

Nicolaides, Phedon

Article — Digitized Version

## Safeguards and the problem of VERs

Intereconomics

*Suggested Citation:* Nicolaides, Phedon (1990) : Safeguards and the problem of VERs, Intereconomics, ISSN 0020-5346, Verlag Weltarchiv, Hamburg, Vol. 25, Iss. 1, pp. 18-24, <https://doi.org/10.1007/BF02924755>

This Version is available at:

<https://hdl.handle.net/10419/140222>

### Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

### Terms of use:

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

Phedon Nicolaides\*

## Safeguards and the Problem of VERs

*One of the most complex problems facing GATT during the current Uruguay round of trade talks is the reform of Article XIX on temporary protection measures, commonly known as safeguards. Our author argues that, provided there are well-defined rules to limit its use, the introduction of some selectivity in safeguard measures need not undermine the GATT system. An appropriate change in the rules would induce countries to resort less to "grey-area" measures, such as voluntary export restraints.*

There are two major obstacles to the reform of Art. XIX of GATT on emergency protection measures or safeguards. The first concerns the nature of a reformed article. Should it explicitly allow selective safeguards that are not applied on a most-favoured-nation (MFN) basis? The other obstacle is the ambiguous legality of measures such as voluntary export restraints (VERs) which effectively function as safeguards. Should countries be prohibited from entering into voluntary agreements and is it possible to enforce such a prohibition? Because VERs have emerged as alternatives to Art. XIX measures, a successful amendment of that article must take into account their close substitutability.

VERs have been repeatedly criticised for being very distortionary instruments of trade policy. Yet such criticism will not achieve their abolition because they are politically attractive to those industries that benefit from their protection. Countries will not unilaterally refrain from using them. What is needed is concerted multilateral action. But in order to advocate multilateral action it is first necessary to demonstrate that VERs are detrimental to the trade system as a whole. This paper argues that from a systemic point of view there is a case for banning VERs because they generate negative externalities.

Although VERs are voluntary, they are, like every other decision, determined by available options or alternatives which are themselves determined in part by GATT rules and obligations. This paper also argues that the introduction of selectivity into Art. XIX will not by itself succeed in reducing the use of VERs. If the proliferation

of VERs and other similar measures is to be controlled there must also be constraints on the discretion of exporting countries to restrict their exports.

One of the foremost legal experts on GATT has described the language of Art. XIX as "extraordinarily oblique".<sup>1</sup> GATT requires that safeguard action is taken only to prevent serious injury, that it should be temporary, that advance notifications should be provided to affected exporters which should also be compensated for any loss of revenue they incur. If the country that takes safeguard action and the affected country (countries) cannot agree on the form of that action or on the amount of compensation, GATT allows the latter to retaliate by withdrawing concessions of equivalent value that benefit the former.

Art. XIX does not explicitly stipulate that safeguards must be non-discriminatory. Nor does it indicate, however, that safeguards may be exempted from the general requirements for non-discrimination as laid out in Art. I. The prevailing legal opinion is that it should be interpreted in the context of the General Agreement.<sup>2</sup> Art. XIX allows suspension of obligations with respect to a particular product but not with respect to a particular country. It permits, therefore, "product selection", but not "country selection".

Petersmann explains at length why discriminatory safeguards contravene both the letter and spirit of GATT.

\* The Royal Institute of International Affairs, London, UK. Revised and abridged version of the author's RIIA Discussion Paper No. 21, "The Hydra of Safeguards: An Intractable Problem for GATT".

<sup>1</sup> J. Jackson: World Trade and the Law of GATT, Indianapolis 1969, p. 557; for a more extensive analysis of the problems of interpreting Art. XIX see also L. Lundy: The GATT Safeguards Debate and the Canadian Textiles and Clothing Policy, in: Journal of World Trade, Vol. 22, No. 6, 1988, pp. 71-94.

<sup>2</sup> E. U. Petersmann: Economic, Legal and Political Functions of the Principle of Non-discrimination, in: The World Economy, Vol. 9, No. 1, 1986, pp. 113-120.

Art. I prohibits discriminatory border measures and Art. XI prohibits quantitative restrictions.<sup>3</sup> The General Agreement provides only for a few explicitly specified exceptions to non-discrimination (e.g. Art. XXIV on customs unions, Art. VI on anti-dumping and countervailing duties). Export restrictions are inconsistent with Arts. XI and XIII. VERs which are not notified contravene Art. X which requires prompt publication of all laws, regulations and other provisions which may affect trade.

The problem, however, remains that because Art. XIX does not explicitly ban selective measures it is not possible to know whether GATT's drafters would have made an allowance for them. Moreover, such measures have primarily taken the form of VERs. Arts. XI and XIII ban export restrictions without clarifying the legal status of those restrictions that are imposed at the request of the importing country. Although there is a respectable body of opinion questioning the legality of selective measures and VERs, it is not possible to provide a definite answer as to their status in GATT.

### Practices on Safeguards

The imprecise and even abstruse provisions of Art. XIX have allowed GATT members wide discretion in their application of safeguard measures. As a result, the following practices have become prevalent:<sup>4</sup>

- ☐ Any increase in imports relative to domestic production has been considered as actionable. There is no widely accepted definition of injury and whether it should be defined in terms of relative market shares or growth of output levels. Importing countries have often used their own diverse and changing criteria for determining injury. It has also become the responsibility of the exporting country to prove that injury had not occurred if it wants to contest a safeguard action.
- ☐ The provisions that injury must be the result of unforeseen circumstances and of undertaken obligations (i.e. previous reduction of trade barriers) have been generally ignored. Even though it could be argued that most changes in international trade are

unforeseen, the purpose of safeguard protection is to provide the opportunity for rationalization and restructuring so that the affected domestic industry could regain its competitiveness. Safeguard measures are not supposed to provide permanent protection especially when foreign producers become well established. Yet, many, supposedly temporary, measures have become a permanent feature of the trade policy of most industrial countries (e.g. steel and textile quotas).

- ☐ Notification of safeguard measures is not always undertaken and compensation is even more rarely offered. Between 1950 and 1986 there were only 132 formal notifications of Art. XIX action. Compensation was made available on only 31 occasions.
- ☐ Many safeguard measures have been selectively targeted against particular countries, contrary to Art. I which prohibits discriminatory trade restrictions.
- ☐ Many safeguard measures have been implemented in the form of volume quotas, contrary to Art. XI which prohibits quantitative trade restrictions.

### Growth of Grey-Area Measures

Despite the discretion allowed to importing countries by Art. XIX, extra-GATT measures such as VERs are used more frequently to provide emergency protection. There were 137 VERs identified by the GATT Secretariat as being in force in 1986-87. Of these, 68 protected EC markets and 45 the US market.<sup>5</sup> More than three quarters of these VERs covered only six industries: steel (44), agricultural products (25), cars and transport equipment (15), textiles (25) (not already included in the Multifibre Arrangements, MFA), electronic products (16) and shoes (8). Japan and Korea alone were affected by 39 of the total number of VERs. During the same period approximately 10% of world trade was affected by these VERs.<sup>6</sup>

These statistics reinforce suspicions that the largest trading countries have resorted to grey-area measures to protect certain old and uncompetitive industries from the more efficient producers of particular countries. The EC and individual member states have initiated most of the VERs which affect Japan and Korea. In fact, the EC has shown a strong predilection for preferential trade agreements and other agreements that manage or regulate trade. Considering its agreements with EFTA, ACP and Mediterranean countries only 25% of its total trade is conducted on an MFN basis; by contrast, almost 90% of the US trade was until its recent free trade agreements with Canada and Israel conducted on an MFN basis.<sup>7</sup> It should be noted, however, that there is

<sup>3</sup> E. U. Petersmann: Grey Area Trade Policy and the Rule of Law, in: *Journal of World Trade*, Vol. 22, No. 2, 1988, pp. 23-44, here pp. 30-33.

<sup>4</sup> E. McGovern: *International Trade Regulation*, Exeter 1986, p. 291; G. Sampson: Safeguards, in: M. Finger, A. Olechowski (eds.): *The Uruguay Round: A Handbook on the Multilateral Trade Negotiations*, Washington, D.C. 1987, p. 143.

<sup>5</sup> M. Kostecki: Export-Restraint Arrangements and Trade Liberalisation, in: *The World Economy*, Vol. 10, No. 4, 1987, pp. 425-454.

<sup>6</sup> Ibid.

<sup>7</sup> R. Pomfret: The Threat of Preferential Trading Arrangements, in: *Economic Impact*, Vol. 65, No. 4, 1988, pp. 54-59.

a degree of uncertainty in these statistics since VERs are not a transparent and easily identified policy instrument. It should also be noted that the US has been gradually abandoning its multilateralist position for bilateral arrangements and other selectively applied policies.

### Escape from Legal Obligations

Despite their wastefulness,<sup>8</sup> VERs, OMAs and other means of managing trade have been proliferating because they are a politically attractive form of protection. Politicians favour them because affected countries do not have to be compensated, these instruments are not visible to voters and, more importantly, they are outside the normal process of legislative and judicial review. VERs, for example, are "voluntary" restrictions undertaken by foreigners and, therefore, require no formal policy action by the importing country. VERs allow countries to escape both their domestic and international legal obligations.

Affected exporting countries tolerate them because market sharing arrangements enable them to charge higher prices. For them protection through VERs is preferable to non-discriminatory tariffs whose revenue accrues to the importing country's Treasury. This, of course, does not mean that they would prefer VERs to free trade. Third countries rarely protest because these instruments handicap their most efficient competitors. And protected industries prefer them because unlike tariffs, quantitative restrictions prevent foreign producers from increasing their market share as their efficiency improves.<sup>9</sup>

Not only does the opaque nature of VERs make them a particularly distortionary economic instrument, but it also makes them an objectionable political/constitutional instrument. Petersmann<sup>10</sup> observes that in most western democracies governments are under constitutional constraints to formulate their policies in a manner that takes into account national interests and allows the expression of such interests. Moreover, public policies are subject to parliamentary and judicial review. By contrast, VERs are not democratically discussed, do not provide for "due process" since they ignore any interests other than producer interests, raise the prospect of "capture" of the policy-making process by special interests, are not subject to any review or effective "checks and balances", are disproportionate in their effects and often conflict with domestic anti-trust and competition laws. Governments that resort to VERs probably exceed their authority. In fact there is "surreptitious policy-making" outside constitutional constraints because "the executive branches do not

enjoy a general statutory authority in the USA nor in the EEC to enter into VERs inconsistent with GATT, and to induce firms to set up export cartels inconsistent with the competition laws in the USA and the EEC, respectively".<sup>11</sup>

While most governments individually may be willing to tolerate the use of such trade measures, the trade system as a whole suffers from them because no country has any incentive to prevent the erosion of GATT rules. The detrimental effect of grey-area measures on the trade system makes them particularly unsuitable as trade-policy instruments.

### Systemic Effects of VERs

VERs are a particularly distorting and inefficient method of protection. They may also contravene GATT law. But those who advocate their dismantling and prohibition are faced with a dilemma. Such trade arrangements are *voluntary*. They are outside GATT because the countries involved prefer them to safeguard action on the basis of Art. XIX. Hindley has argued that the voluntary nature of VERs implies that Art. XIX provides for remedies which are considered inferior or more damaging by both parties. He compares VERs with "out-of-court" settlements. The fact that these settlements occur outside formal legal processes does not signify the imminent collapse of a country's legal system. He concludes, by implication, that VERs do not threaten the GATT system. Hindley also warns that the weakening of Art. XIX would not necessarily discourage VERs. They could simply be replaced by GATT-sanctioned selective measures.<sup>12</sup>

Hindley is certainly correct in drawing attention to the costs of alternative options to VERs. Action under Art. XIX is avoided because it might provoke a series of

<sup>8</sup> See D. Greenaway, B. Hindley: What Britain Pays for Voluntary Export Restraints, London 1985; B. Hindley: EC Imports of VERs from Japan — a Costly Precedent, in: Journal of World Trade, Vol. 20, No. 2, 1986, pp. 168-184.

<sup>9</sup> For an historical exposition on the use and growth of VERs see K. Jones: Voluntary Export Restraint: Political Economy, History and the Role of GATT, in: Journal of World Trade, Vol. 23, No. 3, 1989, pp. 125-140. An insight into the analysis of the policy makers' motives for resorting to VERs is provided by G. Wolf: Why Voluntary Export Restraints? An Historical Analysis, paper presented to a conference on The Political Economy of Export Restraints, Washington, D.C., 6-8 June 1989. Wolf identifies the conflicting interests of the various branches of government as one of the main reasons for the "popularity" of VERs as safeguard measures.

<sup>10</sup> E. U. Petersmann: Grey Area Trade Policy and the Rule of Law, op.cit.

<sup>11</sup> Ibid, p. 34.

<sup>12</sup> B. Hindley: Voluntary Export Restraints and the GATT's Main Escape Clause, in: The World Economy, Vol. 3, No. 3, 1980, pp. 329-341; B. Hindley: GATT Safeguards and Voluntary Export Restraints: What Are the Interests of Developing Countries?, in: The World Bank Economic Review, Vol. 1, No. 4, 1987, pp. 689-705.

retaliatory and counter-retaliatory measures drawing in third countries as well.<sup>13</sup> That such a chain of events is thought to be possible is a symptom of the defects of Art. XIX. Because its provisions are vague, its application is ambiguous and, therefore, cannot prevent escalation of disputes. These defects must be taken into account by any proposal on the reform of Art. XIX.

It is, however, inappropriate to compare VERs with out-of-court settlements. Presumably, these settlements create no negative externalities that undermine the legal system. The same cannot be said about VERs. They may be voluntary, yet they are still detrimental to the system as a whole. VERs are not effective in resolving disputes and containing conflict. Whereas good policies make the trade system more stable and predictable, VERs introduce new uncertainties. This may seem paradoxical since VERs are explicitly intended to manage trade. But, because of the inherently opaque process by which they are negotiated, the consumers of restricted products may not be aware that VERs are enforced and usually have even less information on whether they will ever be allowed to expire. The exporters of controlled products may not be clear themselves as to the time duration of VERs. More damagingly to the efficient allocation of resources, VERs raise the spectre of targeting of additional exporters, although no one can be certain about who might be the next target. As elaborated below, concern about being the next target is not unfounded since one of the major characteristics of the use of VERs is their gradual expansion to cover new sources of supply of the restricted product.

### **Tendency to Spread**

The tendency of selective restrictions to expand is a direct consequence of their trade-diversionary effect.<sup>14</sup> They expand because they are a "porous" barrier which can be circumvented.<sup>15</sup> Either the targeted exporters transfer their production facilities to third countries or the domestic market or unaffected third country exporters take the opportunity to expand their own exports.

Eventually, a series of VERs would produce the same results as a non-discriminatory tariff applying to all countries. The difference is that such a series of VERs generates uncertainty as to the degree of openness of the importing market and which exporting country would be targeted next. The diversionary effect of VERs also impedes the smooth functioning of a market-oriented trade system. Whereas a tariff would not directly disturb the allocation of productive capacity among exporting countries, a VER would induce relocation of such capacity. Admittedly, in certain cases (e.g. textiles) trade

diversion has helped poor countries develop some indigenous manufacturing capability. However, good systemic rules are those that have minimum influence on the functioning of the forces of trade – in this instance, comparative advantage.

### **Uneven Application**

In selecting the new exporters to be restrained, the importing country inevitably has to assess the possibility and cost of retaliation. By their very nature, VERs must be enforced by the exporter. They cannot be initiated unless the exporter is persuaded to do that. The importing country has to choose which of the major exporters to ask to "volunteer". VERs may be voluntary but they are motivated by the perceived costs of alternative measures. In so far as those measures contain an element of threat (or, must contain an element of threat if they are to be credible), VERs and other selective measures are more likely to be targeted against small countries or countries that have shown unwillingness to be drawn into trade wars (e.g. Japan, South Korea, Hong Kong). Conversely, VERs would normally be a privilege of large countries. It is perhaps not surprising that they are used almost exclusively by the US and the EC – the two largest traders with no inhibitions about threatening other countries. It is precisely the absence of any international rules and the fact that they are voluntary that lead to the uneven application of VERs. Hence, some countries are effectively exempted from experiencing the behaviour they demand from others. Characteristically, of all the identified VERs in 1986, only 4 restricted exports of the US and EC.<sup>16</sup>

Selective measures inevitably lead to varying degrees of trade monitoring and management which raise the cost of international transactions. The exports of countries not formally subject to restrictions also have to be monitored so that the importing authorities can ensure that there is no trans-shipment of restricted products. Hence, such measures have undesirable side-effects.

### **Encouragement of Collusion**

Monitoring also takes place on the exporting side. Exporting countries need to develop means of controlling exports and allocating export permits. Thus, VERs, OMAs and other trade-management measures

<sup>13</sup> G. Wolf, *op. cit.*, p. 21.

<sup>14</sup> R. Pomfret, *op. cit.*

<sup>15</sup> J. Bhagwati: *Protectionism*, Cambridge, Mass. 1988.

<sup>16</sup> G. Sampson, *op. cit.*, p. 145.

encourage collusion among companies in the exporting countries. Wolf observes that "VERs are what keeps MITI (and Japan Inc.) in business" and they are "how established Japanese firms deal with their most fearsome competitors – other Japanese firms".<sup>17</sup> There is also evidence that they encourage collusion among companies in the exporting and importing countries when trade and industry representatives meet to agree on permitted quantities and prices.<sup>18</sup> The colluding firms may use their monopoly power to exploit other markets, reducing competition and economic efficiency in those markets as well. A case in point is the US-Japan semiconductor agreement which set a price-floor in Europe as well. Once selectivity is permitted, it would be difficult to ensure that it is not used for the wrong purposes of market-sharing, market-rigging and price-fixing.

Finally, VERs are systemically defective because they are outside the system of international trade rules. They are opaque measures which escape both international and domestic scrutiny. Third countries may be aware of their existence and involved governments may be aware of their obligations under domestic law. This argument raises the question whether voluntary agreements by sovereign nations should be subject to international surveillance and regulation. VERs may be voluntary but they cause externalities which affect the trade of third countries. The trade system would function better if all participants followed transparent policies.

Even though exporting countries enter into VERs voluntarily, they do so because they fear the consequences of alternative measures. Hence, there is an aspect of trade policy about which aggrieved countries cannot seek GATT's impartial arbitration or support. VERs are motivated by considerations of relative power. A power-oriented system is inherently more unfair and arbitrary than a rule-oriented system.

Ultimately, the root of the problem is the fact that Art. XIX does not provide a well-defined alternative to those countries that would want to refuse to adopt a VER. As long as not all trade instruments are subject to effective international and domestic political, legislative and judicial controls, reform of Art. XIX alone will not reduce the propensity of governments to resort to opaque and discriminatory instruments.

### Legalisation of Selectivity

Most proposals on reform of Art. XIX and on grey-area measures have tended to fall within two broad categories favouring either a relaxation of Art. XIX to permit selectivity or a ban on VERs. Legalisation of

selective measures without any accompanying restrictions on their use will most likely not improve the present situation. Such legalisation will simply expand the options available to importing countries. A ban on VERs would narrow those options by limiting the ability to discriminate. But such a ban is unlikely to be achieved on its own. Why should the countries that use VERs suddenly decide to give them up? They would still want to target the exporters that cause "market disruption".

Therefore, any proposals on the reform of safeguards must consider (a) the consequences of permitting selectivity in Art. XIX and (b) the problem of preventing recourse to grey-area measures. Within Hindley's "voluntarist approach",<sup>19</sup> the dilemma is how to make the use of Art. XIX more attractive without further weakening whatever international disciplines still exist on safeguards. How can both importing and exporting countries see more benefits in using Art. XIX so that the new rules are self-enforced?

At present importing countries avoid using MFN safeguards under Art. XIX because of the possibility of retaliation by third countries. Exporting countries consent to selective safeguards (e.g. VERs) because they enable them to earn high profits over their exports and because the ambiguity of the provisions of Art. XIX makes the outcome of a refusal to implement a VER uncertain and possibly more damaging to them. Consequently, Art. XIX will become more attractive (less costly) to use if it is made less vague. It will strengthen the trade system if it provides more definite answers regarding the application of safeguards. This would require that some constraints are imposed on the discretion of both importing and exporting countries. There is, therefore, the possibility of a mutually beneficial exchange whereby those constraints can be seen as what importing countries have to "pay" in order to "buy" more predictable behaviour from exporting countries and vice-versa.

On the particular provisions of a modified Art. XIX, Zietz has recently suggested the removal of any references to "serious injury" which is difficult to define.<sup>20</sup> Perez-Lopez has also proposed that a revised Art. XIX should not require compensation and,

<sup>17</sup> G. Wolf, *op. cit.*, p. 9.

<sup>18</sup> See K. Jones, *op. cit.*

<sup>19</sup> B. Hindley: *GATT Safeguards and Voluntary Export Restraints: What Are the Interests of Developing Countries?*, *op. cit.*

<sup>20</sup> J. Zietz: *Negotiations on GATT Reform and Political Incentives*, in: *The World Economy*, Vol. 12, No. 1, 1989, pp. 39-52.

<sup>21</sup> J. Perez-Lopez: *Case for GATT Code on Temporary Measures*, in: *The World Economy*, Vol. 12, No. 1, 1989, pp. 53-68.

therefore, would not permit retaliation because the determination of equivalent benefits to be withdrawn has always been a source of dispute.<sup>21</sup> Both of these proposals would make Art. XIX simpler. They must, however, be accompanied by stricter rules on safeguard action if Art. XIX is not to be biased against exporters.

If selective measures are to be permitted, abuse of the rules would be more effectively prevented if they were expressed in the form of well-defined exceptions to a general prohibition. This way minimises the likelihood of conflicting interpretations of the intent and scope of the rules of safeguards. The country resorting to selective safeguards would have to specify at the outset their duration (no discretion in further manipulating trade rules), notify them, consent to international surveillance and initiate a domestic judicial review process. The importing country would then feel safe that it would have access to measures that could protect its industries from suspected market-targeting practices of certain exporters. The exporters would also be assured that they would not be permanently discriminated against.

### **Need for Unambiguous Rules**

Selectivity undermines the trade system because the discretion in its use makes it unpredictable as to when it will be applied and how long it will be applied to each exporter. Ultimately, therefore, what is inimical to the trade system is not so much the discriminatory element of selectivity but its arbitrariness. Rules that would regulate selectivity and make it less arbitrary should improve the state of commercial relations even if not all exporters are treated the same all the time. Rules that make selective measures more transparent and strictly temporary (i.e. no permanent discrimination) must be even better.

It may be thought as contradictory that the industries which benefit from VER protection would favour more transparent trade policies. No industry would want to publicise the fact that it benefits from protectionism that imposes costs on the rest of the economy. Hence, transparency would be regarded as a cost borne by them. However, a reformed Art. XIX would make some selective safeguards legal so that an industry demanding protection would not have to go through the lengthy and difficult process of negotiating a VER. Also the limits on the duration of safeguards could be complemented with the establishment of a procedure that would simplify their implementation.<sup>22</sup>

Similarly exporting countries could be willing to

accept legalisation of selectivity as long as it were accompanied by unambiguous rules which would provide an assurance against its abuse by importing countries. Therefore, the important point to note is that there is scope for trade-offs that can improve the use of safeguards and at the same time strengthen the discipline imposed by international rules. The exact nature of such trade-offs is something that can only be determined at the negotiating table and will depend on the particular consensus and interests of participating countries.

Recent papers by the US and the EC tabled at the Uruguay Round support the view that selective measures should be subject to stricter rules. However, they make no suggestions about how the use of VERs might be discouraged. An improved Art. XIX should hopefully reduce incentives for resorting to VERs. It should also be recognized that no rules will ever prevent two determined, sovereign countries from reaching a secret agreement on their bilateral trade. Nor will private companies stop attempting to set up collusive arrangements. GATT should not make a futile attempt to eliminate all possible VERs. Rather it should realistically seek to protect those countries which are unwillingly drawn into grey-area policies.

Given that VERs are voluntary, how can a country be coerced into adopting a VER? VERs are voluntary in the sense that action under Art. XIX is the alternative which is avoided. It is conceivable, however, that an importing country may attempt to escape its obligations under a reformed Art. XIX by threatening broader action on trade and non-trade issues. This option to expand conflict would normally be available only to large countries. Hence, even a reformed Art. XIX would not redress this bias in the use of VERs. Nevertheless, the option of resorting to VERs would not be open to them if GATT members were prevented from restricting their exports even at the request of other countries. The conclusion, therefore, is that if all safeguard measures are to be brought under international discipline it is necessary to amend both Art. XIX and Arts. XI and XIII on export restrictions. Unfortunately, the Uruguay Round negotiations on safeguards have not yet seriously considered what reform might be necessary on GATT's provisions on export restrictions. It is, thus, imperative that in the last remaining year of the Uruguay Round negotiators look beyond Art. XIX.

### **Prospects for Reform**

A permission of selectivity in well defined circumstances and on an exceptional basis may be

<sup>22</sup> See, for example, the suggestions contained in J. Zietz, *op. cit.*, and J. Perez-Lopez, *op. cit.*

thought of as the price to be paid for ending the present stalemate and imposing some discipline on the use of selective measures. Whether the price is too high depends on what is expected to be accomplished by a system of trade rules. If the purpose of these rules is to eliminate completely discriminatory policies, then perhaps the price is high. By contrast, the partial and temporary deviation from ideal policies. These rules provide an escape valve that releases protectionist pressure before it damages other aspects of trade relations.

What are the prospects for reform of Art. XIX? That will happen only if GATT members perceive benefits for themselves. This paper has argued that there is scope for a change in the rules that could be in the interest of

all countries, without causing damage to the foundations of the GATT system. Moreover, a reformed Art. XIX will induce a reduction in the use of VERs only if it is accompanied by stricter and more explicit rules on export restrictions.

Ultimately, however, no international rules can prevent predatory trade behaviour. Governments may resort to more anti-dumping action and private companies may still continue in secret with their collusive arrangements. Private actions fall outside the scope of GATT. Therefore, the only real guarantee for unimpeded trade is reform of domestic legal systems and institutions giving equal rights of market access to foreign products and reducing the bias in favour of producers' interests.

---

Rudolf Adlung\*

## Non-Tariff Barriers and the Uruguay Round

*The use of non-tariff barriers to trade, which began to be important in the 1970s, has continued to increase throughout the 1980s. Notwithstanding the difficulties and limitations it faces, the Uruguay Round probably presents the only present opportunity of coming to grips with many existing exemptions to, and distortions of, GATT rules.*

Former GATT Rounds have been noticeably successful in dismantling tariff protection. The Dillon, Kennedy and Tokyo Rounds each resulted in tariff cuts of approximately one fourth. To date, average rates in industrial countries amount to about 5 to 6 percent (manufacturing sector).

To a large extent tariff reduction was tantamount to a reduction of overall protection, thereby contributing considerably to international market integration, to more efficient resource allocation and the exploitation of economies of scale. Apparently, trade liberalization and economic growth have been mutually linked in a virtuous circle. This process, however, was jeopardized and partially interrupted in the course of the 1970s, with increasing intensity.

Oil-price shocks, rising pressure from new competitors (especially some Asian NICs) and the persistent current-account imbalances of major trading partners have fostered the revival of protectionist moods and corresponding political initiatives. The trading system has been under increasing strain. Due to sluggish economic growth and the lack of new job opportunities, governments have felt bound to cushion or to avoid painful adjustment processes by external protection. And in many cases, rather than applying tariffs, the appropriate instruments as provided for in the GATT, they have resorted to intervention outside the scope of the General Agreement.

A salient feature of "new" protectionism is the increasing use of non-tariff measures, often of a bilateral, discriminatory nature. Having tied their own hands by high degrees of bound tariffs – at least in the industrial sector – prominent trading partners have tried

---

\* Federal Ministry of Economics, Bonn, West Germany. The article reflects only the author's views.