

Consistency of Export-restraint Arrangements with the GATT

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FORTY years of stressful history would challenge the capacity of any international agreement on trade and commerce to cope with new developments and practices not carefully enough contemplated by the original draftsmen.¹ The General Agreement on Tariffs and Trade (GATT)² is no exception.

Indeed, the lack of an adequate institutional structure for the GATT³ renders it even more vulnerable than many agreements to the problem of 'relevance' in a world now substantially different from the one which existed in the immediate post-World War II period. Yet few practices have posed as large a problem for the policy objectives and 'rule' language of the GATT as those generally called 'voluntary export restraints' (VERs), 'voluntary restraint arrangements' (VRAs) or 'orderly marketing arrangements' (OMAs). In spite of extensive economic and policy criticism suggesting that, as an instrument of trade policy, export-restraint arrangements are usually a fourth- or fifth-best choice⁴ (or worse), these arrangements have proliferated to such an extent that it appears that some countries prefer them to all other trade-restricting devices.

Why this is so has been the subject of comment elsewhere.⁵ Clearly it relates, *inter alia*, to the national constitutional structures of governments which inhibit the use of other measures (such as tariffs or quantitative import restrictions, which may sometimes require parliamentary action or prerequisites specified in legislative delegations of power). It also relates to international rules such as the GATT's Article XIX, its main 'escape clause' (providing for emergency protection against sudden surges of imports of a particular product), which requires an import-restricting country to 'compensate' exporting countries with new trade 'concessions'.

While economic and other policy considerations surrounding the use of export-restraint arrangements have been amply explored, there is remarkably little analytical examination of the related legal question of whether such arrangements

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are consistent with GATT obligations. Yet that legal question could have a considerable impact on the policy debate on, as well as on the negotiating context of, any attempt to revise the rules. It is the purpose of this article to analyze the legal question. Are export-restraint arrangements consistent with GATT obligations?

The answer turns out to be rather complex. There are a number of different types of export-restraint arrangement and the GATT consistency of some of them differs from that of others. In addition, certain circumstances offer legal escapes for the use of such arrangements, which in other situations may not be consistent with the GATT. In short, there is no simple overall answer. 'It depends . . .' is the best that can be said.

First, it is necessary to explore, in the next section, some of the different characteristics of export-restraint arrangements. Then in the following section the analysis will turn to non-government measures largely escaping GATT discipline, after which there is a section on governmental measures. After that the most significant potential exception in the GATT, namely Article XIX, the 'escape clause', will be explored — followed by a brief section on other exceptions and some concluding remarks.

In this discussion it will be assumed that all relevant participating governments are 'contracting parties' to the GATT.

EXPORT-RESTRAINT ARRANGEMENTS

A number of different types of measures, which can be considered under the overall concept of 'export-restraint arrangement', impose restraints on exports from an exporting country. What is common to all of them is that the restraints are primarily imposed or regulated by, or within, the exporting country. In the terminology often used in international trade meetings in recent years, these are called 'grey area' measures, suggesting that they may not always be clearly inconsistent with international rules (such would presumably be 'black'), but that they do not live up to the basic policy goals of the international economic system.

The principal classification of importance is the distinction between those measures imposed by the *government* of the exporting country and those imposed or effected totally by an *industry* through an industry association or some other non-government entity.

Non-government measures could include agreements, whether explicit or implicit (tacit), between industry groups in the exporting and importing countries. Various subtle approaches have also been observed, such as 'predictions' of export trends.

Government measures can include explicit government-to-government agreements (usually, technically, in treaty form) in which the exporting government agrees to limit exports to the other country in certain ways. In the law of the United States, and in some other countries, these are termed 'orderly marketing arrangements'.⁶ In some cases, a government on one side may explicitly agree with a non-government group on the other side (an industry association or group of firms) that exports should be restrained. The government might be that of the exporting country or it might be that of the importing country. In such cases the agreement is usually deemed 'informal' and not legally binding.

With government measures that are informal or tacit, the usual pattern is for the government of the exporting country to make some sort of 'statement', or explanation of intent, by which it will seek to ensure that exports of a particular product to another country will be kept below certain limits. The Japanese restraints on automobile exports to the American market are a prime example.⁷

Reasons for the Use of Export-restraint Arrangements

Why are these measures so attractive to governments and their trade-policy officials? There are several reasons, to some of which there have already been allusions. Informal measures often escape various constraints in national or international law. Thus a government, which under its constitution or statutory law has no formal authority to enter into an explicit international agreement, may find it feasible and reasonably effective to have an implicit or informal arrangement for the foreign limitation of exports. This allows both governments concerned to avoid the necessity of implementing legislation or complicated procedures (which would often lead to delay as well as rigidities on the power to remove the measures in the future). Furthermore, the possibility of 'negotiating' export-restraint arrangements on a selective, rather than a most-favoured-nation (MFN), basis is sometimes felt to be politically useful.⁸ Finally, it also tacitly allows avoidance of the 'compensation requirement' under the GATT's main 'escape clause'.⁹

The government of the exporting country may cooperate in an export-restraint arrangement for various reasons. First, the government may expect that an arrangement of this kind, similar to an export cartel, will be 'profitable'. Economists have noted that the 'monopoly rents' of export-restraint arrangements are often captured by the exporting country and may function partly as a replacement for the compensation requirement. Secondly, the exporting country can be coerced by the government of the importing country threatening other forms of trade restriction that would be more harmful to its interests. Finally, it can be persuaded, or coerced, to cooperate for non-trade policy reasons.¹⁰

NON-GOVERNMENT MEASURES

If governments do not participate in an export-restraint arrangement there is very little exposure to a claim of inconsistency with GATT obligations. For example, if the measure is an explicit or tacit agreement or 'arrangement' by which the exporting firms in one country restrain their exports to a particular country — possibly at the request of competing industry groups in the potential importing country — arguably the GATT does not cover the arrangement. The GATT does not normally purport to regulate non-government behaviour or the behaviour of private firms.¹¹ The general purpose and thrust of the GATT is to restrain government interference in international trade, so as to leave private firms the maximum freedom of choice about business matters, thus conforming to market-oriented principles.

Non-government activity, however, can create a great risk of exposure to the national laws of competition of an importing country. Without government involvement, there may be little or no opportunity to use, as a defence, an importing country's anti-trust or competition law which would be allowed for 'government compulsion' or 'act of state'.¹²

This is particularly so in respect of exports directed to the United States. Thus a non-government arrangement restraining trade destined for the American market is very risky indeed.¹³ As a matter of international law, however, there is little that constrains this behaviour. Thus, for importing countries which do not have anti-trust or other significant laws on competition, non-government export-restraint arrangements may escape the charge of inconsistency with GATT rules and with national laws.

This highlights an important lacuna in the current structure of international economic rules. Although the draft charter of the International Trade Organization (ITO), the Havana Charter,¹⁴ contained a chapter devoted to the subject of inappropriate anti-competitive behaviour of private firms, the charter never came into force.¹⁵ In 1960, the Contracting Parties to the GATT made a determination that it would be inappropriate to try to bring under its authority this category of questions.¹⁶ Since then, other international organizations have tried to develop international rules governing the behaviour of private firms, but so far none of these operate with any binding character.¹⁷

GOVERNMENTAL EXPORT-RESTRAINT ARRANGEMENTS
AND GATT OBLIGATIONS

In respect of export-restraint arrangements that involve government action, two basic types of arrangement must be evaluated: those which impose quantitative

restraints and those which involve price controls or floors (similar to part of the agreement between the United States and Japan on trade in semi-conductors).

Quantitative Restrictions of Exports

There are two articles in the GATT which deal with quantitative restrictions of exports — Article XI and Article XIII. These will be evaluated in turn.

Article XI

When the government acts explicitly to restrain exports to a particular country, then the risk of inconsistency with GATT rules is apparent. The most obvious provision of the GATT which relates to export-restraint measures is Article XI(1) which reads:

‘No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation . . . or on the exportation . . . of any product. . .’

Most export-restraint arrangements constitute such restrictions and, therefore, appear to be contrary to this provision.

Difficulties may arise when some export-restraint arrangements, although non-governmental in form, closely approximate to government action. A government may merely ‘encourage the voluntary restraint’ of its exporting firms and argue that the measure is essentially non-governmental in character. Some might argue that Japanese ‘administrative guidance’ approaches this characterization. Other governmental approaches might tacitly condition certain government benefits (for example, access to capital, sympathetic ‘regulatory’ decisions and tax measures) on ‘patriotic compliance’ with a request to restrain exports.

This, then, raises a troublesome question as to which government activity becomes a measure recognized by GATT rules as ‘governmental’. Article XI of the GATT refers to ‘other measures’ and thus has within it the potential, in a GATT or other dispute-settlement panel having ‘creative inclinations’, of a determination that informal governmental measures are nevertheless contrary to the GATT.

Another difficulty under Article XI may be the effects of export-restraint arrangements on competition. In 1950, the Contracting Parties (unanimously) approved a working-party report on Article XI which concluded that, ‘where export restrictions were in fact intended for the purpose of avoiding competition among exporters and not for the purpose set out in the exception provisions of Articles XI and XX, such restrictions were inconsistent with the provisions of the [General] Agreement’.¹⁸ This early approach, however, must be viewed in the context of the GATT determination, already referred to, not to bring within

the competence of the GATT questions of anti-competition policy. In 1950, there still remained a hope that an ITO charter would come into being, but in 1960 that hope had died.

Article XIII

Article XIII contains an obligation that the allocation of quotas should be non-discriminatory, including those which are exempted from the general prohibition on the use of quantitative restrictions under Article XI.¹⁹ Under this provision, quotas should be applied in such a way that the importation of the like product from all third countries, or the exportation of the like product to third countries, should be similarly prohibited or restricted, based on historical or 'normal' patterns of trade allocation.²⁰

Apart from the possibility that action is required only against exporting countries which have created particular difficulties because of a dynamic and unforeseen increase in exports, it seems likely that the importing country will seek to protect its domestic industry against all suppliers and that, therefore, it will have an incentive to act on a non-discriminatory basis. An example of this may be the 1984-85 VRAs on steel shipments to the United States which attempted to include all the major suppliers. Nevertheless, several difficulties may arise.

First, it may be that certain exporting countries will not accept export-restraint arrangements. Secondly, it is possible that all the exporting countries are subject to such arrangements, but that the conditions in the separate bilateral agreements with the importing country differ significantly. Such differences may result in restraint arrangements that could be contrary to Article XIII.

There may also be some situations where the heavy hand of the importing country suggests that the export-restraint arrangements are not 'voluntary'. Discrimination will result from the actions of the importing countries, thus representing another challenge to GATT rules.

Other Interpretations of Article XI

It has been argued that, although government-ordained export-restraint arrangements may fall under a literal reading of the prohibitions of Article XI, these provisions, as far as export restrictions are concerned, may have been written merely in order to protect countries from export controls that would limit their supplies.²¹ When the importing country to which the exports were directed itself instigates the restrictions in order to safeguard its domestic industry, it would not need such protection against limitations of its supplies. Under this line of reasoning, the prohibition in Article XI on the use of quotas to restrict exports should not apply to the case being examined here.²²

There are few reasons to suppose though that the prohibition of export quotas in Article XI is as limited in scope as only to protect supplies of other countries. It is also possible that the Contracting Parties to the GATT did not link the prohibition

of quotas to a specific purpose, but wanted to prohibit the use of quantitative restrictions in general, irrespective of the possible purposes of the action, because quotas (i) are relatively non-transparent, (ii) create too much uncertainty for exporters and (iii) cannot be 'overcome' by greater efficiency by the producer-exporter. The 1960 GATT ruling already mentioned reinforces this view.²³

Export-restraint Arrangements Establishing Floor Prices

A few export-restraint arrangements have been designed to prevent exports to one or more foreign markets below a certain floor price. Obviously, this would offer competitive benefits to importing-country producers, possibly even benefiting their exports to third markets or the competing downstream industries (since parts would be just as costly to foreign downstream competitors). The 'other measures' language assists the arguments that such arrangements (if not implemented with 'duties, taxes or other charges') are inconsistent with GATT Article XI. Likewise, the non-discrimination rules of Articles I and XIII could be invoked in the case of selective price-floor restraint arrangements.²⁴ Of course, as noted below, some of these arrangements may have a separate justification in the GATT. In particular, some of these arrangements may be justified as 'settlement' agreements in proceedings dealing with unfair practices, as in dumping or subsidy cases, sometimes called 'price undertakings'.

Enforcement: Who will Complain?

The discussion above suggests that a government-imposed measure restraining exports can be contrary to the GATT. In fact, there seems to be little doubt that (in spite of statements sometimes made in speeches or the literature) governmental export-restraint arrangements are often *prima facie* inconsistent with the GATT. Perhaps exceptions can be found to square the measures with GATT rules, but that is a separate question (discussed in other sections below). Thus the initial indication is that most voluntary restraint arrangements, orderly marketing arrangements and so on are inconsistent with Article XI or other articles of the GATT.

The problem comes, however, in exploring the consequences of such breaches of the GATT. Two aspects of this can be explored: (i) the rights and obligations of the two countries which are 'parties' to the export-restraint arrangement and (ii) the rights and obligations of third parties.

Participants in Arrangements

Who will complain? The government imposing the restraint is unlikely to complain in the GATT against its own activity. The government of the country to

which the restrained exports are destined is very likely to have been the seeker of the measures, requesting the restraints as a 'safeguard' measure to alleviate 'injury' to its own competing industry. Thus a dilemma of the GATT rule is the question of enforcement.

If the export-restraint arrangement is embodied in a legally binding instrument (which would be a 'treaty' under international law) this agreement itself, as between its parties, may prevent any 'GATT liability' of the parties towards each other. This is because the restraint agreement is later in time; and, as between the parties to both it and the GATT, the 'later in time' rule prevails under traditional international treaty law.²⁵ It can be argued that even if the later treaty was illegal because it was incompatible with the multilateral treaty, this would involve liability towards third parties only and not between the participants in the restraint arrangement.

But a counter argument may exist. According to international law, parties cannot bilaterally derogate from a multilateral treaty, if such would be 'incompatible with the effective execution of the object and purpose of the treaty as a whole'.²⁶ The possibility of discriminating among countries through the use of export-restraint arrangements, or of concealing actions contrary to general multilateral policies of 'transparency', could arguably cause such incompatibility.²⁷ The counter-counter argument is that the GATT does not apply as long as there is no effect on third parties.²⁸

It is possible that in some (probably very few) cases, the domestic law of either the exporting country or the importing country would be so structured as to allow challenge to the measures or government activity by some private party (such as an importing or exporting establishment) which argues that it has been harmed. This was nearly (but not quite) the situation in the *Consumers Union v. Kissinger* case in the United States during the 1970s.²⁹

Third-party Complaints

A country (member of the GATT) which is not in any way a participant in an export-restraint arrangement could complain. It would have some hurdles to get over. For example, if it brought a complaint in the GATT under Article XXIII, it technically needs to show 'that any benefit accruing to it . . . is being nullified or impaired or that the attainment of any objective of the [General] Agreement is being impeded'. The mere inconsistency of an export-restraint arrangement with the GATT (for example, Article XI) only gives rise to the GATT legal theory of '*prima facie* nullification or impairment' (such that the burden would shift to the defending country to show that there was no nullification or impairment).³⁰ Likewise, even if a measure is not contrary to any specific provision of the GATT, a nullification or impairment of benefits accruing to a contracting party is technically possible under Article XXIII.

In general, the 'harm' in this context is that the restraint measures between countries A and B harm country C either because they divert more exports (and

competitive pressures) towards the market of country C or because they cause prices for the products to country C to be increased. These cases, however, are seldom brought and only one has succeeded.³¹

Third countries could furthermore be affected by an export-restraint arrangement when this implies a warning to their exporters that 'unilateral action' may be taken against them if their exports surge above certain levels (and especially warnings not to try to take advantage of the established restraint arrangements with other countries). Such 'warnings' may inhibit potential exporters even if, in fact, it is not very likely that the protectionist action will or can be taken.³²

It is also possible that an export-restraint arrangement with a floor-price agreement may prevent other countries from making certain trade-policy choices. For example, if two countries, A and B, hold between them a large percentage of world trade in a product that has significant economies of scale and they agree that country B will undertake not to sell that product in country A below \$1, then there is an incentive for country B to divert its products to a market where it can price more cheaply and keep its economies of scale. The effect of this will be to displace the products of country A from third markets. In this case, it will be to the advantage of country A to seek to have country B apply the discipline applying to the A market to products destined for third markets. In such a case, the third-market countries might argue that their rights and benefits have been impaired in that they cannot opt to receive lower-priced goods. This could be especially irritating when the exports of country B are important inputs to downstream production in the third market. This appears to be part of the basis for a complaint by the European Community in the GATT against the agreement on semi-conductors between the United States and Japan.³³

International Supervision or Surveillance

Part of the analysis above has led some to argue that the only effective policing of these 'grey area' measures must be through an international body such as the GATT. The Contracting Parties to the GATT have authorized, since 1982, a half-yearly survey of developments in the international trading system. As part of this, the GATT Secretariat now prepares a report twice a year which includes, *inter alia*, a list of 'grey area' measures. The next question will be what should happen in the light of such reports. Perhaps the Uruguay Round negotiations on a safeguards code can address this question.

EXCEPTIONS TO GATT OBLIGATIONS: ARTICLE XIX

The main article of the GATT which might be invoked to justify export-restraint measures is Article XIX. Three aspects of this article, in relation to export-restraint arrangements, are examined below.

Policies on Safeguards

While liberal trade may benefit an importing country as a whole, it may also harm its domestic industry which produces similar or competing products. In order to give the domestic industry of the importing country time to adjust to the new situation, and also to release some of the political pressure against liberal trade, Article XIX of the GATT allows contracting parties to take safeguard measures temporarily to restrain imports of a particular product and to protect the corresponding domestic industry for a short period of time.³⁴

GATT Article XIX includes language which, when a member country can show that Article XIX prerequisites are met (not too hard), allows a member country to 'suspend' its obligations under the GATT if these have led to injury to the domestic industry. The rules of the GATT so suspended would include Article XI. Indeed, current practice amply confirms that import quotas are used under Article XIX, in spite of the prohibition contained in Article XI. Thus countries could also use 'other measures' or export restraints. Since most export-restraint arrangements are probably imposed in the context of a claim for 'safeguards' purposes — that is, to restrain import competition affecting an injured competing domestic industry — Article XIX could be the prime candidate to support an assertion that restraint arrangements are consistent with the GATT in spite of Article XI prohibitions.

The conceptual problem is that Article XIX allows the *importing* country to suspend its obligation and says nothing about the *exporting* country. At first sight, it appears that Article XIX may not assist either participant in the export-restraint arrangement, for the action (that is, the need for the suspension of the GATT rule) is performed by the *exporting* country, not the importing country as Article XIX implies. The question then becomes one of whether the language of Article XIX in such circumstances could be interpreted as authorizing the exporting country to take such measures, at least when the importing country (alleging injury to its industry) has sought and asked for them. (This problem is not confined to the exception of Article XIX, but may occur under other possible exceptions listed below.)

Perhaps such an argument could be sustained. It might go as follows. If, in certain cases, a safeguard measure under Article XIX of the GATT would have been possible, but the countries involved prefer an export-restraint arrangement, such a measure should be allowed if it would not affect third parties.³⁵

Selectivity and MFN in Article XIX

One of the important debates of recent years about Article XIX of the GATT is whether measures taken under this article must be imposed in a manner consistent with the most-favoured-nation principle.³⁶ The principal argument in favour of selective safeguard measures is that there is no explicit MFN requirement in Article XIX, so that this provision does not prevent the suspension of the MFN

requirement of Article I as part of the 'escape clause' authority. Supporters of a non-discriminatory application of safeguards argue that Article XIX allows the suspension of an obligation in respect of a product, as opposed to a country. They refer to an interpretative note to Article 40 of the Havana Charter, equivalent to Article XIX of the GATT, which provides that safeguards 'must not discriminate against imports from any member country'. It is also argued that, as a matter of economic policy, the MFN requirement is much to be preferred. Clearly a specific export-restraint arrangement with just one exporting country (when more than one exists) would seem to contravene the MFN requirement of Article XIX. Thus if Article XIX can be deemed to provide an exception for export-restraint measures, it may be argued that it does so only when a network of such measures is put in place, thereby closely approximating an MFN approach (if tariffs or quantitative import restrictions were used instead).

Compensation Requirement of Article XIX

Article XIX(2) of the GATT provides for consultation between the country which wants to take safeguard action and 'the contracting parties having a substantial interest as exporters of the product concerned'. Since Article XIX(3) authorizes a retaliatory response for the affected parties, it is accepted that the parties entitled to consultation can accept compensatory 'concessions' by the safeguard-acting country. Alternatively the harmed country can implement compensatory trade restraints on the products of the safeguard-acting country. Providing protection for the domestic industry through the use of export-restraint arrangements may tacitly allow avoidance of this compensation requirement.

Compensation is not always given in practice.³⁷ An explanation for this may be the costs of a retaliatory withdrawal of concessions for countries depending on imports and the fact that, as a result of the already extensive tariff reductions made during successive GATT rounds of multilateral tariff negotiations, there is often very little left with which to compensate, particularly if the trade in the item on which safeguard action is being taken is very large, as is the case with steel or automobiles.³⁸

As noted previously, however, economists have observed that an export-restraint arrangement may increase the profitability of the exporting firms. These 'monopoly rents' thus function partly as a replacement for the 'compensation requirement'.

Recently, it has been suggested that auctioning the available import quotas would enable the importing country's government to capture these rents, thereby reducing the cost of the protection.³⁹ Since these monopoly rents can be an important inducement for the cooperation of the exporting countries, the use of such auctioned quotas may lead the exporting countries to refuse 'voluntary' restriction of their exports. Moreover, since auctioned quotas would appear to be

administered by the importing country, they would probably amount to 'normal' quantitative import restrictions instead of an export-restraint arrangement.⁴⁰

OTHER GATT EXCEPTIONS

Obviously, in spite of Articles I, XI and XIII, export-restraint arrangements may be legally justified under the GATT by other measures which provide exceptions. For example, the GATT Contracting Parties could always grant a waiver under Article XXV. Balance-of-payments exceptions in the GATT (including those for developing countries), under Article XII, might be extended to the actions of an exporting country at the request of an importing country troubled by balance-of-payments difficulties (subject to an analysis similar to that of the 'escape clause' above). Developing countries might likewise use a similar argument quoting clauses in Article XVIII. In addition, it is theoretically possible that a country would be able to call on the GATT provision which enables member countries to maintain legislation which conflicts with the GATT if such legislation was in force on accession to the GATT (so-called 'grandfather' rights). If these rights were applied to a particular export restraint on the grounds that it was in force prior to the country's entry into the GATT, it could escape challenge under Article XI or Article XIII.⁴¹ (Grandfather rights do not apply to Article I.)

A few more likely GATT exceptions (in addition to the 'escape clause' previously discussed) are briefly explored below.

Price Undertakings and Settlements in Unfair Trade Cases: The General Agreement itself and the GATT codes on dumping and subsidies explicitly allow governments or firms to establish 'price undertakings' (that is, assurances of minimum export prices) as a method of suspending or settling anti-dumping⁴² or countervailing-duty⁴³ proceedings in an importing country. In addition, there is arguably 'implied' authority in the dumping and subsidy rules to enter into at least certain types of agreements to 'settle' or to reach a compromise in such cases. A number of measures which might be included in the category of export-restraint arrangements may be 'justified' under these international rules of exception. If so justified, relief from both the rules of Article XI and the principle of non-discrimination in Articles I and XIII would be claimed. It is not clear just how far such authority for exceptions might extend to justify an export-restraint arrangement, but clearly this authority should not be deemed unlimited. More elaboration of this question, however, must await other works.

Article XX (General Exceptions): Article XX of the GATT contains several general exceptions for the purpose of, for example, the protection of public morals and health. Generally speaking, the measures taken under this provision must be 'necessary', so the exception does not apply if its purpose could be served by a less

restrictive alternative. Moreover, the actions are subject to a 'soft MFN clause'. Although theoretically possible, it is not very likely that an otherwise illegal export-restraint arrangement would be justified by this article.

Article XXI (Security Exceptions): In practice, the exception of Article XXI, which is based on the national-security interests of a country, may be more important. It can be argued, for example, that a strong steel or automobile industry is vital to these security interests.⁴⁴ If so, measures contrary to specific GATT obligations, taken to protect these interests, could qualify for this exception. Although Article XXI states that the measure must be 'necessary' for a country's security interests, it is primarily left to the judgment of the national government whether there exists a less restrictive alternative. Again, it may be conceptually difficult to apply this exception to export-restraint arrangements and exempt the exporting country from its obligations under Article XI of the GATT on the basis of the security interests of the importing country. But since, under this provision, the importing country would be allowed to take almost any protective measure, the use of export-restraint arrangements could, in these cases, be defended as a less harmful action than the available alternatives.

CONCLUSIONS

It seems clear that, in many cases, export-restraint arrangements are not consistent with GATT rules, particularly those of Article XI. This is quite apart from a number of policy arguments showing that such arrangements have damaging economic consequences. Yet in analyzing the legal issues, it must be recognized that there are a number of legal justifications, which can be made under the exceptions to GATT rules, for certain export-restraint arrangements. The most significant such legal exception is that of Article XIX, the (main) 'escape clause'. Although it is not clear that Article XIX would legally justify a deviation from Article XI by an *exporting* country, there is at least a plausible argument that it would do so. Clearly export-restraint arrangements are an important part of the general 'safeguards' subject. Once again, this points to the need for a negotiated rule discipline that will explicitly constrain the temptation to use export-restraint arrangements frequently as an instrument of trade policy.

1. The author wishes to acknowledge the able assistance of Thijs Alexander and Ross Denton, both post-graduate students in law, from the Netherlands and the United Kingdom, at the University of Michigan during 1987-88.

2. *General Agreement on Tariffs and Trade*, 30 October 1947, reproduced in the following: *US Statutes at Large*, Washington, Vol. 61, Parts 5 and 6, 1948; *Treaties and Other International Acts Series* (TIAS), No. 1700 (Washington: US Government Printing Office, 1947); and *United Nations Treaty Series*, New York, Vol. 55, 1950, p. 194. See, generally, John H. Jackson, *World Trade and*

the Law of GATT (Indianapolis: Bobbs-Merrill, 1969), and Jackson and William Davey, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 2nd edition (St Paul, Minneapolis: West Publishing, 1986), especially pp. 609-21.

3. Although the GATT does not provide much institutional structure, Article XXV provides for the contracting parties acting jointly. Moreover, Article XXX allows the GATT to be amended, but, because of the stringent voting and procedural requirements, the GATT is often deemed unamendable.

4. Michel Kostecki, 'Export-restraint Arrangements and Trade Liberalization', *The World Economy*, London, December 1987, p. 425; David Greenaway and Brian Hindley, *What Britain Pays for Voluntary Export Restraints*, Thames Essay No. 43 (London: Trade Policy Research Centre, 1985); Carl Hamilton, 'Economic Aspects of Voluntary Export Restraints', in Greenaway (ed.), *Current Issues in International Trade* (London: Macmillan, 1985) p. 99; Kent Jones, 'The Political Economy of Voluntary Export Restraint Agreements', *Kyklos*, Basle, Vol. 37, No. 1, 1984, p. 82; Tracy Murray, Wilson Schmidt and Ingo Walter, 'On the Equivalence of Import Quotas and Voluntary Export Restraint', *Journal of International Economics*, Amsterdam, February 1983, p. 191; Morris E. Morkre and David Tarr, *Staff Report on Effects of Restrictions on United States Imports: Five Case Studies and Theory* (Washington: Federal Trade Commission, 1980); and Wendy E. Takacs, 'The Non-equivalence of Tariffs, Import Quotas and Voluntary Export Restraints', *Journal of International Economics*, November 1978, p. 565.

5. See, for example, Hindley, 'Voluntary Export Restraints and the GATT's Main Escape Clause', *The World Economy*, November 1980, p. 313; Ernst-Ulrich Petersmann, 'Grey Area Policy and the Rule of Law', *Journal of World Trade*, Geneva, April 1988, p. 23; Thomas Sauermilch, 'Market Safeguards against Import Competition: Article XIX of the General Agreement on Tariffs and Trade', *Case Western Reserve Journal of International Law*, Cleveland, Ohio, Winter 1982, p. 83; Christopher W. Savage and Gary N. Horlick, 'United States Voluntary Restraint Agreements: Practical Considerations and Policy Recommendations', *Stanford Journal of International Law*, Fall 1985, p. 281; Jan Tumlir, *Protectionism: Trade Policy in Democratic Societies* (Washington: American Enterprise Institute, 1985); and Jagdish N. Bhagwati, 'VERs, Quid Pro Quo DFI and VIEs: Political-economy-theoretic Analyses', *International Economic Journal*, Seoul, Spring 1987, p. 1.

6. See, for example, Section 203 of the United States Trade Act of 1974.

7. See, *infra*, Note 12.

8. See sub-section below on 'Selectivity and MFN in Article XIX'.

9. See sub-section below on the 'Compensation Requirement of Article XIX'.

10. An example of this may be the Japanese acceptance of the Arrangement Regarding International Trade in Textiles in exchange for the reversion of Okinawa. See, generally, David B. Yoffie, *Power and Protectionism: Strategies of the Newly Industrializing Countries* (New York: Columbia University Press, 1983) pp. 135-38. On the issue of coercion, also see Hindley, *loc. cit.*, pp. 331-32.

11. Apart from a provision covering official import monopolies (Article II[4]) and state-trading companies (Article XVIII[1][b]), which can still be regarded as within the public domain, the only type of private behaviour alluded to in the GATT is dumping. The GATT, however, does not prohibit dumping. It merely regulates the control of dumping by governments (Article VI).

12. See, generally, Spencer Weber Waller, 'Redefining the Foreign Compulsion Defense in US Antitrust Law: the Japanese Auto Restraints and Beyond', *Law and Policy in International Business*, Washington, Vol. 14, No. 3, 1982, p. 747; 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', *Harvard International Law Journal*, Cambridge, Massachusetts, Winter 1986, pp. 99 and 141-49; Donald E. deKieffer, 'Antitrust and the Japanese Auto Quotas', *Brooklyn Journal of International Law*, Winter 1982, p. 59; Mitsuo Matsushita and Lawrence Repeta, 'Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion', *Case Western Reserve Journal of International Law*, Winter 1982, p. 47; and Barry Hawk, *United States, Common Market and International Antitrust: a Comparative Guide* (New York: Prentice-Hall, 1986) pp. 300-6, 578-609 and 614-36.

13. See, for example, *Consumers Union of US Inc. v. Kissinger, Federal Reporter (Second Series)*, Washington, Vol. 506, 1974, p. 136 (Court of Appeals, District of Columbia circuit, 1974), *cert. den.*, *United States Supreme Court Reports*, Washington, Vol. 421, 1975, p. 1004.

14. Havana Charter, UN Document ICITO/1/4, New York, 1948, ch. V.

15. On the history of the GATT, see Jackson, *op. cit.*, ch. 23.

16. The Contracting Parties adopted a report by a group of experts in which the majority considered that it would be unrealistic to recommend a multilateral agreement for the control of international restrictive business practices because '[t]he necessary consensus among countries upon which such an agreement could be based did not yet exist'. See *General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents*, hereafter cited as *BISD*, 9th Supplement (Geneva: GATT Secretariat, 1961) p. 171. See, generally, *Restrictive Business Practices* (Geneva: GATT Secretariat, 1959). The majority of the group of experts felt, furthermore, that they, as experts on restrictive business practices rather than on the legal aspects of the GATT, were incompetent to judge whether these practices could be deemed to fall under any specific provisions of the GATT. See also Jackson, *op. cit.*, section 14.1.

17. The most important in this context are the codes of the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). See, generally, Hawk, *op. cit.*, pp. 786-802; Joel Davidow, 'The Implementation of International Antitrust Principles', in Seymour J. Rubin and Gary C. Hufbauer (eds), *Emerging Standards of International Trade and Investment* (Totowa, New Jersey: Rowman & Allanheld, 1984); and Norbert Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980).

18. *Use of Quantitative Restrictions for Protective and Other Commercial Purposes* (Geneva: GATT Secretariat, 1950) p. 9.

19. It should be realized that the most-favoured-nation (MFN) obligation of Article I is probably not broad enough to cover quotas. See Jackson, *op. cit.*, p. 322.

20. GATT Article XIII(2)(d). See Jackson, *op. cit.*, pp. 322-27.

21. Kostecki, *loc. cit.*, p. 441; and Sauermilch, *loc. cit.*, p. 116.

22. *Ibid.*

23. See, *supra*, Note 16. On the issue of whether the Contracting Parties intended to create a general elimination of quotas, see Gerard Curzon, *Multilateral Commercial Diplomacy: the General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques* (London: Michael Joseph, 1965) pp. 130-35, and William Adams Brown, *The United States and the Restoration of World Trade* (Washington: Brookings Institution, 1950) pp. 75-78.

24. While the MFN obligation of Article I arguably does not cover quotas, it may apply to measures establishing floor prices.

25. Of course, some of these agreements explicitly reserve rights under the GATT and this would still theoretically allow a party to bring a GATT complaint, but there is very likely to be little interest to either participant in the export-restraint arrangement to bring a GATT or other complaint.

26. Article 41 of the 1969 Vienna Convention on the Law of Treaties states: 'Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.'

27. Petersmann, 'Grey Area Policy and the Rule of Law', *loc. cit.*

28. Hindley, *loc. cit.*, p. 329.

29. See, *supra*, Note 13. After the anti-trust issue was dismissed, the case centred around the question of whether officials in the United States Department of State had acted *ultra vires* in seeking the export limitations. The Court held that such was not the case, since the action by the Executive was lacking any 'legally binding effects'. See also *Sneaker Circus Inc. v. Carter, Federal Supplement*, Washington, Vol. 457, 1978, p. 771 (District Court for the Eastern District of New York, 1978).

30. If a panel of the GATT finds a *prima facie* nullification or impairment, for example in the case of a violation of a GATT obligation, it will normally recommend cessation of the measure

complained against, unless the offending country is able to carry the burden of proof against the recommendation, including a burden of proof that no nullification or impairment has occurred. See, generally, Jackson and Davey, *op. cit.*, p. 351. Cf. the report of the GATT panel on taxes on petroleum and certain imported substances levied by the United States under the Superfund Amendments and Reauthorization Act of 1986, *BISD*, 34th Supplement (1988), especially pp. 155-58.

31. See, for example, the GATT panel report on the European Community's action against Japan over the United States-Japan semi-conductor agreement, GATT Document L/6309, Geneva, 1988. See also the 1976 complaint (rejected) under the United States Section 301 procedure in which United States steel interests complained against an export-restraint arrangement between the European Community and Japan. See Jackson and Davey, *op. cit.*, p. 809.

32. See, for example, the European Community's protest against United States warnings regarding imports of machine tools into the United States, *International Trade Reporter*, Bureau of National Affairs, Washington, 7 January 1987, p. 12.

33. See, *supra*, Note 31.

34. See, generally, David Robertson, *Fail Safe Systems for Trade Liberalisation*, Thames Essay No. 12 (London: Trade Policy Research Centre, 1977).

35. See, for example, Hindley, *loc. cit.*, pp. 328-32.

36. See M.C.E.J. Bronckers, *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law* (Deventer: Kluwer, 1985); Mark Koulen, 'The Non-discriminatory Interpretation of GATT Article XIX(1): a Reply', *Legal Issues of European Integration*, Deventer, No. 2, 1983, p. 87; Petersmann, 'Economic, Legal and Political Functions of the Principle of Non-discrimination', *The World Economy*, March 1986, p. 113; and Jackson and Davey, *op. cit.*, pp. 428-35.

37. Robertson, *op. cit.*, p. 23.

38. See, for example, *Japanese Voluntary Restraints on Auto Exports to the United States*, Hearings before the Sub-committee on Trade, House Committee on Ways and Means, 99th Congress, 1st Session (Washington: US Government Printing Office, 1985) Statement by Michael B. Smith, Acting United States Trade Representative, pp. 17-18; and Hindley, *loc. cit.*, p. 327.

39. See, for example, Hufbauer, *The Legacy of the Japanese Voluntary Export Restraints*, Hearing before the Sub-committee on Trade, Productivity and Economic Growth, Joint Economic Committee, 99th Congress, 1st Session (Washington: US Government Printing Office, 1985) pp. 78-79; and C. Fred Bergsten, Kimberly Ann Elliott, Jeffrey J. Schott and Takacs, *Auction Quotas and United States Trade Policy*, Policy Analyses in International Economics No. 19 (Washington: Institute for International Economics, 1987). In the United States, Section 1102 of the Trade Act of 1974 authorized the President to sell import licences at public auction. This included *inter alia* Section 201 procedures. Section 1401 of the Omnibus Trade and Competitiveness Act of 1988 amended Section 203 to include, in Section 203(a)(3)(F), the option of auctioning quotas as an explicit Presidential remedy.

40. Auctioned quotas may raise difficult problems with regard to several GATT provisions, particularly Articles II, VIII and XIII, the GATT Licensing Code and even the 'standstill' commitment of the Punta del Este Declaration. On the GATT consistency of auctioned quotas, see Bergsten, Elliott, Schott and Takacs, *op. cit.*, pp. 125-45, and Laura Baughman, 'Auctioning of Quotas: Lots of Pain for Little Gain', *The World Economy*, September 1988, p. 397.

41. Article 1(b) of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (*United Nations Treaty Series*, Vol. 55, 1950, p. 308) exempts the contracting parties from certain obligations that are inconsistent with prior legislation.

42. Article 7 of the 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade', reprinted in *BISD*, 26th Supplement (1980), pp. 171-88.

43. Article 4 of the 'Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade'. See *ibid.*, pp. 56-83.

44. See, for example, *Issues Relating to the Domestic Auto Industry*, Hearings before the Sub-committee on International Trade, Senate Finance Committee, 97th Congress, 1st Session (Washington: US Government Printing Office, 1981) Statement by Paul J. Fannin, former United States Senator, p. 88; and Lochmann, *loc. cit.*, pp. 118-19.