve the position of the foreign producer who participates in the VER-induced cartel, rather than competing under normal market conditions.³⁴

VERs pose the strongest threat to the interests of developing countries. As in the case of the safeguard measure, the main targets of VERs would be those countries with a "rapidly changing structure of exports," coupled with high economic growth. Developed countries would be the major initiators of VERs because they are the ones who are losing competitive advantage in certain areas of manufactures which the more successful LDCs have penetrated.³⁵ Non-tariff measures, particularly VERs and OMAs, have been disproportionately directed to manufactured exports from developing countries, disregarding the differential and preferential treatment to them accorded by the GATT.³⁶ Hindley, however, persuasively contends that VERs may be the "necessary evil" for developing countries where the latter can make the best of the current sad state of developed country trade policy.

Due to their non-transparent nature, data on VERs is scarce. Thus, only general aggregate international trade data may provide us with a rough picture of the growing prevalence of non-tariff barriers (NTBs), VERs being one of the more popular NTBs. Developed countries have the highest share of imports covered by NTBs. As of 1986, the European Community (followed closely by the United States) and Japan had the highest share of NTB protection on their imports.³⁷ In 1987, Kostecki calculated that in the mid-1980s, no less than ten percent of world trade, and about twelve percent of non-fuel trade, were covered by VERs. Of the 137 export-restraint agreements

³² *Id.* at 150.

³³ See BRONCKERS, *supra* note 13, at 123-29.

³⁴ MICHAEL J. TREBILCOCK ET AL., *supra* note 9, at 71.

³⁵ Brian Hindley, *GATT Safeguards and Voluntary Export Restraints: What are the Interests of Developing Countries?*, 1 WORLD BANK REV. 689 (1987).

³⁶ See Gary P. Sampson, *Non-Tariff Barriers Facing Developing Country Exports*, in DEVELOPING COUNTRIES AND THE GLOBAL TRADING SYSTEM 171, 184 (John Whalley ed., 1989).

³⁷ Sam Laird & Alexander Yeats, *Nontariff Barriers of Developed Countries, 1966-1986*, FINANCE AND DEVELOPMENT Mar. 1989, at 12, 12-13.

he reported for the period 1986-1987, sixty-eight protected the European Community market, forty-five the United States market, and ten the Canadian market.³⁸

The latest available figures on VERs are from the GATT Secretariat's latest Report on the Developments in the Trading System, covering the period from September, 1988 to February, 1989. Very few of these arrangements have actually been notified to the GATT Secretariat. Product categories affected by these VERs are concentrated mainly in the textile and clothing sectors (seventy-seven agreements, twenty-nine of which have been notified to the Textile Surveillance Board as part of the Multi-Fiber Agreement); agricultural and food products (sixty-four agreements); steel and steel products (fifty-two agreements); electronic products (thirty-two agreements); automobiles and other transport equipment (twenty-one agreements); footwear (seventeen agreements); and machine tools (fourteen agreements). Most of the VERs protect the European Community market or one of its member states, or the United States—the two account for four-fifths of the VER measures listed.³⁹

IV. THE NEED FOR A REALISTIC PERSPECTIVE

There is no question that VERs and the other forms of bilateral agreements undermine the liberal and "legal" trade regime that the GATT seeks to perpetuate. Their widespread acceptance does not demonstrate that the multilateral obligations assumed by the GATT parties have been modified.⁴⁰ The principal factor that helped establish the GATT and the liberal trading regime was the dominant economic and military power of the United States after World War II. The United States' interests set the stage for trade liberalization, notably in the sphere of tariff concessions.⁴¹ But this initial boost towards liberalization depended largely on the economic hegemony of the United States. With the decline of United States economic power vis-a-vis Europe, and later, in relation to East Asia, non-tariff barriers

³⁸ Kostecki, *supra* note 25, at 428-29.

³⁹ GATT SECRETARIAT, *Developments in the Trading System*, L/6530 at 91 (1989).

⁴⁰ See discussion of Hasan Moinuddin, *Grey Area Trade Policies*, in *FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER* 197, 200 (1988).

⁴¹ See Robert E. Baldwin, *The Changing Nature of U.S. Trade Policy since World War II*, in *THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY* 5, 5-7 (Robert Baldwin & Anne Krueger eds., 1984).

outside the GATT became more and more popular, with the use of discriminatory trade restraints increasing.⁴²

Economic theory confirms that such VER agreements are extremely disadvantageous to consumers, reduce efficient competition, and harm economic welfare as a whole. Prices remain artificially high, and there is no guarantee that the protected domestic firms will make the necessary adjustments to restore competitiveness to their products. In the 1983 European Community-Japan VER restricting Japanese exports of video recorders into the European Community, the level of exports was varied according to the sales of European Community producers, in hopes of increasing the output of indigenous Philips-Grundig sales of VCRs, and of protecting the V2000 Philips format over the VHS and Betamax formats of the Japanese firms. By aligning Japanese VCR prices with the factory prices of European producers, the VER merely induced prices of all VCRs in the European Community to increase. Neither did it encourage Philips-Grundig to increase their output, nor prevent the eventual demise of the less competitive V2000 format.⁴³

In defiance of these undisputed economic facts, governments, as well as private firms, continually resort to the VER and its various permutations, shunning the reasonable legal avenues available to them under the escape clause. It is true that the demands of powerful domestic producers drown out the influential, but no less valid, complaints of consumers, due to protectionist biases in decision-making in market economies.⁴⁴ Petersmann regards this as a "constitutional failure of representative democracy."⁴⁵ But if safeguard protection does provide a safety valve for injured local firms, then why is it not exploited? Is political expediency the only cause of its early demise? If the VER is truly legally and economically despicable as it is pictured to be, why is this alternative preferred by the developed countries in general and by most of the targeted exporters? Why is the VER consistently preferred by a country such as the United States, which was instrumental in creating the GATT rules on safeguards it now circumvents?

⁴² Gernot Klepper, *The Next GATT Round: Bilateralism versus Multilateralism*, 21 INTER-ECONOMICS 236, 236-37.

⁴³ Brian Hindley, *EC Imports of VCRs from Japan, A Costly Precedent*, 20 J. WORLD TRADE L. 168, 179, 182.

⁴⁴ See ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 183-208 (1988).

⁴⁵ *Id.* at 205.

The answers lie in the fact that the original Article XIX provision in the GATT of 1947, and the improved version in the Agreement on Safeguards in the Final Act of GATT 1994, exemplify the inherent contradictions in the GATT system of liberal trade. As aptly put by the Institute of International Economics, "Safeguards provisions pose something of a paradox. Although they allow the imposition of trade restrictions, safeguards also make it possible to arrive at agreements to liberalize trade that otherwise could not have been achieved."⁴⁶ It can likewise be argued that the equivocal mercantilistic parameters of the safeguard provision—mistakenly perceived as beneficial for a multilateral system—have helped spawn the growing popularity of bilateral agreements.

The real issue in the safeguard measures/VER chasm is one of declining competitiveness in the sunset industries mainly found in the developed world; VERs are often negotiated between parties with disparate levels of economic and/or political power. One party always enters the trade equation from a position of strength. The weaker party, however, is rewarded by cornering at least a coveted segment of the export market. Smaller or less established exporters, (the so-called "innocent bystanders"), are often left out in the cold because of their lack of influence in both the internecine political tug-of-war in the importing state, and the international trade negotiations transpiring between the parties involved in the VER. In this interlocking of interests, however, the efficient producer is nevertheless "punished" for its comparative advantage, while the "innocent bystander" could be penalized for being "out of the loop."

Even with the pernicious economic effects resulting from VERs, affected manufacturers and their cooperating governments will always seek the most painless, and thus more strategic way to check competition from importers. If the Article XIX escape clause has been scarcely resorted to, it is indicative that it does not perform its enunciated function as the "safety valve" for injured producers; the diversion to bilateralism may be attributed precisely to the failure of the escape clause to provide a viable option. A multilateral approach always presents itself to be the ideal. But as long as the protectionist interests of one state can be "sufficiently persuasive" to induce another state to modify its export behavior, informal arrangements will always be, for the most part, the tempting alternative. Because VERs, in general,

⁴⁶ Colleen Hamilton & John Whalley, *Safeguards, in* COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 79, 80 (Jeffrey Schott ed., 1990).

have not been regulated by the GATT system,⁴⁷ they have been insulated from legal review.⁴⁸

This is not to say that VERs, VRAs and OMAs should be condoned. Rather, it is because the safeguard clause has not lived up to its promise to offer an "escape" that the problem of "serious injury" to domestic producers could not be controlled and regulated within the GATT discipline. In other words, the significance of the escape clause and its further development in the Uruguay Round lies in a pragmatic analysis of *why* it has often been *avoided*, or *evaded*, and not in the ritual of reiterating its virtue due to its avowed consistency with the GATT framework. The growing eminence of "gray area" trade policies is therefore more of a *strategic response*⁴⁹ to actual and perceived deficiencies in the safeguard procedure than an innate advantage in the VER.

V. DEMYSTIFYING THE GATT

A. The "All-or-Nothing" School

The perceived safeguard measure/VER dichotomy is a microcosm of the flawed all-or-nothing approach to GATT law. Before delving into this central issue, there is a need to discard certain preconceived notions of the GATT system which have been practically immortalized by repetition and regurgitation in numerous writings.

There is no doubt that the GATT regime is the sole existing legal framework for international trade.⁵⁰ An arbitrary line, however, has been drawn to distinguish the *function* from the *significance* of GATT rules. A clear demarcation divides those who defend the "rule-oriented" perspective and those who espouse the "power-oriented" approach.⁵¹ The former "legalist" school of thought believes that the GATT can be considered a legal system in itself, designed to regulate trade relations between states, with corresponding legal responsibili-

⁴⁷ The exception is the textile industry, which has been regulated by the Multi-Fibre Agreement. See Sampson, *supra* note 8, at 456-57.

⁴⁸ See Lochmann, *supra* note 31, at 153.

⁴⁹ The use of the term "strategic" here merely refers to the constant weaving in and out of the GATT system, i.e., shifting allegiances to GATT-consistent and GATT-inconsistent solutions to trade problems. There is no reference to the strategic game theory approaches in economics that focuses on the impact of restraints under conditions of imperfect competition.

⁵⁰ See Guy Ladreit de Lacharriere, *The Legal Framework for International Trade*, in THE LEUTWILER REPORT, TRADE POLICIES FOR A BETTER FUTURE 95 (1987).

⁵¹ This classification has coined by Prof. John H. Jackson. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989).

ties and obligations.⁵² A greater degree of fairness, stability and predictability, as well as the evolution of procedures for compromise, are the strongest arguments for conforming to a set of rules in international trade.⁵³ To the legalists, those who cling to the "power-oriented" treatment of the GATT reserve "too great a role for negotiation of disputes," with an alarming tendency towards "political compromise."⁵⁴

A branch of the legalist school accords GATT an even loftier "constitutional function," whereby the principles of non-discrimination, transparency and dispute settlement act as "mutually agreed international legal constraints on the broad trade-policy powers of governments in order to outlaw economically inefficient and harmful trade-policy instruments."⁵⁵ Since GATT rules represent the "liberal constitutional principles" in democratic societies,⁵⁶ the trade order espoused by GATT should be transposed to national laws that govern the determination of each state's respective domestic trade policies.⁵⁷

In sum, observance of GATT rules guarantees the "stability of the conditions of trade and levels of protection as well as a limitation of the means of protection to the relatively least costly ones."⁵⁸ The question at this point arises: if the GATT truly contains the most acceptable and efficient set of rules for international trade relations, then why are GATT rules unashamedly waylaid by the United States and the European Community,⁵⁹ the economic powers who have had a direct hand in its formulation?

The "pragmatist," power-oriented group, on the other hand, maintains that the GATT merely "provides a process through which

⁵² See JOHN H. JACKSON & WILLIAM DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (1986); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989); JAMES FAWCETT, *LAW AND POWER IN INTERNATIONAL RELATIONS* (1982).

⁵³ See John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-101 (1978).

⁵⁴ Philip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1018 (1985) (reviewing JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984)).

⁵⁵ Ernst-Ulrich Petersmann, *Economic, Legal and Political Function of the Principle of Non-discrimination*, 9 WORLD ECON. 113, 119 (1986).

⁵⁶ Ernst-Ulrich Petersmann, *Verfassungsrechtliche Grundprobleme bei der rechtlichen Regelung der Instrumente der Handelspolitik*, in ZÖLLE, VERBRAUCHERSTEUERN, EUROPÄISCHES MARKTORDNUNGSRECHT 5-31 (Heinrich Wilhelm Kruse ed., 1988).

⁵⁷ See Ernst-Ulrich Petersmann, *Handelspolitik als Verfassungsproblem*, 39 ORDO 239-254.

⁵⁸ Jan Tumlir, *GATT Rules and Community Law-A Comparison of Economic and Legal Functions*, in *THE EUROPEAN COMMUNITY AND GATT* 1, 8 (Meinhard Hilf et. al. eds., 1986).

⁵⁹ See Biswajit Dhar, *The Decline of Free Trade and U.S. Trade Policy Today*, 26 J. WORLD TRADE L. 133 (1992).

trade problems are negotiated and compromised within a general framework of rules.”⁶⁰ As there is always a political factor behind the law, rules cannot be justified by simply explaining their economic rationale or normative standard.⁶¹ The extreme “rule of law” position “assumes an impassable gulf between law and politics.”⁶²

Long, a former GATT Director-General, acknowledges the limitations of the law in the context of international trade relations because there are “inherent difficulties” in the regulation of something as fluid and vigorous as world trade.⁶³ He asserts that “[w]ith a deterioration in the economic environment, national political constraints often oblige governments to act outside a legal framework created in different economic circumstances.”⁶⁴ The flexible procedures in the renegotiation of tariff concessions, the exceptions to the prohibition of quantitative restrictions, and the safeguard clause which permits the suspension of GATT obligations confirm that the contracting parties sought to avoid undue rigidity in the implementation of certain GATT provisions, in order to render compliance more feasible both politically and in terms of trade policy.⁶⁵ In brief, the pragmatic approach considers the GATT constellation of “rules” as merely a means to an end, a starting point for discussions, a forum for reconciling opposing trade interests. Some have even advanced the proposition that trade policy should be decided by duly elected officials and bureaucrats who are sensitive to the interests of the constituencies affected, rather than by private litigants and international judges who are beholden to theoretically fixed rules.⁶⁶

In reality, this rule versus power-oriented categorization of the functionality of GATT law carries not much practical relevance. Of course, for multilateral negotiations, dispute settlement and academic scholarship it is imperative that what is “legal” be defined, so as to be able to determine what is not. But the fact of the matter is, states perpetually flip-flop between invoking the “divine status” of the GATT at one point, and resorting to bilateral agreements or unilateral measures at another point—policy orientations dependent on the exi-

⁶⁰ See Trimble, *supra* note 54, at 1017.

⁶¹ Daniel K. Tarullo, *Logic, Myth, and the International Economic Order*, 26 HARV. INT’L L. J. 533 (1985).

⁶² Daniel K. Tarullo, *Foreign Trade in the Present and a New International Economic Order*, 85 AM. J. OF INT’L L. 245, 247 (1991) (reviewing Detlev Chr. Dicke and Ernst-Ulrich Petersmann).

⁶³ Long, *supra* note 2, at 7.

⁶⁴ Long, *supra* note 2, at 60.

⁶⁵ Long, *supra* note 2, at 61.

⁶⁶ See Trimble, *supra* note 54, at 1029.

gencies of the moment. This seesawing between these two apparent extremes in different trade situations cannot be classified strictly as the pragmatist's approach. GATT regulations are quietly side-stepped when they cannot accomplish a particular need at a certain time. However, they are still complied with and relied upon when it is in the interest of the concerned state to do so.

It would be erroneous to pigeonhole such ingenuity in trade policy as "power-oriented;" that is to say, that international trade regulations are consigned to being simply initial bases for discussion and ruled by the relative strengths of the negotiating parties. Neither is a "justified disobedience" to GATT rules being advocated here. In the evaluation of rules, the actual status of international trade relations must be acknowledged. *Strategy* determines whether a contracting party conducts trade relations within the GATT framework or outside it. It can be suggested that it is this complex "interplay" between GATT-consistent and GATT-contradictory measures and policies that actually constitutes the realistic legal-political-economic structure circumscribing the whole gamut of international trade relations. To use Professor Jackson's christened term in a wholly different context, an "interface"⁶⁷ endures between the GATT framework and its mirror image exterior to it—not a stark legal/extra-legal division, but a continuum based on strategic considerations.

It is hardly a surprise to see nations—be they the economic heavyweights who dictate the legal spiels, so to speak, or the aspiring lightweights gagged by their lack of political or economic influence—passionately refer to GATT provisions with respect to one issue, but in another breath, engage in non-transparent bilateral agreements/unilateral instruments beyond the GATT's scope. The result of the decision to opt for or against a GATT-derived solution, although presumably advantageous to the state which selects the solution, may sometimes produce unexpected consequences. As illustrated earlier, Japan responded to the American 1984 VER on automobiles by modifying its products for the higher-end of the market. Thus, the Japa-

⁶⁷ Professor Jackson used this term in his discussion on antidumping laws. Jackson adopts the "interface" analogy by referring to the difficulties involved in making two computers with different systems to work, contending that an "interface mechanism" may be necessary "to allow different economic systems to trade together harmoniously." See JACKSON & DAVEY, *supra* note 52, at 650-651. "Interface," in this article, is an attempt to picture managing and bridging the relationship between the GATT "rule of law" world with the ostensibly GATT "illegal" parallel universe of bilateralism, unilateralism and protectionism.

nese firms were able to increase the prices of their cars while remaining within the imposed volume ceilings.⁶⁸

VERs—which mainly cover sensitive areas such as steel, clothing, textiles, agricultural products, cars, electronic products and machine tools—have not automatically prevented a loss of jobs in the protecting countries. For instance, employment in the steel industry fell by forty-two percent in the European Community and fifty-four percent in the United States between 1973 and 1984 although VERs in steel were in place. The OECD estimates that between 20,000 and 35,000 jobs in the United States automobile industry were protected by VERs on automobiles in 1982, but there were redundancies of more than 200,000.⁶⁹ Domestic producers stand little to gain in the long run, unless they are given additional protection against other competitors—generating layer upon layer of protection. When the United States forced Japan to sign an Orderly Marketing Arrangement (OMA) for television sets in 1977, the import market share of Korean and Taiwanese TVs zoomed from fifteen percent to fifty percent in a single year.⁷⁰

The continuing attraction of the “gray area” trade measure confirms that the GATT system can often help, but not satisfactorily resolve, the balancing of interests involved in trade policy-making on the domestic level.⁷¹ VERs will definitely decline in importance, when both fact and perception affirm that the GATT mechanisms, particularly Article XIX, offer sufficient flexibility to resolve situations of serious injury to domestic producers.⁷²

It is not true that the GATT system is “eroding,” and that there has been a growing disenchantment with the legalistic perspective.⁷³ On the contrary, the element of strategy has played a major role in the operation of the system since time immemorial; attention has only

⁶⁸ Charles Coyles & Steven Dunaway, *The Cost of Trade Restraint*, IMF Staff Paper (March 1987).

⁶⁹ OECD Observer, *The High Cost of Protection*, No. 150, 5 (1988).

⁷⁰ Clemens F.J. Boonekamp, *Voluntary Export Restraints*, FINANCE AND DEVELOPMENT Dec. 1987, at 2, 5.

⁷¹ Prof. Kenneth W. Abbott argues that international trade law does promote satisfactory resolution of the “Prisoner’s Dilemma” in the context of domestic decision-making in the area of trade. See Kenneth W. Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT’L L.J. 501, 503-04 (1985).

⁷² See Horst G. Krenzler, *Exportselbstbeschränkungen—ein aktuelles Problem der Handelspolitik der Europäischen Gemeinschaft*, 2 EUROPARECHT 177, 181 (1977).

⁷³ See the well-reasoned proponent of the rule-oriented line of thinking in Miquel Montana i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT’L L. 103 (1993).

been given to the practical effects of the GATT in the last two decades because the economic world order has changed.

B. The "Liberalization-Mercantilization" Syndrome

Existing parallel to the illusory rule/power distinction in the appreciation of GATT law is the myth that the GATT promotes only the liberalization of trade. Peculiar to the GATT orientation is the forced marriage of liberal and mercantilistic components in the GATT system, creating internal contradictions in the entire GATT system as a whole.⁷⁴ An economist has rightly dubbed this coupling the "liberalization-mercantilism" syndrome.⁷⁵ The GATT supports a legal structure composed of provisions ensuring the liberalization of trade, but at the same time, allows numerous exceptions nullifying each of these fundamental principles.⁷⁶ These fatal protectionist "qualifiers" neutralize the liberalizing thrust of the GATT and encourage participating states to more, rather than less protectionism.⁷⁷ At the outset, exceptions should be integrated with the underlying philosophy of the GATT regulations, and as a corollary, should facilitate compliance with such rules. Unfortunately, the provisos in the key GATT provisions go beyond corrective measures, and have the effect of offering wide-ranging protectionist opportunities, legitimized by their inclusion in the GATT.⁷⁸

Article XIX is a case in point. The safeguard procedure proceeds from the assumption that free trade may injure, in certain instances, a liberalized economy. But it is clear from the content of the Article that the protection from injury favors the production sector of the affected economy.⁷⁹ This observation holds true for all the protective measures available in the GATT regime.⁸⁰ The protection allowed by the provision discourages structural adjustment and adaptation to the

⁷⁴ Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 INT'L ORG. 561, 593 (1981).

⁷⁵ See Detlev Lorenz, *Ursachen und Konsequenzen des Neomerkantilismus*, in INTERNATIONALE ANPASSUNGSPROZESSE 15 (A. Woll ed., 1981).

⁷⁶ Horst Werner, *Das GATT Heute: Die Ausnahme als Regel*, in DIE NEUORDNUNG DES GATT: REGELN FÜR DEN WELTWIRTSCHAFT-LICHEN STRUKTURWANDEL UND TECHNOLOGI-TRANSFER 43 (1987).

⁷⁷ Josef Molsberger & Angela Kotios, *Ordnungspolitische Defizite des GATT*, 41 ORDO 93 (1990).

⁷⁸ Among these are the Balance of Payment exceptions in Articles XIV and XVIII; the support for a protectionist agricultural policy in Article XI(2)(c), and subsidies for agricultural products in Article XVI.

⁷⁹ RICHARD SENTI, *GATT: SYSTEM DER WELTHANDELSORDNUNG* 240 (1986).

⁸⁰ HEINER FLASBECK, *FREIHANDEL, GATT UND DAS INTERNATIONALE WAERHUNGSSYSTEM* 14 (1985).

increased imports. Moreover, it preserves the status of inefficient manufacturers, regardless of the relative positions in the international market economy.⁸¹ The mercantilistic component of the GATT serves as a "framework for exercising producer's property rights."⁸² The GATT therefore makes no provision for special rules to reward those who have the comparative advantage to succeed in the liberal trading system it sought to create.⁸³ The "gainers" from trade do not have the same legal standing as the "losers."⁸⁴

Petersmann posits that states often concede to protectionist forces despite their agreement on the economically harmful effects of protection because of the bias in the domestic decision-making procedures of governments. The political influence of producers is much stronger than those of the consumer public and the other sectors of the economy.⁸⁵ This contention would have been wholly correct if the GATT itself did not provide the mechanisms that sanction the producers' priority in the economy. In the escape clause and, among others, in the antidumping sections,⁸⁶ customs union and free trade area provisions, protectionism is grafted on the GATT corpus itself. Since the GATT was forced to walk the tightrope between these mercantilistic concessions and the multilateral philosophy in trade relations it espouses, the suspension of obligations normally requires giving written notice to the contracting parties, especially to those whose products are affected, to pave the way for consultations regarding the proposed safeguard action.⁸⁷ The real paradox here is that the GATT-bound protectionist component spawned the non-GATT spinoffs (such as VERs, OMAs, Voluntary Import Expansions (VIEs), preferences of domestic firms for government procurement, cartels, variable import levies and the like), clearly because the GATT versions did not go far enough.

⁸¹ Molsberger & Kotios, *supra* note 77, at 97.

⁸² See Gary C. Hufbauer's Comment, reviewing J. Michael Finger, *Protectionist Rules and Internationalist Discretion in the Making of National Trade Policy*, in *NEW INSTITUTIONAL ARRANGEMENTS FOR THE WORLD ECONOMY* 310, 324 (Hans Juergen Vosgerau ed., 1989).

⁸³ Michael Finger, *Protectionist Rules and Internationalist Discretion in the Making of National Trade Policy*, in *NEW INSTITUTIONAL ARRANGEMENTS FOR THE WORLD ECONOMY* 310, 322 (Hans Juergen Vosgerau ed., 1989).

⁸⁴ *Id.*

⁸⁵ Ernst-Ulrich Petersmann, *Protektionismus als Ordnungsproblem und Rechtsproblem*, 47 *RABELS ZEITSCHRIFT* 478, 483-84, 500 (1983).

⁸⁶ See RAINIER BIERWAGEN, *GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAWS* (1990).

⁸⁷ GATT 1947, *supra* note 1, at art. XIX(2).

This “structural deficit” which the custom and tradition of the GATT system perpetuates, undermines the very rule-based system it doggedly pursues. The comment that obedience to the GATT has become outmoded because the world has changed profoundly since the GATT’s inception is a gross oversimplification; if this were the case, then every change in the economic environment would warrant a change in international trade rules. GATT law would then be a mere phantom of the trade opera. The continuous negotiations in various tariff rounds, the adoption of various codes covering certain ambiguous aspects of the original agreement, and the evolution of dispute settlement practice exhibit the desire of the contracting parties to fine-tune the main agreement to changing economic and political conditions.⁸⁸ While the numerous exclusions, exceptions and derogations in the 1947 Agreement have undoubtedly substantially altered whatever semblance of “symmetry”—the balancing of benefits and concessions—the GATT possesses,⁸⁹ the license to turn to quantitative restrictions in cases of “serious injury” to domestic producers fundamentally impaired whatever “initial symmetry”⁹⁰ it ought to have had.

C. The Escape Clause: GATT Ambivalence in the Concrete

Regardless of the careful wording of Article XIX in the 1947 Agreement to conform to the general GATT principles, the subtext of the article clearly involves the *loss of the competitive advantage of affected domestic producers with respect to products identical or similar to, or directly competitive with, products manufactured by them*. The three elements necessary to trigger the concession in this Article—the “unforeseen developments,” the effect of the obligations incurred under the Agreement, and most important, the contracting party’s domestic producer’s experiencing or being threatened by “serious injury”—indicate that the rationale of the provision is to come to the rescue of producers who are unable to stave off the imports that compete with their products. When these three requirements are fulfilled, the contracting party may suspend its obligations under the GATT.⁹¹

⁸⁸ Andrew Farran, *The Interplay of Law and Economics in International Trade Regulation*, in *ISSUES IN WORLD TRADE POLICY: GATT AT THE CROSSROADS* 193, 195-96 (R.H. Snape ed., 1986).

⁸⁹ *Id.* at 200.

⁹⁰ *Id.*

⁹¹ GATT 1947, *supra* note 1, art. XIX(1)(a).

These obligations may either be in the form of tariff concession withdrawals or quantitative restrictions.⁹²

The rationale for the escape clause lies mainly with the concept of "serious injury," which is not clearly defined in the GATT of 1947. The absolute increase of imports is not necessary to justify a safeguard measure; it is sufficient that conditions exist "as to cause or threaten serious injury"⁹³ that would merit the suspension of obligations. The latitude the Article gives to the contracting party affected is theoretically broad: the mere threat of "serious injury" opens the door to the use of the escape clause. Although the Article does not explicitly identify the party who is to make the determination of "serious injury," it appears logical that it would be the affected contracting party, because it is such party that has the interest in exploiting the safeguard measure. Existing and actual, rather than potential domestic producers, seem to be the producers referred to in the provision, as the imports must "cause or threaten" serious injury.⁹⁴

There is no mention in the old Article XIX as to which party must assume the burden of proof in the establishment of "serious injury." Such a task may have been substituted by the requirement for a consultation procedure. In circumstances where a compromise between the parties is not reached, the affected exporting party may suspend its own obligations, or substantially equivalent concessions vis-à-vis the party invoking the escape clause, not later than ninety days after the safeguard action has been taken.⁹⁵ Other GATT members who may have a substantial interest as exporters of the product concerned should be part of the consultation process.⁹⁶

The bias in favor of the producer's interest prevails when the Article nevertheless allows the safeguard action to be taken provisionally without prior consultation, i.e., in critical circumstances where delay would cause damage which would be difficult to repair.⁹⁷ Consultation, however, is required immediately after taking such action, although in practical terms, the safeguard measure is already *fait accompli*. Furthermore, if there is still disagreement among the contracting parties, the party wishing to employ the safeguard action may

⁹² DAM, *supra* note 10, at 105-06.

⁹³ GATT 1947, *supra* note 1, art. XIX(1)(a).

⁹⁴ See discussion of Article XIX in Patrizio Merciai, *Safeguard Measures in GATT*, 15 J. WORLD TRADE L. 41 (1981).

⁹⁵ GATT 1947, *supra* note 1, art. XIX(3)(a).

⁹⁶ GATT 1947, *supra* note 1, art. XIX(2).

⁹⁷ GATT 1947, *supra* note 1, art. XIX(2).

still do so.⁹⁸ But in this particular instance, the affected exporting country can, within a flexible time frame, retaliate by suspending obligations under the GATT, or grant substantially equivalent concessions.⁹⁹ Among the retaliatory actions are quantitative restrictions, tariff increases, etc. Many commentators observed early on that the prospect of retaliation and paying compensation dampen enthusiasm for emergency action under the GATT framework.¹⁰⁰

Taken as a whole, the crux of the problem is that it concedes the upper hand to the producer, yet imposes a rather cumbersome, if not burdensome, consultation procedure that turns away the potential users of the clause. It might be claimed that the tedious step-by-step procedure acts as the counterweight to the advantage given to the producer and adds a multilateral dimension to the whole process. However, the multilateral facet in this Article is weak because emergency action without prior consultation is still permitted in "critical circumstances." In addition, the possibility of retaliation may actually discourage contracting parties from availing themselves of this GATT protectionist alternative. From the other end, the formalities required in the consultation procedure dilute the levelling effect of retaliation. Experience has also shown that the escape clause has neither lived up to its ordained function as a safety valve for the protectionist forces, nor guaranteed effective retaliation for the prejudiced exporting party. If this emergency action provision could not provide the theoretically *temporary* adjustment mechanism to the producer, or encourage structural adjustment during its operation, perhaps it should have been done away with altogether and the VER system regulated as far as practicable.

VI. THE AGREEMENT ON SAFEGUARDS OF GATT 1994: TWO STEPS FORWARD BUT ONE STEP BACKWARD

A. A General Overview

In all respects, the revised Article XIX that makes its appearance in the Agreement of Safeguards in the GATT of 1994 refines the categorical but somewhat discretionary wording of the 1947 text. The cri-

⁹⁸ GATT 1947, *supra* note 1, art. XIX(3)(a).

⁹⁹ GATT 1947, *supra* note 1, art. XIX(3)(a).

¹⁰⁰ See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); Gerard & Victoria Curzon, *The Management of Trade Relations in the GATT*, in *INTERNATIONAL ECONOMIC RELATIONS OF THE WESTERN WORLD 1959-1971*, 148, 223 (1976); Thomas R. Graham, *Reforming the International Trading System: The Tokyo Round Negotiations in the Final Stage*, 12 *CORNELL INT'L L.J.* 1, 24 (1979).

teria for safeguard actions have been rendered more specific and the consultation procedure strengthened. The duration of the safeguard measures is now more limited, ensuring that the overriding objective of adjustment is not sidestepped. This bodes well for the multilateral process the new rules hope to revitalize. Numerous sections in the Agreement demand full transparency in every phase leading to the application of the safeguard measure, whether in its provisional form or in its principal construction.¹⁰¹

The new Agreement brooks no compromise by neither relaxing the conditions for the application of the escape clause nor bringing the VERs into the GATT fold,¹⁰² indicative of the resolve to underscore the principle of multilateralism. For sure, the most vital section in the 1994 Agreement on Safeguards is the prohibition of Voluntary Export Restraints, Orderly Marketing Arrangements and other forms of bilateral agreements,¹⁰³ and the obligatory phasing out of similar existing agreements according to a set timetable presented to the Committee on Safeguards¹⁰⁴ by the members concerned.¹⁰⁵ These timetables shall provide that the VERs, OMAs and the like should be phased out or made to conform to GATT 1994 within four years of the effective date of the World Trade Organization (WTO) agreement.

¹⁰¹ GATT SECRETARIAT, *Agreement on Safeguards*, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS 315, arts. 3(1) and 4(2)(c) (1994) [hereinafter *Safeguards*].

¹⁰² The Agreement, however, brings all the *existing* "gray area" measures under its control. See *Safeguards*, *supra* note 101, art. 11(1)(b).

¹⁰³ See *Safeguards*, *supra* note 101, art. 11(1)(b). Among the measures specifically included under the scope of the prohibited bilateral agreements are export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

¹⁰⁴ Under the new Agreement, the Committee on Safeguards, which shall be composed of any member willing to serve in it, shall have a number of important functions, among them: (1) to monitor and report annually to the Council for Trade in Goods on the general implementation of the Agreement and make recommendations; (2) upon the request of an affected member, to find out if the procedural requirements of the Agreement have been complied with in connection with a safeguard measure and report its findings to the Council for Trade in Goods; (3) to assist members in the consultation procedure; (4) to examine safeguard measures taken pursuant to Article XIX of GATT 1947 as well as emergency actions taken under GATT 1994, monitor their phase-out, and make a report when appropriate to the Council for Trade in Goods; (5) to review, at the request of a member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent, and report the same to the Council for Trade in Goods;" (6) to receive and review all notifications required by the Agreement and report this to the Council for Trade in Goods; (7) to perform any other function in connection with the Agreement the Council for Trade in Goods may determine. See *Safeguards*, *supra* note 101, art. 13.

¹⁰⁵ See *Safeguards*, *supra* note 101, art. 11(2).

An exception to this proscription may be granted, however, upon mutual consent between the members concerned. The exception would allow an importing member to one specific measure, the duration of which may extend up to December 31, 1999.¹⁰⁶ The Annex to the Agreement on Safeguards explicitly provides for the aforementioned exception to the VER rule. The European Community was granted an exception to the VER prohibition with respect to its trade with Japan of certain passenger cars and light commercial vehicles¹⁰⁷—a VER which shall remain in effect until December 31, 1999. In theory at least, the improvements to Article XIX will bring a great degree of “predictability” to the international trading system, including the relationship of the developed members with the developing countries.¹⁰⁸

But the escape clause’s *raison d’être*—to reduce the inflow of highly competitive imported products into the local market—continues to maintain a collision course with the general orientation of the liberal trading system of the GATT 1994, enhancements notwithstanding. Although the new rules seek to confine the scope of the escape clause to the extent *necessary only to prevent serious injury and to facilitate adjustment*, a critical “escape” from this redefined “escape clause,” is enshrined in the Agreement—surreptitiously planting a device for selectivity. Despite the more open quota allocation system insisted by the rules,¹⁰⁹ an exception may be made by the importing country (through “quota modulation”) when it can clearly demonstrate that imports from certain suppliers have increased in “disproportionate percentage” during the representative period in question.¹¹⁰ In addition, it should also be shown that the departure

¹⁰⁶ See *Safeguards*, *supra* note 101, art. 11(2).

¹⁰⁷ Included in the VER with Japan are passenger cars, off road vehicles, light commercial vehicles, light trucks (up to five tons), and the same vehicles in wholly knocked-down form (CKD) sets. *Safeguards*, *supra* note 101, Annex to the Agreement on Safeguards.

¹⁰⁸ UNCTAD SECRETARIAT, A PRELIMINARY ANALYSIS OF THE RESULTS OF THE URUGUAY ROUND AND THEIR EFFECTS ON THE TRADING PROSPECTS OF DEVELOPING COUNTRIES 42 (1994).

¹⁰⁹ The key word here is “open”: the new system is definitely more transparent than its precursor because the member applying the restrictions “may seek agreement” regarding the allocation of shares of the quota with all the suppliers concerned. But this consultation clause is diluted by the concession that when it is not “reasonably practicable,” the allocation of product shares can be based on proportional percentages established during a representative period. This exception guarantees built-in advantages for the stronger, or already established suppliers. It would also be difficult to prevent collusion between the importing member and “favorite” suppliers.

¹¹⁰ *Safeguards*, *supra* note 101, arts. 5(2)(a), 5(2)(b).

from the regular quota allocation process¹¹¹ is justified, and that the conditions thereof are equitable to all suppliers of the product concerned. Some misgivings can be raised with respect to the third requirement, that "the conditions of such departure are equitable to all suppliers of the product concerned," for it is precisely the departure from the normal procedure that would render the quota allocation inequitable to some of the suppliers.

There is no dispute that the increased transparency and predictability of allocating the quotas streamlines the application of emergency actions. But abuse of the open-ended exception could lead to selective or discriminatory measures against the weaker suppliers who, more often than not, originate from the economically weaker member states, or more specifically, from the relatively weaker developing countries. Cognizant of the latter's plight, the Agreement sets aside special rules reserved for developing countries. The value of these provisions for the developing world should be judged, however, in the context of their practical consequences vis-a-vis the suppliers who occupy the more advantageous market position in the restricted market. Will the preferential treatment granted to developing countries be sufficient to counterbalance the institutionally entrenched position of the favored exporters? According to Article 9 of the Agreement, as long as the developing country's share of the affected imports does not exceed three percent, safeguard measures cannot be applied. This exception is to be dispensed with when the developing members who have less than a three percent share collectively account for more than nine percent of the total imports of the product concerned.¹¹² In contrast to the rules for other members, developing states can extend their safeguard measures two years beyond the maximum eight year period.¹¹³

This multi-layered Rubik's cube of stricter conditions and prohibitions, coupled with contradictory concessions and compromises, perpetuates the tradition of balancing advantages and con-

¹¹¹ *Safeguards*, *supra* note 101, art. 5(2)(a). The Agreement provides: "In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product."

¹¹² *Safeguards*, *supra* note 101, art 9(1).

¹¹³ *Safeguards*, *supra* note 101, arts 9(2) and 7(3).

cessions in the old GATT. Such “balancing of advantages” in GATT 1994 may buttress the legal structure of the system, but may perpetuate this old element of dysfunctionality found in the 1947 setup.

The term “balancing” of advantages or interests is actually a misnomer because the scales have always been, and are still, tipped in favor of the influential producer, the powerful importing nation, or the established supplier. The conduct of this constellation of players becomes increasingly difficult to predict, as the scope of operations of many large firms are on a global scale and involve the overlapping of many jurisdictions and interests. The more stringent conditions added to the entire procedure, while laudable, may further persuade the major players in the GATT system to resort to alternative measures, such as the use of the antidumping weapon, as more flexible safeguard actions.¹¹⁴ The new safeguard system cannot be improved without corresponding adjustments in the other relief measures in the trading system.¹¹⁵ Pivotal is the provision in GATT 1994 that expressly declares the “gray area” measure wholly unacceptable from the GATT point of view.¹¹⁶ The issue that hangs in the balance is whether the banning of these “distasteful” bilateral agreements—at least officially—can totally eliminate disguised *unilateral* actions and subtle *quid pro quo* actions on the part of states who still consider the new escape clause too tedious to be complied with faithfully. Will colluding states be able to concoct a newfangled VER mutant to circumvent the tighter hold of the new Safeguards Agreement? The new discipline, to be of any practical utility, should “explicitly constrain the temptation to use export-restraint arrangements” in any form as instruments of trade policy.¹¹⁷

¹¹⁴ For an example of a discussion on this theme under the old rules which will still hold true until the respective national legislatures or, in this case, the European Union, modify their national legislation to faithfully abide to the antidumping rules in the new Agreement, see Christopher Norall, *New Trends in Anti-dumping Practice in Brussels*, 9 *WORLD ECON.* 1 (1986); *The New Amendments to the EC's Basic Anti-Dumping Regulation*, *COMMON MKT. L. REV.* (1989); Bernard M. Hoekman & Michael P. Leidy, *Dumping, Antidumping and Emergency Protection*, 23 *J. OF WORLD TRADE* 5, 27-44 (1989). A more recent contribution on the possible effects of the new antidumping regulations to European antidumping policy is Paul Waer & Edwin Vermulst, *EC Anti-Dumping Law and Practice after the Uruguay Round*, 28 *J. OF WORLD TRADE* 2, 5-21 (1994). See also Senti's brief summary of the new antidumping section in the Final Act in Richard Senti, *GATT-WTO: Die neue Welthandelsordnung nach der Uruguay-Runde*, *INSTITUT FÜR WIRTSCHAFTSFORSCHUNG DER ETH ZÜRICH*, 86-91 (1994).

¹¹⁵ See Hamilton & Whalley, *supra* note 46, at 91.

¹¹⁶ See *Safeguards*, *supra* note 101, art. 11(1)(b).

¹¹⁷ John H. Jackson, *Consistency of Export-Restraint Arrangements with the GATT*, 11 *WORLD ECON.* 485, 497 (1988).

It should be reiterated once again that neither GATT disobedience, nor GATT fatalism is advocated in this exposition. The effectiveness of the GATT is dependent not only on the strength of an integrated dispute settlement regulation which will make protectionist biases more difficult to carry out, and on the new institutional structure of the World Trade Organization,¹¹⁸ but also on the feasibility of a fair and equitable implementation of the rules and the willingness of the major players to adapt to the new game. In the final analysis, it can only be the concerted effort on the part of the economically powerful members of the GATT to voluntarily restrain themselves from undermining the fortified ramparts of the reinforced safeguard system. It is still an open question whether the United States, for instance, would be willing to give up its occasional resort to "aggressive unilateralism,"¹¹⁹ or the European Community its highly discretionary antidumping policies.

Even as the Uruguay Round negotiations proceeded, authorities in both the European Community and the United States persisted in introducing rules and procedures aimed at competition, be it fair or unfair. Robertson, who has closely followed the development of safeguard actions and VERs for some time, concludes that in developed countries (and especially in technologically-sophisticated industries), "trade remedy actions are now treated as a right," and there is no indication that they will be relinquished.¹²⁰ The United States' declining dominance in the world economy, the European Community's single market program associated with reciprocity in trade, and Japan's persistence in penetrating work markets in manufacturing increase the risks of protectionism in the post-Uruguay Round world.¹²¹

The United Nations Conference on Trade and Development engages us with a caveat in its recent preliminary report on the effects of the Uruguay Round on developing countries:

In this context, a determining factor would be the extent to which *the major trading entities actually respect their obligations in the sense of not abusing the flexibility built into various agreements, and in renouncing action seeking to obtain concessions through bilateral pressures entailing the threat of punitive action rather than through the offering of reciprocal*

¹¹⁸ See Ernst-Ulrich Petersmann, *Why do Governments Need the Uruguay Round Agreements, NAFTA and the EEA?*, 49 *AUSSENWIRTSCHAFT* 1, 31-55 (1994).

¹¹⁹ See *AGGRESSIVE UNILATERALISM* (Jagdish N. Bhagwati ed., 1990).

¹²⁰ See David Robertson, *GATT Rules for Emergency Protection*, TRADE POLICY RESEARCH CENTRE, HARVESTER WHEATSHEAF 95 (1992).

¹²¹ Juergen Wiemann, *The Implications of the Uruguay Round and the Single Market for the European Community's Trade Policy towards Developing Countries*, Berlin: Occasional Papers of the German Development Institute (GDI), No. 99, at 21-24 (1990).

benefits (emphasis added). The respective changes sought in domestic trade laws to accommodate the provisions of the Uruguay Round agreements would serve as an important indication of their eventual impact on world trade.¹²²

True, the dispute settlement proceeding has been elevated to a procedure almost resembling judicial enforcement.¹²³ But since there is an interplay between the legal and political-economic factors, the new GATT rules should be *useful and workable*, or at the barest minimum, *perceived to be such* by the contracting parties—from the viewpoints of both advantaged and disadvantaged member states. The litany of woes expounded by numerous scholars relating how the safeguard measure was abandoned in favor of the VER and its ilk simply demonstrate that Article XIX in its original form was, or was perceived to be, ineffective or too expensive. As the VER became more the rule than the exception, it became increasingly apparent that the VER had become the most “expedient” solution to the decline of competitiveness. Thus, while GATT 1994 arguably improves the *formal* parameters of the emergency action, the inconsistency of the original concept with the GATT system, though reduced, has been carried over and may continue to hamper its serviceability. As a consequence, parties may weave in and out of the GATT framework pursuant to their respective strategic considerations—as they have in the past.

¹²² UNCTAD SECRETARIAT, *supra* note 108, at 44.

¹²³ See *Safeguards*, *supra* note 101, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, arts. 2(1), 3, 3(4), 17(1), 17(6), 17(13), 17(14). The dispute settlement of the new World Trade Organization is the central element in providing the security and predictability to the international trading system (Article 3). A Dispute Settlement Body (DSB) is to be created under the auspices of the World Trade Organization, to administer the rules of the consultation and dispute settlement procedures of the agreements covered by the Final Act. The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements (Article 2(1)). The DSB shall issue recommendations and rulings aimed at achieving a satisfactory settlement of disputes in accordance with the rights and obligations covered by the agreements. (Article 3(4)). The new rules provide an appellate procedure that gives a party to a dispute a right to appeal a panel report on issues of law to a standing Appellate Body within sixty days after the circulation thereof (Article 16(4) and Article 17(1) & (6)). The Appellate Body is empowered to uphold, modify or reverse the legal findings and conclusions of the panel report (Article 17(13)). Most important, the Appellate Body report shall be adopted by the DSB and *unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the Members*. (Article 17(14)). In other words, the decision to adopt the panel report and the decision of the Appellate Body reviewing the panel report on legal grounds resides ultimately in the DSB and not on the unanimous consent of the contracting parties, as in GATT 1947. The DSB is undoubtedly clothed with a unique form of judicial power with extraterritorial reach to adjudicate trade disputes covered by the agreements with finality, removing the ultimate discretion to adopt panel reports from the member states.

B. Specific Provisions

The Agreement on Safeguards in the GATT 1994 in its Preamble mentions the need to *clarify* and *reinforce* the safeguard mechanism in the GATT framework, to *reestablish multilateral control over safeguards*, and to *eliminate* measures that escape such control.¹²⁴ In a nutshell, the Agreement hopes to bring all emergency actions and their nuances under the GATT umbrella. The Preamble summarizes what the expanded provisions of the new Article XIX set out to do: It boasts of sections that finally define some of the open-ended categories mentioned in the old Article XIX, such as "serious injury," "threat of serious injury," and "domestic injury;"¹²⁵ circumscribes the application of safeguard measures only to the extent necessary to prevent serious injury;¹²⁶ strengthens the multilateral aspect of the clause by laying down more specific rules for the consultation process;¹²⁷ and most significantly, prohibits any form of VERs, OMAs or similar agreements,¹²⁸ while phasing out those in existence at the time of the Agreement.¹²⁹ Furthermore, by reiterating the importance of structural adjustment and competition in the Preamble, the Agreement implies that emergency actions should not lose sight of the real solution to the problem; safeguard measures are merely the means to the end. In another context, such a reminder implicitly acknowledges the clash between the short-term and long-term objectives of the safeguard clause.

Articles 2, 4 and 5 in the Agreement on Safeguards puts in black and white what has more or less been confirmed by GATT practice and custom. The condition for the application of safeguards is practically identical to the GATT 1947 provision, except for the clarification that the increased quantities imported may be "absolute or relative to domestic production."¹³⁰ The controversy over the nondiscriminatory application of the Article is put to rest when the Agreement categorically states that the measure be applied to a product "irrespective of its source."¹³¹

The "serious injury" definitions in Articles 2 and 4 are not cured of the *causal link* between injury with "increased quantities" of the

¹²⁴ *Safeguards*, *supra* note 101, Preamble, 2nd paragraph.

¹²⁵ *Safeguards*, *supra* note 101, art. 4.

¹²⁶ *Safeguards*, *supra* note 101, art. 5.

¹²⁷ *Safeguards*, *supra* note 101, art. 12.

¹²⁸ *Safeguards*, *supra* note 101, art. 11(1)(b).

¹²⁹ *Safeguards*, *supra* note 101, art. 11(2).

¹³⁰ *Safeguards*, *supra* note 101, art. 2(1).

¹³¹ *Safeguards*, *supra* note 101, art. 2(2).

product.¹³² From an economic point of view, the increase in the quantity of imports does not “cause” conditions in the local industry; it is merely an “effect” precipitated by the “interplay of supply and demand forces at home and abroad.” But the factors that constitute this supply and demand paradigm—income, consumer tastes, technology, input prices—are the real causal variables.¹³³ Although the juxtaposition in time of increased imports and the “significant overall impairment in the position of a domestic industry” need not establish a causal relation, GATT practice and custom concedes such a determination.¹³⁴ The new rules, therefore, still maintain this “low threshold” for determining a connection between increased quantities of imports and injury. Member states can still invoke the escape clause when deteriorating domestic demand echoes an increase in the market share of competing foreign suppliers. An actual decline in competitive advantage is not registered as a factor in the enumeration in Article 4(2)(a).¹³⁵ The fundamental issue of the relative competitiveness of the foreign competitor and the domestic producer has not yet been solved. Article 4(2)(b) of the Agreement, however, attempts to reduce the repercussions of this intentioned oversight by providing that the investigation to determine whether the increased imports have

¹³² *Safeguards*, *supra* note 101, arts. 2 and 4. Article 2 provides: “A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

Article 4(1)(a) provides: “‘serious injury’ shall be understood to mean a significant overall impairment in the position of a domestic industry.”

¹³³ Alan O. Sykes, *GATT Safeguards Reform: The Injury Test*, in *FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS* 203, 205-06 (Michael J. Trebilcock & Robert C. York, eds., C.D. Howe Institute, Policy Study No. 11, 1990).

¹³⁴ Kenneth Dam wrote that “It is more doubtful that the requirements of Article XIX are met by an absolute increase in quantities which, because of an even greater increase in consumption, represents a decrease relative to production. Even if the ‘increased quantities’ causal standard can be said to be met, the relative increase in domestic production may negate the idea of ‘serious injury.’ (next paragraph) In spite of their rigorous and complicated nature, *these substantive requirements tend to be relatively innocuous in practice as a consequence of the operation of a procedural rule.*” (Emphasis added). *DAM*, *supra* note 10, at 102.

¹³⁵ Article 4(2)(a) reads: In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. *Safeguards*, *supra* note 101, at art. 4(2)(a).

caused or threaten serious injury should demonstrate, on the basis of objective evidence, the existence of the causal link. Moreover, when there are other factors other than increased imports that cause injury to the domestic country, the causal connection shall not be confirmed.¹³⁶

Alas, in practical terms, the more precise definitions relating to the concept of "serious injury," do not pose a heavy burden on the affected producer to prove "serious injury." While "serious injury," now requires a "significant overall impairment in the position of a domestic industry,"¹³⁷ the more defined investigatory process to determine the latter still rests in the hands of the "competent authorities" of that member.¹³⁸ These same administrative authorities shall evaluate all the relevant factors contributing to the status of the affected industry,¹³⁹ and shall establish the "causal link" to the serious injury on the basis of objective evidence.¹⁴⁰

If what commentators say about the powerful political influence of producers over politicians is valid,¹⁴¹ pressure from producers could, as in the past, be brought to bear on the "competent authorities" to confirm "serious injury," despite the inclusion of all other "interested parties" (notably the consumer groups) to submit their evidence.¹⁴² It must be noted, however, that under the accord, only member states can apply for safeguard measures; private parties are not given the right of action to bring complaints against their own governments. Publication requirements to ensure transparency, which shall include the findings and reasoned conclusions of such investigation by the competent authorities,¹⁴³ may inauspiciously dampen the enthusiasm of overzealous national authorities who may be too willing to surrender to the influence of producer groups.

Like the antidumping proceeding in Article VI and its counterparts in American¹⁴⁴ and European¹⁴⁵ law, a wide latitude of discre-

¹³⁶ *Safeguards*, *supra* note 101, art. 4(2)(b).

¹³⁷ *Safeguards*, *supra* note 101, art. 4(1)(a).

¹³⁸ *Safeguards*, *supra* note 101, art. 3(1).

¹³⁹ *Safeguards*, *supra* note 101, art. 4(2)(a).

¹⁴⁰ *Safeguards*, *supra* note 101, art. 4(2)(b).

¹⁴¹ See Petersmann, *supra* notes 6, 44, 55-57, 85 and 118.

¹⁴² See *Safeguards*, *supra* note 101, art. 3(2).

¹⁴³ *Safeguards*, *supra* note 101, art. 3(1).

¹⁴⁴ Thomas J. Schoenbaum, *Antidumping and Countervailing Duties and the GATT: An Evaluation and a Proposal for a Unified Remedy for Unfair International Trade*, 30 GERMAN Y.B. INT'L LAW 177 (1987).

¹⁴⁵ The standard work in this field is IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS IN THE EUROPEAN COMMUNITY* (1990).

tion given to the administrators of the trade policy instrument, coupled with hidden agendas in trade policies, may be strong enough a temptation to favor a finding of injury.¹⁴⁶ "Public interest" is mentioned as a factor in the application of safeguard measures. This qualification hardly discards the built-in advantage of producers' interests in the debate because their rallying cries—"unemployment," "loss of jobs," "cheap imports"—are always successful in winning policymakers over to their side.

In the Agreement, there is a praiseworthy attempt to check the abuse of the safeguard measure by setting time limits and procedural safety nets. It shall apply "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment,"¹⁴⁷ and shall not last longer than four years¹⁴⁸—unless the competent authorities determine, pursuant to certain checks-and-balances, that the safeguard measure continues to be needed to prevent serious injury, with the condition that there is evidence that the industry is adjusting.¹⁴⁹ A safeguard measure, including the period of initial and/or provisional application, can run for four years with an extension to eight years, but shall not exceed eight years in the case of developed countries.¹⁵⁰ At the very least, the above limitations furnish an assurance that the emergency actions taken would be temporary. In view of the more delicate situation of developing countries, the latter's measures may last up to ten years.¹⁵¹

Seeking to phase out still existing applications of Article XIX, safeguard measures which were applied pursuant to GATT 1947 and in existence at the time the WTO agreement came into effect shall be terminated "not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO agreement," whichever comes later.¹⁵² These limits, however, are not of earth-shaking importance to the international trading regime because of the paltry number of safeguard measures still in existence. An additional restriction in the Agreement covers the use of quantitative restrictions. As a general rule, such measures shall not be

¹⁴⁶ See the particular application of European antidumping laws on the East Asian NICs in Ernesto M. Hizon, *Antidumping and the European Policy vis-a-vis the East Asian NICs*, 18 *WORLD COMPETITION* 1 (1994).

¹⁴⁷ *Safeguards*, *supra* note 101, art. 5(1).

¹⁴⁸ *Safeguards*, *supra* note 101, art. 7(1).

¹⁴⁹ See *Safeguards*, *supra* note 101, arts 2, 3, 4, 5, 8 and 12.

¹⁵⁰ *Safeguards*, *supra* note 101, art. 7(3).

¹⁵¹ *Safeguards*, *supra* note 101, art. 9(2).

¹⁵² *Safeguards*, *supra* note 101, art. 10.

below the level of imports of a recent period, i.e., the average of imports in the last three representative years, unless clear justification is given to warrant a different level of imports to prevent serious injury.¹⁵³ Unlike the old rule, provisional safeguard measures in case of critical circumstances where delay may cause damage "difficult to repair" require a preliminary determination of injury based on clear evidence. The provisional measure can only last for a maximum of two hundred days, during which the procedural requirements of the escape clause should be met.¹⁵⁴

A novel feature that aims to encourage structural adjustment to the imports is the provision for progressive liberalization at regular intervals during the period of the measure's application, if the expected operation of the measure exceeds one year. If the measure exceeds three years, the member applying it is obliged to make a mid-term review and adjust the pace of liberalization accordingly.¹⁵⁵

Retaliation is still an option available to the affecting exporting member, in spite of the fact that governments have been less disposed to invoke the escape clause because it involves negotiating compensation. Members are enjoined to reach a consensus on an "adequate means of trade compensation" for the effects of the safeguard measure on their trade,¹⁵⁶ but if no agreement is reached within thirty days under the consultation procedure provided, the affected member may retaliate by suspending "substantially equivalent" concessions or obligations,¹⁵⁷ provided the Council for Trade in Goods does not disapprove the form of retaliation.¹⁵⁸

In stark comparison to the immediate right of retaliation allowed in the GATT 1947 rules, the parties in GATT 1994 are given some kind of a "cooling-off period" before they are entitled to retaliation. The Agreement thus permits a waiver of compensation requirements. The relaxation of the rule approving immediate retaliation can admittedly reduce the tendency towards selectivity. The mandatory three year delay gives the parties involved the opportunity to resolve their conflicts through other means available in GATT 1994, such as the improved dispute settlement proceeding or arbitration.¹⁵⁹ The right

¹⁵³ *Safeguards*, *supra* note 101, art. 5(1).

¹⁵⁴ *Safeguards*, *supra* note 101, art. 6.

¹⁵⁵ *Safeguards*, *supra* note 101, art. 7(4).

¹⁵⁶ *Safeguards*, *supra* note 101, art. 8(1).

¹⁵⁷ *Safeguards*, *supra* note 101, art. 8(2).

¹⁵⁸ *Safeguards*, *supra* note 101, art. 8(2).

¹⁵⁹ See *Safeguards*, Annex 2 to the Final Act, *Understanding on Rules and Procedures Governing the Settlement of Disputes* 404.

of suspension of obligations under the revised regulation cannot be exercised for the initial three years the safeguard measure is in operation, "provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provision of this Agreement."¹⁶⁰

A Committee on Safeguards, created under the Agreement, acts as a kind of administrative body, answerable to a Council for Trade in Goods, for the general implementation of the provisions in the Agreement on Emergency Actions on Imports. A member state notifies the Committee on Safeguards upon initiating an investigatory process relating to emergency action under the Agreement. Moreover, the member state informs the Committee of its findings of serious injury and its decisions to apply safeguard measures.¹⁶¹ Members are also required to notify the same Committee of their laws, regulations and administrative procedures relating to safeguard measures;¹⁶² the maintenance of existing measures;¹⁶³ and non-governmental measures.¹⁶⁴ Mandated notifications in the investigatory process;¹⁶⁵ in the submission of evidence; in the proposed timetables for application of the safeguard measures;¹⁶⁶ in the relevant laws and administrative regulations;¹⁶⁷ in the requirements in the application of provisional safeguards¹⁶⁸ or existing safeguard measures;¹⁶⁹ and in the reports of discussions and mid-term reviews¹⁷⁰—all of which form the bedrock of the enhanced consultation process—are also forwarded to this Committee.

VII. A PROGNOSIS: BACK TO THE FUTURE

The strategic interaction between the safeguard clause and the mighty VER will not cease with the new Agreement on Safeguards. GATT 1994 perpetuates the Janus-faced dilemma of the safeguard measure and the VER. Indeed, the escape clause's boundaries have been defined and the VERs outlawed, yet the effectiveness of the new rules of the game will largely depend on the willingness of the major

¹⁶⁰ *Safeguards*, *supra* note 101, art 8(3).

¹⁶¹ *Safeguards*, *supra* note 101, art. 12(1).

¹⁶² *Safeguards*, *supra* note 101, art. 12(6).

¹⁶³ *Safeguards*, *supra* note 101, art. 12(7).

¹⁶⁴ *Safeguards*, *supra* note 101, art. 12(9).

¹⁶⁵ *Safeguards*, *supra* note 101, art. 12(1).

¹⁶⁶ *Safeguards*, *supra* note 101, art. 12(2).

¹⁶⁷ *Safeguards*, *supra* note 101, arts. 12(6) & 12(8).

¹⁶⁸ *Safeguards*, *supra* note 101, art. 12(4).

¹⁶⁹ *Safeguards*, *supra* note 101, art. 12(7).

¹⁷⁰ *Safeguards*, *supra* note 101, arts. 12(3) & 12(5).

players in the trading system to conform to them. As it would be more difficult to comply with the more stringent requirements for the application of the safeguard clause, it remains doubtful if more member states would opt for the measure. It is more plausible to assume that the antidumping and countervailing duty, and the possible "price undertaking" compromise under such a regime, would presumably be the trade policy instrument of choice of many developed countries, 1994 modifications notwithstanding. The fact that antidumping is increasingly resorted to by developing nations is further proof of its growing viability.

Unilateral actions, such as the Section 301 and Super 301 provisions available to the United States, hang like a Damocles sword over the heads of Japan, the East Asian NICs and, in some instances, the European Community, when certain American economic interests are involved. Even if the Final Act resulting from the Uruguay Round negotiations is eventually ratified by all contracting parties, aggressive unilateralism from any party shall negate any advances made by the GATT towards broader multilateralism.

VERs by their very nature are chameleon-like, adjusting and mutating according to the needs of the parties involved. They are also the least transparent and difficult to verify. The new Agreement on Safeguards pointedly prohibits all types of VERs and brings all existing VERs within the ambit of the GATT. Surely, this will be one of the most critical provisions in the entire GATT 1994 text; its effective implementation is crucial to the success of the future world trade order. But if history is any guide, it is highly likely that member states, whether large or small, would nonetheless try to manage an amount of flexibility vis-a-vis the VER issue. The new Uruguay Round Agreement does not diminish by an iota the inherent attractiveness of the VER insolving trade conflicts and easing political pressures at home with a minimum of fuss. The essence of the VER dissuades those entangled in its web to expose it to the uncertainty of multilateral consensus. It will take a sea-change in the mindset of the GATT member states to guarantee that the VER problem will finally be resolved under the new 1994 regime.