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An Analysis of Article XIX: The Safeguard Problem after the Uruguay Round

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I. INTRODUCTION

Article XIX of the GATT permits contracting parties to escape their GATT obligations and raise trade barriers to safeguard any of their producers seriously injured by an increase in imports.[1] However, recent criticism has pointed out that "[d]issatisfaction with article XIX of the GATT in its current form is rife, and the need for reform is well accepted. The article has been largely bypassed as countries do what the article does not permit them to do: selectively discriminate against supplying countries in the application of trade barriers, ..."[2] International trade statistics support criticism of article XIX on the ground that "many countries use safeguards selectively, shutting out only certain countries or suppliers."[3] In fact, selective safeguard measures, according to GATT statistics "currently show some 270 such measures in effect . . . . Voluntary restraint agreements are the safeguard meausures used most often, according to GATT statistics—77 at last count."[4] "Numerous GATT signatories, especially the United States, the European Community, Canada and Australia, have invoked Article XIX to afford protection to a range of 'injured' industries."[5] The Uruguay Round of GATT negotiations attempted to deal with the safeguards problem. However, the Uruguay Round "addressed but failed to resolve ongoing problems with the Safeguard Clause."[6] Article XIX of the GATT has been characterized as "the Achilles heel of multilateral trade negotiations for the past fifteen years and will continue to be so for the years to come."[7]

This article analyzes Article XIX of the GATT by exploring the legal requirements of safeguard measures in the GATT, and then addresses the different positions taken during the Uruguay Round by the United States, the European Community and Developing Countries. As voluntary restraint agreements proliferate (the terms VER and VRA are used synonomously in this paper), the GATT itself may

1. Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHIC. L. REV., 255, 256 (1991).
2. Gary Sampson, *Safeguards, in* THE URUGUAY ROUND: A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATIONS 143 (J. Michael Finger & Andrzej Olechowski eds., 1987).
3. *Uruguay Round Negotiators Begin Talks On Proposed Text For Safeguards Pact*, Int'l Trade Rep. (BNA) Vol. 6, No. 34, at 869 (July 5, 1989)[hereinafter *Uruguay Talks*].
4. *Id.*
5. Sykes, *supra* note 1, at 256.
6. Eric C. Emerson, *Voluntary Restraint Agreements and Democratic Decisionmaking*, 31 VA. J. INT'L L. 281, 298 (1991).
7. Sampson, *supra* note 2, at 143.

weaken as more countries ignore Article XIX and take selective action. This article analyzes the need to strengthen Article XIX because of the "breakdown of the so-called 'escape clause' or safeguards provisions (Article 19) of the GATT."[8] Before addressing the ramifications of the Uruguay Round on Article XIX, it is necessary to explore the actual legal requirements of safeguard action within the GATT.

II. THE LEGAL REQUIREMENTS OF SAFEGUARD ACTION UNDER GATT ARTICLE XIX

Article XIX(1)(a) states:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, . . . for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part.[9]

The history of the actual legal requirements of this article reveals how truly relaxed they have become.

A. An "Unforeseen Development" Is No Longer an Article XIX Requirement

The "unforeseen development" requirement has little meaning. After the Hatters' Fur case, in which a change in ladies' hat styles constituted an unforeseen development, the degree of a given import's impact will always be "unforeseeable."[10] The unforeseen developments requirement has been read out of existence under the GATT.[11]

B. The "Increased Imports" Requirement is a Nullity

According to Article XIX, "the increased quantities of imports" must result from "unforeseen developments" and from "the effect of obligations incurred under the Agreement." A recent commentator has stated: "[t]hese provisions pose interesting interpretive problems, and modern GATT practice has converged on an interpretation that renders both virtual nullities."[12]

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8. ROBERT E. BALDWIN, TRADE POLICY IN A CHANGING WORLD ECONOMY, 227 (1988).
9. General Agreement on Tariffs and Trade, article XIX, *opened for signature* Oct. 30, 1947, 61 Stat. 43, T.I.A.S. No. 1700, 55 U.N.T.S. 187.
10. Ruth E. Olson, *GATT-Legal Application of Safeguards in the Context of Regional Trade Arrangements and its Implications for the Canada-United States Free Trade Agreement*, 73 MINN. L. REV. 1488, 1502 n.47 (1989).
11. Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 161 (1980).
12. Sykes, *supra* note 1, at 287.

C. There is No Need to Show Causation Under Article XIX

The text of Article XIX states that the safeguard measure may be invoked when the increased imports "cause or threaten" serious injury. However, it has generally been an easy matter to invoke Article XIX "without showing much of a causal relationship."[13] Some commentators note that Article XIX may not have any requirement of causation at all, and that the only real condition for invoking Article XIX is the existence of injury.[14] The recent Uruguay Round created a draft Agreement on Safeguards which "omits any requirement of linkage between increased quantities and GATT obligations."[15]

D. The Definition of "Serious Injury" Within Article XIX is Ambiguous

The GATT itself gives no guidance on what constitutes serious injury.[16] To meet the Article XIX "serious injury" requirement, a case-by-case analysis is required.[17] An early GATT Working Party decision established that an exporter challenging Article XIX safeguards has the burden of proof on the issue of "serious injury."[18] Some commentators believe that "serious injury" in Article XIX means the same thing as "material injury" in Article VI of the GATT.[19] Material injury is any "injury that is more than *de minimis*."[20] De minimis injury occurs when market penetration is five percent or less.[21] Thus, the definition of "serious injury" remains vague and the country invoking the safeguard measure has a relatively easy time defending itself on this issue. In fact, after the current Uruguay Round, "the draft Agreement on Safeguards imposes no meaningful constraints upon the ability of signatories to interpret the 'serious injury' requirement

13. Howard M. Liebman, *GATT and Countertrade Requirements*, 18 J. WORLD TRADE L. 252, 258 (1984).
14. Andreas F. Lowenfeld, *Fair or Unfair Trade: Does it Matter?*, 13 CORNELL INT'L L.J. 205, 218 (1980).
15. Sykes, *supra* note 1, at 288.
16. Michael W. 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 HARV. INT'L L.J. 99, 123 (1986).
17. Rochelle A. Fandel, *The Response of "Escape Clause" of GATT and Section 201 of the Tariff and Trade Act of 1974 to the Needs of Developing Countries*, 17 CAL. W. INT'L L.J. 208, 217 (1987).
18. Loretta Lundy, *The GATT Safeguards Debacle and the Canadian Textiles and Clothing Policy: A Proposal for an Equitable Approach to North-South Relations*, 22 J. WORLD TRADE 71, 74 (Dec. 1988).
19. Lowenfeld, *supra* note 14, at 218.
20. Peter D. Staple, *Implementing "Tokyo Round" Commitments: The New Injury Standard in Antidumping and Countervailing Duty Laws*, 32 STAN. L. REV. 1183, 1195 (1980).
21. *Id.*

as they wish."[22] "Article XIX could be greatly improved by changing the interpretation of a serious injury. Giving economic content to serious injury by considering the economy-wide implications of protection holds the key to reform."[23] For example, "one group of proposals would limit findings of 'serious injury' to cases of extensive unemployment or underemployment in the import-competing industry."[24] If there were objective criteria to be evaluated when a country invoked Article XIX, contracting parties could feel that safeguard measures are less arbitrary and selective.

E. Article XIX Safeguard Measures do not Seem to Require Adherence to the MFN Principle

Although numerous law review articles argue that "safeguard measures must apply according to the MFN principle,"[25] there is considerable evidence from the language and the practice of Article XIX itself which suggests the contrary. Article XIX "does not explicitly require non discriminatory application."[26] Not only does the language of Article XIX permit discriminatory application of its provisions, "in practice a large measure of discrimination is condoned by the GATT Contracting Parties."[27] Discriminatory Article XIX safeguard measures "are and have been quite common in GATT practice."[28] From the beginning, "GATT members have found ways to discriminate when they safeguard their domestic industries. This practice is a propensity that has accelerated dramatically in the last decade."[29] In fact, at the recent Uruguay Round meetings, officials from United Nations Conference on Trade and Development (UNCTAD) noted the "growing disregard of GATT's Article XIX, which provides for protective action in cases of emergency, particularly what they see as growing circumvention of the most-favored-nation requirement in applying restrictions."[30] The problem of selectively using safeguards was not directly addressed at the Uruguay Round: "Sources within the General Agreement on Tariffs and Trade pointed out that the safeguards text

22. Sykes, *supra* note 1, at 291.
23. Sampson, *supra* note 2, at 150.
24. Sykes, *supra* note 1, at 291.
25. Olson, *supra* note 10, at 1502.
26. *Id.* at 1502 n.49.
27. Marco C.E.J. Bronckers, *Reconsidering the Non-Discrimination Principle as Applied to GATT Safeguard Measures: A Rejoinder*, 1983/2 LEGAL ISSUES EUR. INTEGRATION 113, 127.
28. Marco C.E.J. Bronckers, *The Non-Discriminatory Application of Article XIX GATT: Tradition or Fiction?*, 1981/2 LEGAL ISSUES EUR. INTERATION 35, 53.
29. Alan C. Swan, *The "Escape Clause" and the Safeguards Wrangle*, 1989 B.Y.U. L. REV. 431, 435.
30. *GATT: Developing Countries Uneasy Over Progress of Uruguay Round Negotiations, UNCTAD Says*, 6 INT'L TRADE REP. (BNA) 1314 (Oct. 11, 1989) [hereinafter *Developing Countries*].

agreed to July 6 does not address such subjects as selectivity of safeguards . . . ."[31] Other commentators such as Robert Baldwin have noted that there is "greater danger in accepting selectivity than in allowing continuation of the current situation . . . selective controls would eventually lead to more generalized protective regimes . . . ."[32]

The intent of Article XIX with regard to non-discrimination is ambiguous. "[T]he General Agreement contains no interpretative material on Article XIX."[33] "[T]he preparatory work of Article XIX(1) does not support a particular interpretation."[34] Thus, the intent, the language, and the actual practice of Article XIX seem to allow discriminatory or selective use of safeguard measures. Despite all of these facts, the current authoritative view of Article XIX is that it requires a non-discriminatory interpretation because of a 1980 GATT Panel Decision which asserted for the first time that quantitative restrictions need "non-discriminatory administration."[35] Given the analysis of the legal requirements of Article XIX, it appears that countries can unilaterally determine the necessity for safeguards and can "impose them without any kind of prior GATT approval."[36]

F. The Compensation/Retaliation Problem Under Article XIX

GATT Article XIX(2) states: "Before any contracting party shall take action . . . it shall give notice in writing . . . as far in advance as may be practicable and shall afford . . . those contracting parties having a substantial interest as exporters . . . an opportunity to consult." This means that a party taking safeguard action under Article XIX should "negotiate over the possibility of compensation . . . . It further authorizes measured retaliation when those negotiations fail . . . ."[37] GATT Article XIX(3) allows "adversely affected states" to impose "countermeasures" to prevent or remedy the injury if delay would cause irreparable injury to their domestic producers. These provisions of Article XIX have also been circumvented. "In recent years, many governments have avoided the obligation of compensating other countries with reductions in protection on other product lines (or risk retaliation) by negotiating orderly marketing agreements or voluntary

31. *Uruguay Round Group on Safeguards Agrees to Draft Text For TNC Meetings*, 7 INT'L TRADE REP. (BNA) 1067 (July 11, 1990).
32. WILLIAM R. CLINE, TRADE POLICY IN THE 1980S at 31 (1983).
33. Mark Koulen, *The Non-Discriminatory Interpretation of GATT Article XIX(1): A Reply*, 1983/2 LEGAL ISSUES EUR. INTEGRATION 87, 90.
34. *Id.* at 91.
35. MARCO C.E.J. BRONCKERS, SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS: ISSUES OF PROTECTIONISM IN GATT EUROPEAN COMMUNITY AND UNITED STATES LAW at 81 (1985).
36. Olson, *supra* note 10, at 1507.
37. Sykes, *supra* note 1, at 287.

restraint agreements."[38] However, recently commentators have been "hostile to the compensation and retaliation provisions of Article XIX."[39] But the compensation and and retaliation provisions of Article XIX should not be abandoned[40] because they make certain that countries do not use Article XIX opportunistically or for frivolous reasons. In theory, "the advantage of the retaliation proviso seems to be that it serves as a brake on protectionism."[41] Furthermore, "[t]he GATT drafters intended contracting parties to use article XIX defensively in emergencies, not offensively to gain unfair trade advantages."[42] Thus it would be more consistent with the drafter's intent under Article XIX not to abandon the retaliation and compensation provisions which act as a check on protectionist trade barriers. "[I]f Article XIX has indeed facilitated a significant number of concessions—a plausible though unverifiable proposition—its overall effect on the welfare costs of protection may well have been favorable."[43] The compensation/retaliation provision operates in a way which controls the purely arbitrary use of safeguard measures.

III. THE ADVANTAGES OF STRENGTHENING ARTICLE XIX

According to recent commentary, "[t]he latest round of GATT negotiations, the Uruguay Round, addressed but failed to resolve ongoing problems with the Safeguard Clause."[44] Three distinct areas will be examined with regard to strengthening the requirements of the Safeguards Clause: the political and legal benefits of adhering to the MFN principle in Article XIX; the economic benefits of adhering to the MFN principle in Article XIX; and the benefits of creating a Surveillance Committee to insure that Safeguard Actions under Article XIX are carried out in an objective manner.

A. The Political and Legal Benefits of Requiring Adherence to the MFN Principle in GATT Article XIX

Allowing continued use of selectivity in the application of Article XIX will "worsen international political relations."[45] "In recent years, the United States has sought to improve its credibility among the GATT contracting parties in the hope of encouraging broader compliance with the GATT. United States compliance with GATT rules will

38. BALDWIN, *supra* note 8, at 227.
39. Sykes, *supra* note 1, at 295.
40. *Id.* at 298.
41. BRONCKERS, *supra* note 35, at 89.
42. Olson, *supra* note 10, at 1516.
43. Sykes, *supra* note 1, at 290.
44. Emerson, *supra* note 6, at 298.
45. BALDWIN, *supra* note 8, at 235.

enhance this credibility."[46] By using VRAs and selective safeguards, the United States is perceived by many other GATT signatories as illegally circumventing the GATT. "The typical VRA runs afoul of article XIX . . . [because] frequently VRAs are negotiated without a prior finding of injury."[47] VRAs also violate the MFN (most favored nation) requirement of Article I because they are typically negotiated with only one or two exporting nations.[48] The use of VERs or VRAs has proliferated in recent years and this can "undermine the legal authority of the GATT system, introduce the evils of discrimination into a trading regime grounded in principles of nondiscrimnation among trading partners, and afford protection of open-ended duration."[49] Clearly, developing countries would favor a strong United States commitment to the MFN principle in Article XIX. As the Coordinator of International Trade Programs at UNCTAD stated: "A clear-cut commitment to the MFN principle for the introduction of protective measures is needed . . . along with specific structural adjustment obligations and objective criteria for action, which . . . would restore credibility to the world trading system."[50] It is clear that developing countries would be politically pleased by a strong U.S. commitment to the MFN Principle in Article XIX: " '. . . the developing countries want to refer to the basic principles of GATT.' " [51] Other scholars have argued that "the assurance that Article XIX is not to be applied 'selectively' is one of the few, if not the only, significant reasons for developing countries adhering to the GATT."[52] Thus there are numerous political and legal benefits accrued by revising the Safeguards Clause so that it clearly requires adherence to the MFN principle. The United States is a signatory to the General Agreement on Tariffs and Trade.[53] By continually negotiating VERs and by ignoring the MFN principle of Article XIX, the U.S. undermines the "collective effort to create a fair trading system."[54] The Safeguard Code should be revised so that selectivity is restricted and so that VRAs can be restrained because "VRAs are inconsistent with the traditional interpretation of Article XIX which holds that safeguard measures have to be applied on a non-discriminatory basis . . . ."[55]

46. Olson, *supra* note 10, at 1506.
47. Emerson, *supra* note 6, at 292.
48. *Id.* at 293.
49. Sykes, *supra* note 1, at 257.
50. *Developing Countries*, *supra* note 30.
51. *Agreement on Agriculture Within Reach as Uruguay Round Review Set to Resume*, 6 INT'L TRADE REP. (BNA) 412 (Apr. 5, 1989).
52. Rodney de C. Grey, *A Note on U.S. Trade Practices*, *in* TRADE POLICY IN THE 1980S, at 243, 249 (William R. Cline ed., 1983).
53. Emerson, *supra* note 6, at 291.
54. *Id.* at 292.
55. BRONCKERS, *supra* note 35, at 3.

By complying with the terms of an international treaty to which the U.S. is a signatory, credibility in the GATT is restored. Furthermore, a strict adherence to the MFN principle in Article XIX and a commitment to restrict the growing use of VERs will also restore the legal strength of GATT as fewer countries feel Article XIX is being circumvented. By avoiding the selectivity problem in Article XIX, the situation will worsen: "[t]he issue of selectivity still blocks a consensus on a new Safeguards Code, and undermines the authority of Article XIX."[56] Developing countries would be pleased by a U.S. commitment to the MFN principle in GATT Article XIX. The U.S. realized this and at one point, "[t]he U.S. proposal suggested that safeguards be only offered on a most-favored-nation basis."[57] Finally, "the most convincing argument against selectivity, however, can be found in the Leutwiler Report (GATT 1985, p.43)."[58] That report argues: "Article XIX is not a punishment for an offending exporter, but an admission that the protected industry is not competitive . . . a non-discriminatory safeguard action affects all suppliers, actual and potential .... This concentrates the pressure for adjustment where it ought to be—on the protecting country and the protected industry."[59]

B. The Economic Benefits of a Stronger Safeguards Clause

According to many economists "considerable economic benefits ordinarily flow from adherence to the MFN principle."[60] The reason is that "safeguard measures that discriminate against nations that increase their exports tend to penalize precisely those exporters that have done the most to improve their efficiency, thus lessening the incentive to become more efficient."[61] Other commentators agree that there would be economic advantages in requiring the Safeguard Clause to be used on an MFN basis and restricting the use of VERs:

> Donges (1984), the Scott Study Group of the Trade Policy Research Centre (Scott, 1984), Aho and Aronson (1985), Curzon and Price (1985), the GATT "Wisemen's" Group (Leutwiler et al., 1985) and Preeg (1985), believe that reductions in all forms of import barriers and export subsidies on a non-discriminatory basis across all commodities would create the most favourable conditions for high, sustained rates of income and employment growth throughout the world economy and for harmonious political relations among nations.[62]

The economic benefits of requiring strict adherence to the MFN principle in Article XIX would be timely given that "GATT's economists

56. *Id.* at 4.
57. *Uruguay Talks*, *supra* note 3, at 869.
58. Sampson, *supra* note 2, at 148.
59. *Id.*
60. Sykes, *supra* note 1, at 294.
61. *Id.*
62. BALDWIN, *supra* note 8, at 250.

already have signaled a decline in the favorable growth rates in world trade of the past few years."[63] However, the recent Uruguay Round did not directly address the problem of selectivity and discrimination in Article XIX thus missing the chance to gain economic advantages under the GATT: "The draft Agreement on Safeguards does not resolve the issue directly. It provides that safeguard measures shall apply to product 'irrespective of their source,' except under exceptional circumstances . . . [which] indicate[s] its controversial and unsettled status among the negotiators and the need for further high-level political discussions."[64]

As noted, VRAs are proliferating and are seen as violating GATT Article XIX. Another problem with VRAs is the excessive economic costs associated with them. One estimate states that the cost to U.S. consumers of the auto VRA was approximately $5.8 billion in 1984 alone.[65] The reason "VERs are exceptionally expensive is because they transfer much of the implicit tax on consumers abroad . . ."[66] Thus, by cutting back on VRAs, GATT contracting parties could accrue economic benefits.

C. Multilateral Surveillance of Safeguard Action: Another Way to Improve Article XIX of GATT

Currently, Article XIX "does not subject national safeguard measures to effective multilateral surveillance. Through the introduction of a multilateral surveillance mechanism in a Safeguards Code, the interests of importing and exporting countries could be balanced evenhandedly."[67] This idea of a GATT Surveillance Committee on Safeguards is supported by other commentators. A Surveillance Committee would help draw "nations back into the framework of Article XIX."[68] An Article XIX Surveillance Committee would review all restrictive safeguard actions in an ex post manner: Governments would notify the GATT Secretariat who would use objective economic criteria to determine serious injury and the appropriateness of the safeguard action.[69] Establishing an SSC (Safeguards Surveillance Committee) for Article XIX could help bolster international trade within the GATT framework. "By consistently exposing national im-

63. *GATT Members Meet in Final Session for 1990 Following Collapse of Uruguay Round Talks*, 8 INT'L TRADE REP. (BNA) 23 (Jan. 2, 1991).
64. Sykes, *supra* note 1, at 293.
65. Emerson, *supra* note 6, at 292.
66. Martin Wolf, *Why Trade Liberalization is a Good Idea*, *in* THE URUGUAY ROUND: A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATIONS 14, 18. (J. Michael Finger & Andrzej Olechowski, eds., 1987).
67. BRONCKERS, *supra* note 35, at 71.
68. Harold B. Malmgren, *Threats to the Multilateral System*, *in* TRADE POLICY IN THE 1980S, at 189, 195 (William R. Cline ed., 1983).
69. *Id.*

port relief programs to international scrutiny, the SSC can help repel protectionist tendencies."[70] A Surveillance Committee would be beneficial in terms of enforcing Article XIX and "it would seem to be an important function for a new Safeguards Code Committee to develop . . . ."[71]

IV. THE DISADVANTAGES OF STRENGTHENING ARTICLE XIX

Some commentators are more cautious when it comes to the selectivity problem in Article XIX. They argue "[t]he adoption of proposals to eliminate discriminatory safeguards actions might prove counterproductive, as might the adoption of certain proposals to encourage greater use of Article XIX in preference to VERs."[72] The three main arguments made here are: 1) requiring the MFN principle in Article XIX is against the language and practice of that Article; 2) VERs do not violate GATT prohibitions; 3) requiring the MFN principle in Article XIX will not necessarily curtail the use of VERs.

A. The Legal Problem with Requiring the MFN Principle in Safeguard Actions Under Article XIX

The explicit language of Article XIX does not require non-discriminatory application.[73] Not only does the language not require non-discriminatory application, but actual practice under the GATT has allowed selective use of safeguards.[74] Thus, the language and practice of Article XIX allow selective safeguard use. This analysis ignores a 1980 GATT panel decision which makes "non-discriminatory interpretation of Article XIX . . . authoritative."[75] It also ignores the fact that even those individuals who would like to see continued use of selective safeguards admit that "GATT Article XIX is written so that safeguard actions taken pursuant to its terms are to apply to all imports from all sources under the MFN principle."[76] Despite prevailing legal opinion and despite that 1980 GATT panel decision, these individuals maintain that selectivity would be allowed based on a strict reading of the language of Article XIX itself, and based on past practice within the GATT. Furthermore, if there is no MFN principle in Article XIX,

70. BRONCKERS, *supra* note 35, at 108.
71. Michael J. Trebilock, *Reforming the GATT Safeguards Regime*, 15 CANADIAN BUS. L.J. 234, 240 (1989).
72. Sykes, *supra* note 1, at 259.
73. Sampson, *supra* note 2, at 150.
74. Olson, *supra* note 10, at 1502.
75. BRONCKERS, *supra* note 35, at 81.
76. Alan Wm. Wolff, *Need For New GATT Rules to Govern Safeguard Actions, in* TRADE POLICY IN THE 1980S, at 363, 376 (William R. Cline ed., 1983).

then no legal violation occurs when countries selectively use the escape clause.

B. VERs are not Covered by the GATT

The main argument here is that VERs are not covered "by prohibitions in the GATT (*e.g.*, Article XI) because they are voluntarily effectuated by the exporting countries."[77] Additionally, it is stated that "many take the view that VRAs fall outside the GATT escape clause regime."[78] Thus, if VERs are not covered under Article XIX, it is impossible for them to violate that article. This view is also weak. Article I of the GATT requires "that stipulations in an agreement be applied multilaterally and not on a country-by-country basis . . . . [O]ne of the VRAs' strongest features . . . was their selective application . . . ."[79] In addition, "scholars do not disagree on the point that actions taken outside the ambit of article XIX must conform to the MFN principle, unless the GATT provides a waiver for discriminatory treatment in furtherance of another policy."[80] Thus, it appears the stronger argument favors a view that VERs are not legal under the GATT. However, proponents of the legality of VERs and selective use of Article XIX often "cite a decision dating from 1949, where the GATT Contracting Parties held, albeit in a different context, that the determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the Contracting Parties."[81] However, one GATT panel decision on a matter which is "in a different context" seems an insufficient reason to consider VERs legal and outside the purview of GATT.

C. Requiring the MFN Principle in Article XIX Safeguard Actions will not End the Use of VERs

This argument states that since VERs have proliferated (a fact made clear by statistics in the International Trade Reporter) a strict reading of GATT Article XIX will not change behavior:

> Selective actions must be allowed if the GATT rules are to govern conduct as it actually exists now or will exist in the foreseeable future. This is necessary not only to recognize reality—selective measures have become a more important form of import relief . . . failure to amend the GATT rules is hardly likely to result in countries abandoning selective action.[82]

But this seems to ignore another reality: developing countries are

77. BRONCKERS, *supra* note 35, at 92.
78. *Id.*
79. Tamera Fillinger, *The Anatomy of Protectionism: The Voluntary Restraint Agreements on Steel Imports*, 35 UCLA L. REV. 953, 965 (1988).
80. Emerson, *supra* note 6, at 293.
81. BRONCKERS, *supra* note 35, at 71. (citing GATT II BISD 11, at ¶ 1 (1952)).
82. Wolff, *supra* note 76, at 380.

not pleased with the growing use of VERs and selective safeguard measures. This dissatisfaction causes a loss of credibility for the GATT. In addition, proponents of VERs point out that there are some economic benefits to VERs: "[e]xporting countries receive a bribe for entering VERs in the form of quota rents, and may thus be quite content to enter them."[83] However, it appears that in economic terms, a strong commitment to the MFN principle in GATT Article XIX may outweigh any economic gains which may accrue to nations involved in VERs. Even those commentators who point out the beneficial quota rents from VERs find that "[t]he net impact of selectivity on the economic welfare of the GATT community thus appears ambiguous."[84]

V. CONCLUSION

The "real issue in the Uruguay Round is whether the multilateral trading system of GATT is going to be preserved . . . and if the system is to be preserved, it must work better than it does now."[85] Article XIX of the GATT needs reform. "VERs and OMAs tend to proliferate, and, more importantly, the volume of trade affected by them has increased."[86] In fact:

> GATT has estimated that from 30 to 40 percent of the total non-oil exports of developing countries come under some form of restraint [not just quantitative restrictions] in entering the industrialized nations. Although article XIX should govern quantitative restrictions (QRs) on these imports, more than ninety percent (by value) of all import-safeguard actions are handled outside the GATT.[87]

To restrain the growth of VERs and to add credibility to the GATT, there needs to be a renewed commitment to the MFN principle.

"[A]cceptance of a conditional MFN will open the way for the introduction of more trade restrictions, both directly and through retaliatory actions, and will further undermine the GATT."[88] A conditional MFN results "in a more inefficient use of world resources and a consequent reduction in world income and growth rates as low-cost producers are replaced by high cost suppliers."[89] In addition, "selective application would undermine one of the GATT's foremost principles [MFN]. In practice, applying the same safeguard measure to all ex-

83. Sykes, *supra* note 1, at 296.
84. *Id.* at 295.
85. William B. Kelly, *Functioning of the GATT System, in* THE URUGUAY ROUND: A HANDBOOK FOR THE MULTILATERAL TRADE NEGOTIATIONS 81, 85 (J. Michael Finger & Andrzej Olechowski, eds., 1987).
86. Thomas Sauermilch, *Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade*, 14 CASE W. RES. J. INT'L L. 83, 115 (1982).
87. James V. Hackney and Kim Leslie Shafer, *Protectionism and Developing Countries: The Impact on Trade and Debt*, 23 STAN. J. INT'L L. 203, 214 (1987).
88. BALDWIN, *supra* note 8, at 235.
89. *Id.*

porters increases pressure on the country imposing the restriction to remove it sooner."[90] Not only are there significant economic costs from deviating from the MFN principle in article XIX, but there are significant legal and political consequences to such deviation.

First, smaller trading countries "maintain that only through nondiscrimination in application of Article I would their interests and rights be protected. The nondiscriminatory application of Article XIX is the main attraction for smaller trading nations to adhere to the GATT."[91] Thus, allowing selectivity may encourage further breakdown in the GATT as developing countries feel that GATT rules are not being followed. There is a "fear that any formal departure from the unconditional MFN rule will result in all kinds of discrimination."[92] This fear could become realized unless the GATT contracting parties strengthen Article XIX. The Uruguay Round provided the "international community with a major opportunity to stem the deterioration in the international trading system."[93] Although the United States' "proposal suggested that safeguards only be offered on a most-favored nation basis,"[94] the Draft Agreement on Safeguards did not directly end the selectivity problem with Article XIX. If the MFN rule does truly exist as a legal requirement to safeguard action under Article XIX, then that requirement should not be abandoned for short-term political and economic gain. "If GATT rules and procedures are consistently overlooked, they will soon cease to be rules at all."[95] That pragmatic view realizes that "[t]he escape clause standard of Article XIX should not be lowered; to do so would only increase their [voluntary export restraints] use."[96] As VERs increase, more and more world trade is conducted outside the GATT framework and in violation of its rules. But the

> resolutions of trade disputes should be within the parameters of the rules negotiated and ratified . . . if they are not, world trade is misgoverned or, rather ungoverned by ad hoc arrangements based on political needs of the moment. The world was without trade rules in the 1930s, with disastrous results for all concerned.[97]

Clearly, the United States is a signatory to the GATT and needs to show that it adheres to the principles and rules of GATT. However, the international statistics do not indicate such an adherence. In fact, "[e]ighty percent of VRAs are designed to protect industry in the Eu-

90. Hackney and Shafer, *supra* note 87, at 227.
91. Sampson, *supra* note 2, at 148.
92. Gardner Patterson & Eliza Patterson, *Objectives of the Uruguay Round*, *in* THE URUGUAY ROUND: A HANDBOOK FOR MULTILATERAL TRADE NEGOTIATIONS 7, 12 (J. Michael Finger & Andrzej Olechowski eds., 1987).
93. *Developing Countries*, *supra* note 30.
94. *Uruguay Talks*, *supra* note 3.
95. Lochmann, *supra* note 16, at 152.
96. *Id.* at 154.
97. Kelly, *supra* note 85, at 83.

ropean Community and the United States, according to GATT statistics. . . ."[98] Legal analysis suggests that these restraints often violate Article XIX and Article I of the GATT. These restraints need to be restricted so as to restore legal confidence and credibility to the GATT. "Respect for the System would be furthered if the General Agreement were reviewed article by article."[99] This is why "a satisfactory negotiation on safeguards is an essential element in restoring the efficient functioning of the GATT system."[100] A commitment to the MFN principle in safeguards, a revised definition of serious injury which includes objective economic criteria, and a new surveillance committee to examine safeguard actions are all necessary steps for a stronger Article XIX and a stronger GATT system.

98. *Uruguay Talks*, *supra* note 3.
99. Patterson, *supra* note 92, at 17.
100. Kelly, *supra* note 85, at 83.