

Comments

IMPOSING IMPORT RESTRICTIONS UNDER ESCAPE CLAUSE PROVISIONS: A CASE STUDY OF THE AUTOMOBILE INDUSTRY

The world automobile industry is now one of the largest, most diverse industries involved in international trade.¹ Current trends in the international motor vehicle trade have spawned much controversy, especially in North America, the European Economic Community (EEC) and Japan, concerning the imposition of import restrictions.² Escape clause or safeguards provisions, which can be invoked under international and domestic law, provide methods and procedures that allow nations to take emergency action on importations of particular products. These provisions play an important role in allowing domestic manufacturers to seek protection for themselves from increased imports.

The General Agreement on Tariffs and Trade (GATT)³ contains an escape clause provision in Article XIX.⁴ This Article permits a signatory Nation, under international law, to withdraw from concessions made under the Agreement if any product is being imported in such increased quantities as to cause or threaten serious injury to domestic producers of like or directly competitive products.⁵ This provision has increasingly been ignored by major automobile importing Nations as an ineffective method of dealing with

1. In the United States alone, the industry operates approximately 300 manufacturing plants and employs close to one million people. In Europe, in all its facets, the industry employs more of Europe's population than any other commercial activity.

2. See U.S. INT'L TRADE COMM'N INVESTIGATION No. TA-201-44 (Sept. 10, 1980), PREHEARING REPORT TO THE COMMISSION AND PARTIES [hereinafter cited as PREHEARING REPORT]. (Copy on file with the *California Western International Law Journal*.) The European Economic Community was established by the Treaty of Rome in 1957. Its members include Belgium, West Germany, France, Italy, Luxemburg, Netherlands and United Kingdom. In addition, the EEC qualifies as a custom union under Article XXIV(8) of the General Agreement on Tariffs and Trade (GATT).

3. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

4. GATT, *supra* note 3, art. XIX.

5. A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE 27 (1979).

the problem of increased imports. Nations, such as the United States, rely on domestic import trade statutes⁶ which provide for the use of certain types of restrictions not allowed under GATT.⁷ The United States and other importing Nations are also relying on voluntary restraint agreements (VRA)⁸ which are legally outside the auspices of GATT, but, which provide a more effective method of dealing with the problem of increased imports. These measures, however, raise the question of the usefulness of Article XIX as an instrument of international law.

Rapid growth of the world automobile industry in the last three decades has altered the patterns of international trade. Many of the formerly protective markets of North America and Europe have been opened to imports through successive reductions in tariffs and by lower production costs in some exporting countries.⁹ A high penetration of imports into the European and North American automobile markets, threatening employment levels and sales of domestically manufactured automobiles,¹⁰ has resulted in a resurgence of protectionism.¹¹

This Comment reviews the current problem confronting the automobile industry with regard to the imposition of import restrictions. It will examine the international legal basis for imposing import restrictions, including Article XIX of GATT. The results of the recently completed Multilateral Trade Negotiations (MTN)¹² will be discussed with an emphasis on the proposed Safeguards Code,¹³ which still remains in draft form. It will then examine and analyze the different types of restrictions that may be imposed, their effect on international and domestic law and the methods of instituting these restrictions. The responses of the major automobile

6. *See, e.g.*, United States Trade Act of 1974, 19 U.S.C. § 2102 (1976) [hereinafter cited as Trade Act].

7. There are exceptions such as when there is a balance of payments deficit under Article XII of GATT. *See* A. LOWENFELD, *supra* note 5, at 26.

8. *See* A. LOWENFELD, *supra* note 5, at 197-254. (This contains an in-depth analysis of VRAs, some of which will ultimately be discussed in this article.)

9. G. BLOOMFIELD, *THE WORLD AUTOMOTIVE INDUSTRY* (1978). This has resulted in a wider choice of products for the motor vehicle buyer in what have become very concentrated markets.

10. *Id.* at 324.

11. Protectionism in the automobile industry refers to a movement of domestic forces, such as labor unions and domestic manufacturers, who lobby in order to get the domestic government to act on the matter of increased imports, which are affecting the local industry. *Id.*

12. *See infra* note 59.

13. *See infra* note 60.

importing Nations will also be discussed. The escape clause provision contained in Title II of the United States Trade Act of 1974¹⁴ will be examined, including the procedures and effects of a Title II action under the Trade Act. In order to fully understand the problems that increased imports have caused in the international automobile trade, a review of the problems facing the American and European automobile industries is necessary.

I. THE DEVELOPMENT OF THE AUTOMOBILE IMPORT PROBLEM

During the 1950's, the United States and Western Europe were the centers of automobile manufacturing.¹⁵ At that time, both markets were well insulated from foreign competition. The American automobile industry faced international competition from only the most expensive brands imported from Europe and the subcompacts which were not yet produced in the United States.¹⁶ By the late 1970's, however, approximately 25 per cent of American automobile sales were imports and nearly 50 per cent of Great Britain's sales were imports.¹⁷ An important consequence of the changes in the international market is increased competition in all of the domestic markets, especially those of North America and Western Europe.¹⁸ These domestic automobile industries have also had to adjust to government imposed regulations, domestic saturation, investment priorities and elimination, or at least a reduction of trade barriers.¹⁹ The world-wide oil crisis of the 1970's²⁰ produced an increased demand for smaller, more fuel efficient automobiles.²¹ This demand was felt most strongly in the United States, where the automobile industry has been producing fuel inefficient automobiles.²² In particular, the gasoline shortage of 1978 generated world-wide demand for — and consequently, purchases of —

14. Trade Act, *supra* note 6.

15. See *World Auto Trade: Current Trends and Structural Problems, Hearings before the Subcomm. on Trade of the House Comm. on Ways & Means*, 96th Cong., 2d Sess. 1 (1980) [hereinafter cited as 1980 *Trade Hearings*]. (Copy on file with the *California Western International Law Journal*.)

16. *Id.* at 27. Japan had not yet produced cars that were competing internationally.

17. *Id.*

18. *Id.*

19. *Id.* at 28.

20. Oil embargoes in 1973 and 1978 resulted in less availability and higher prices of gasoline for automobiles. *Id.* at 27.

21. 1980 *Trade Hearings*, *supra* note 15, at 36.

22. *Id.* at 1. Although the Europeans manufacture some fuel efficient automobiles, the world-wide oil crisis, combined with the European automobile industry lagging behind the Japanese technologically, and in the area of labor, has created a wider acceptance of the

the more fuel efficient imported automobiles.²³ This dramatic rise in demand for imports caused an equally sharp decline in the sales of domestically manufactured automobiles in Europe and North America.²⁴ This decline has provoked a confrontation among several different factions, including automobile manufacturers, automobile dealers, labor unions, the governments of the European Community, the United States and Japan, all of whom are involved in international automobile trade.

The United States has long advocated an open policy with respect to international automobile trade.²⁵ The United States now maintains perhaps the most open motor vehicle market in the world.²⁶ The current United States import tariff on automobiles is the second lowest duty rate on automobiles in the developed world.²⁷ Nevertheless, the American automobile industry has experienced some of the lowest sales and employment levels in its history.²⁸ As a result of the market and economic conditions, the automobile industries of the United States and Western Europe are facing a serious problem caused by increased imports of automobiles manufactured in Japan. The Japanese imports have been penetrating the markets of Europe and the United States at an alarming rate and are expected to increase unless the domestic manufacturers can produce more competitive vehicles in the near future. It appears that the protectionist forces of the importing Nations cannot prolong their desire for more drastic action aimed at reducing the number of imports. These protectionist forces in the United States have been concerned with the imposition of unilat-

Japanese automobile in the European Community. See EUROPE, Nov.-Dec., 1980, at 24 [hereinafter cited as EUROPE].

23. NATURAL RESOURCES & COMMERCE DIVISION, CONGRESSIONAL BUDGET OFFICE: STAFF WORKING PAPER, CURRENT PROBLEMS OF THE UNITED STATES AUTOMOBILE INDUSTRY AND POLICIES TO ADDRESS THEM (July 1980) [hereinafter cited as STAFF WORKING PAPER]. (Copy on file with the *California Western International Law Journal*.) Demand for fuel efficient automobiles averaged about 43 per cent of the U.S. market from 1970-1978. This percentage rose to 56 per cent in 1979 and to well over 60 per cent in 1980. *Id.* at 11.

24. *Id.* at 2. In 1974, after the oil crisis of 1973, retail sales of new passenger cars in the United States dropped from a seasonally adjusted annual rate of 11.439 million to 8.876 million. In 1979, after the oil crisis of 1978, retail sales dropped from 11.312 million to 10.669 million, and sales have further declined to a seasonally adjusted rate of below eight million in the second quarter of 1980. *Id.*

25. PREHEARING REPORT, *supra* note 2, at A-19.

26. *Id.*

27. *Id.* The Japanese import market is fully open. There are no tariffs or quotas. In actuality, Japan is the only nation that actively facilitates the import of passenger cars. See L. A. Times, Sept. 24, 1980, at 2, col. 2.

28. STAFF WORKING PAPER, *supra* note 23, at vii.

eral restrictions by means of legislative action.²⁹ The decision of whether or not to impose unilateral restrictions must be determined by examining the problems currently facing the automobile industry.

II. CURRENT STATUS OF THE IMPORT PROBLEM

An underlying reason for the predicament faced by the American and European automobile industries is domestic manufacturer's past inability to compete against a considerably larger fleet of imported cars offering better gas mileage and a more favorable image of quality.³⁰ As a result, foreign manufacturers such as Japan's Nissan (Datsun) and Toyota have been able to attract an increasing proportion of the world market, capturing a record share of the American market in the first part of 1980.³¹ In 1978, imports accounted for 17.7 per cent of new car sales in the United States; in June of 1980, that figure had risen to 29.2 per cent.³² In the first half of 1980 exports from Japan to the EEC accounted for a 24.6 per cent increase, including a 43.3 per cent rise in Germany and a 14.6 per cent increase in Great Britain.³³

The import-induced injury to the American and European industries has been caused almost entirely by Japanese automobile manufacturers.³⁴ Although the new fuel efficient American cars have become more competitive in the last year,³⁵ the Japanese have so saturated the domestic markets that sales of domestically manufactured cars are still on the decline. The problem facing American automobile manufacturers is not unique. Such international manufacturers as Volkswagon and Fiat, as well as others in the developed world, have felt the impact of increased demand for Japanese imports.³⁶ The automobile manufacturers of North America and Europe must find suitable methods to cope with the problem of increased imports.

29. NAT'L L.J., Mar. 23, 1981, at 26, col. 1 [hereinafter cited as LAW JOURNAL].

30. STAFF WORKING PAPER, *supra* note 23, at vii.

31. *Id.* at 12.

32. *Id.*

33. EUROPE, *supra* note 22, at 24.

34. See U.S. INT'L TRADE COMM'N, PUB. NO. 1110, CERTAIN MOTOR VEHICLES AND CERTAIN CHASSIS AND BODIES THEREFOR: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-44 (1980) [hereinafter cited as CERTAIN MOTOR VEHICLES]. Japanese share of the U.S. automobile market rose from around 11 per cent in 1975-1977, to 15.6 per cent in 1979, to 21.4 per cent for the first six months of 1980.

35. L.A. Times, Oct. 11, 1980, at 11, col. 2.

36. EUROPE, *supra* note 22, at 25.

The imposition of any type of import relief measure must have some legal basis, whether it be international or domestic. The most viable international legal method is the escape clause³⁷ or safeguard provision found in Article XIX of GATT.³⁸ This provision allows a domestic industry to seek some type of temporary relief under international law.³⁹

III. INTERNATIONAL LEGAL BASIS FOR IMPOSING IMPORT RESTRICTIONS

The rapid growth and diversity of international trade has prompted the nations of the world to increasingly rely on GATT as a source of international rules on trade.⁴⁰ GATT is binding only on the signatory Nations, yet it has been looked upon as a symbol for governing international trade law among all trading Nations of the world.⁴¹

A. *General Agreement on Tariffs and Trade*

GATT furnishes a code of conduct for international commercial relations. The principle rules include a prohibition against discrimination among member Nations, protection through tariff action, and negotiable tariff rates.⁴² The Agreement is a multilateral Treaty embodying reciprocal rights and obligations.⁴³

GATT, at the time of its origin, was never intended to play the role it has been forced to play in international trade.⁴⁴ It was origi-

37. An escape clause in the context of an international trade agreement (e.g., GATT) is a provision which allows the participating nations to detract from the obligations they incur under the agreement.

38. GATT, *supra* note 2, art. XIX.

39. *Id.*

40. J. KOLASA, LAW-MAKING AND LAW ENFORCING FOR INTERNATIONAL TRADE: SOME REFLECTIONS ON THE GATT EXPERIENCE. (World Order Studies Program Occasional Paper No. 3 Center of International Studies Princeton University, 1976.)

41. *Id.* ISSUES: Before the 35th General Assembly of the United Nations. United Nations Conference on Trade and Development (UNCTAD) has been competing with GATT as a forum for rule-making in the international trading system. *Id.* at 82-83.

42. F. V. MEYER, INTERNATIONAL TRADE POLICY (1978). See LORTIE, INTEGRATION & THE LAW OF GATT (1975).

43. 1977 U.N.Y.B. at 1172. The U.N. Conference on Trade and Employment drew up a charter for the International Trade Organization (ITO) in 1947-1948, and established an Interim Commission for the organization (ICITO). *Id.*

44. SENATE COMM. ON FINANCE, 96th CONG., 1st SESS., MTN & THE LEGAL INSTITUTION OF INTERNATIONAL TRADE (1979). See AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 73RD ANNUAL MEETING: MULTILATERAL TRADE NEGOTIATIONS, THE CONSTITUTIONAL PROBLEMS OF THE INTERNATIONAL ECONOMIC SYSTEM AND THE MTN RESULTS [hereinafter cited as AMERICAN SOCIETY].

nally conceived as a reciprocal tariff reduction agreement, but eventually evolved into the central international institution for trade.⁴⁵ GATT has become the only viable international vehicle for assisting nations in conflicts concerning international trade policy.⁴⁶ Recently, a number of GATT's constitutional infirmities have begun to emerge. International economic interdependence, the quadrupling of GATT membership to include countries with greatly divergent stages and theories of economies, the crisis of unemployment and energy have all buffeted GATT and international economics.⁴⁷

The law of GATT has been characterized as "soft law,"⁴⁸ not by reason of the vagueness of the formulation of GATT, but owing to numerous exceptions and various procedures that may, under certain circumstances, be invoked to soften, suspend or withdraw obligations that are too rigid.⁴⁹ With increasing dependency on international trade, nations have consistently ignored the specific rules and procedures of GATT.⁵⁰ Article XIX of GATT is a prime example, since it provides safeguards which allow any member nation, under special conditions, to suspend, modify or withdraw its obligations with respect to an imported product.⁵¹

1. *Article XIX of GATT.* The most typical and well-known escape clause provision is Article XIX of GATT. This provision allows a member nation to escape from concessions made under GATT which may result in increased imports and, consequently, in serious injury to a particular domestic industry.⁵² The rationale for including such clauses in international agreements is that these

45. AMERICAN SOCIETY, *supra* note 44, at 58.

46. *Id.*

47. *Id.*

48. J. KOLASA, *supra* note 40, at 31.

49. *Id.*

50. See Comment, *GATT and the Tokyo Round: Legal Implications of the New Trade Agreement*, 11 CALIF. W. INT'L L. J. 302 (1981) [hereinafter cited as *GATT and the Tokyo Round*]. The reasons for the disregard of GATT obligations include the failure of the agreement to rectify the status of developing nations, its failure to deal with non-tariff barriers as a more effective measure to deal with increased imports, prevention of more liberal trade because of strict guidelines and procedures in GATT, and the present situations of import competition and balance of payment deficits which have forced nations to impose import restrictions regardless of GATT prohibitions.

51. J. KOLASA, *supra* note 40, at 34. Nations invoking escape clause provisions or the various softening procedures are Required to seek consultation with all the countries concerned and with GATT members. In most cases, some form of compensation must be negotiated. *Id.*

52. Easton, *Administration of Import Statutes: Possibilities for Harmonizing the Investi-*

clauses are an attempt to relax international trade barriers.⁵³ As these barriers are lowered, domestic industry and its workers may face serious injury, dislocation and, at times, extinction.⁵⁴ The escape clause provides a form of temporary relief to the threatened domestic industry by allowing imposition of import restrictions, thus giving the industry time to adjust to international competition.⁵⁵ Escape clauses provide temporary relief to domestic industries unable to cope with increased foreign competition.⁵⁶ The escape clause should not, however, be automatically invoked upon a sharp increase in imports.⁵⁷ A decline in an international competitive position can result from several causes, including inflation, inefficiency in the domestic industry, and poor long-term planning.⁵⁸

It must be emphasized that GATT obligations have increasingly been ignored. As a result, nations have imposed quantitative restrictions and enacted domestic content laws in apparent violation of GATT rules. Provisions in GATT were made, however, for a continuous series of negotiations that allow amendment to GATT or at a minimum allow for trade negotiations among the contracting parties.

*B. Multilateral Trade Negotiations: The Tokyo Round*⁵⁹

With the completion of GATT in the late 1940's, many nations of the world adopted a trade agreement act. These acts marked the beginning of a commitment to freer trade. Since that time, countries have worked hard to strengthen an open world trading system on a multilateral basis. This multilateral trading system, although strengthened over the years, is now under enormous pressure because of recent developments in the world economy. The world economic situation has reached a point where governments are being urged by domestic constituencies to resort to protectionism to

gative Techniques and Standards of the International Trade Commission, 10 GA. J. INT'L & COMP. L. 65, 66 (1980).

53. *Id.*

54. [1974] U.S. CODE CONG. & AD. NEWS 7263 [hereinafter cited as 1974 NEWS].

55. *Id.*

56. See F. MCFADZAN, TOWARDS AN OPEN WORLD ECONOMY (1972).

57. *Id.*

58. *Id.* at 16.

59. For a more in depth analysis and review of the MTN: Tokyo Round, see generally *GATT and the Tokyo Round*, *supra*, note 50; Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153-75 (1979).

protect sectors in which imports are only a symptom and not a cause of economic distress.

The substantial reduction of tariffs and other barriers to trade has been the objective of a series of negotiations or "rounds" held within the framework of GATT. The latest round was launched in Tokyo, Japan in September of 1973.⁶⁰ Upon its completion in 1979, GATT members had hoped to review the basic trading rules of GATT. The Tokyo Round, which was the culmination of this series of rounds, examined the possibility of revising the multilateral safeguard system and in particular Article XIX of GATT.⁶¹ One proposed revision was the Safeguards Code.

1. *Proposed Safeguards Code.*⁶² There has been much ambiguity as to what types of situations and protective measures legitimately qualify for safeguard action. The objective of the Tokyo Round, with respect to the Safeguards Code, was to arrive at a common set of procedures considered internationally acceptable for the implementation of safeguards.⁶³

The British-North American Committee⁶⁴ issued a policy statement during the latter part of the Tokyo Round that called for a new and clear code of conduct to cover the use of temporary safeguard measures to minimize disruption and to facilitate adjustments in industries that are being severely affected by imports.⁶⁵ The Committee claims that the safeguard measures would be useful instruments for orderly adoption of economic change.⁶⁶

In many cases, when a country has taken action under GATT, the required procedures⁶⁷ have not been followed.⁶⁸ Many coun-

60. 1977 U.N.Y.B., *supra* note 43, at 1172.

61. *Id.* Article XIX specifies the circumstances in which member nations could take immediate action of a nondiscriminatory character to restrict imports of particular products when these products caused or threatened serious injury to domestic producers of a like or directly competitive product.

62. See generally *GATT and the Tokyo Round*, *supra* note 50, at 218-21.

63. W. CLINE, N. KAWANABE, T.O.M. KRONSTJ, & T. WILLIAMS, *TRADE NEGOTIATIONS IN THE TOKYO ROUND, A QUANTITATIVE ASSESSMENT* (1978) [hereinafter cited as *CLINE & KAWANABE*].

64. An organization sponsored by the British-North American Research Association (U.K.), the National Planning Association (U.S.A.) and C.D. Howe Research Institute (Canada).

65. THE BRITISH-NORTH AMERICAN COMMITTEE, *A POLICY STATEMENT* (May 1978) [hereinafter cited as *POLICY STATEMENT*].

66. *Id.* at vi.

67. GATT requires that the country taking action to prove injury and to consult with other affected countries.

tries have restricted imports without invoking Article XIX.⁶⁹ In certain EEC countries, the government has permitted private industry to negotiate voluntary export restraint agreements with counterpart industries in Japan.⁷⁰ The proposed Safeguards Code requires certain procedures for public hearings and examinations of the evidence when a safeguard measure is contemplated.⁷¹

The purpose for introducing the new Safeguards Code is to bring within the framework of GATT the increasing number and variety of safeguard devices that have already been instituted by various nations.⁷² The contracting parties could then improve on these safeguard measures and thus provide a more internationally acceptable set of procedures.⁷³ As a matter of policy, a variety of measures have been advanced in an effort to cope with the mounting influx of imports.

IV. IMPORT RESTRAINTS AVAILABLE TO NATIONS INVOLVED IN THE AUTOMOBILE TRADE

The tariff has been the traditional method of limiting imports. GATT specifically provides for the use of a tariff as a means of protecting domestic industry.

A. *Tariff Barriers*

A tariff is a "list or schedule of articles on which a duty is imposed upon their importation..." into a country. The tariff includes the rates at which the articles are taxed and the custom or duty payable on the articles.⁷⁴ Since the signing of GATT in 1947, the GATT contracting parties have concentrated almost exclusively upon the reciprocal lowering of tariff barriers.⁷⁵ Tariffs, however, have become less effective and important obstacles to trade than have "non-tariff" barriers which are not adequately covered by the present GATT rules.⁷⁶

The United States imposes a tariff on imported cars of 2.9 per

68. Bocskor, *The Tokyo Round: A Labor View*, 9 GA. J. INT'L & COMP. L. 219, 223 (1979).

69. *Id.*

70. *Id.*

71. *Id.*

72. S. GOLT, *THE GATT NEGOTIATIONS 1973-1979: THE CLOSING STAGE* (1978).

73. *Id.*

74. BLACKS LAW DICTIONARY 1682 (4th ed. 1968).

75. Graham, *supra* note 59, at 161.

76. *Id.* at 156.

cent; in contrast, tariffs instituted by the Common Market Countries of Europe are 14 per cent.⁷⁷ In addition, automobiles being imported into the United States are competing with domestically manufactured models that have been assessed taxes of approximately 29 per cent.⁷⁸ Under the guidelines of GATT, the negotiating parties entered into an agreement on January 1, 1980, and began a new series of tariff reductions, averaging 33 per cent.⁷⁹

Remarkable success in reducing import tariffs has been achieved in the face of a new wave of protectionism. Although the tariff increases that have occurred have been minor, recent trade restrictions have taken the form of export restraints, international investment restrictions and non-tariff barriers, none of which are effectively covered by GATT.⁸⁰ In recent years, the most common response to protectionist pressure has been to impose formal or informal quotas,⁸¹ by means of executive agreements, rather than tariff increases mandated by domestic legislatures.⁸²

The continued increase in foreign imports, however, has forced several European nations to impose restrictions on imports.⁸³ Different types of restrictions are used to solve the various problems facing the domestic industry. Several nations involved in international automobile trade have proposed limits on competition.⁸⁴ France and Italy,⁸⁵ for example, have stringent import restrictions that have prevented the Japanese from capturing more than three per cent of the local markets.⁸⁶ Hardest hit by the Japanese imports are those countries that do not have an agreement with Japan to limit imports.⁸⁷ These agreements could decrease unemployment

77. AUTOMOTIVE NEWS, Aug. 4, 1980, at 10. This tariff of 14 per cent only applies to automobiles imported from outside the Common Market.

78. *Id.*

79. Graham, *supra* note 59, at 156.

80. 1980 Trade Hearings, *supra* note 15, at 39.

81. *Id.*

82. *Id.*

83. TIME, Jan. 12, 1981, at 65.

84. STAFF WORKING PAPER, *supra* note 23, at 50.

85. AUTOMOTIVE NEWS, Aug. 18, 1980, at 19. In 1961, Japan and Italy entered into a treaty which set mutual limits on trading in automobiles. *Id.*

86. TIME, *supra* note 83.

87. *Id.* In Sweden, for example, the Japanese have increased their market share from one per cent in 1980 to 14 per cent at present. *Id.* at 19. In other European countries, the Japanese penetration has been climbing toward 10 per cent in West Germany, 13 per cent in Great Britain, and 30 per cent in the Netherlands. See AUTOMOTIVE NEWS, *supra* note 85, at 65.

and increase sales of domestically manufactured automobiles.⁸⁸ Importing nations increasingly rely on quantitative restraints (e.g., quotas) as a method of dealing with the import problem as they have become effective tools in limiting imports.

B. Non-Tariff Barriers in the Form of Quantitative Restraints

1. *Quotas.* A quota is a method by which imports can be limited by reducing the number of imports or reducing the number of imports in proportionate shares to numbers allowed in past years. The imposition of import quotas would have two positive and immediate results: a decrease in unemployment in the domestic automobile industry and an increase in the number of automobiles domestically produced.⁸⁹

Reducing the number of imported automobiles, and thus foreign competition, by imposing import quotas would also have several major drawbacks.⁹⁰ It would force consumers to purchase a domestically manufactured car, to purchase no car at all, or to pay inflated prices for hard to get imports.⁹¹ Reduced foreign competition would result in inflated prices for American automobiles since domestic manufacturers would take advantage of reduced competition to raise their prices.⁹² In addition the lack of competition would cause a delay in the methods of modification which domestic manufacturers must institute in order to remain competitive in the international automobile market.⁹³

Restricting international competition would create an increase in domestic automobile prices and retard the development of a more fuel efficient automobile.⁹⁴ The United States Government has estimated that restricting imports by 500,000 cars a year would result in a \$700 per car increase on the price of imports.⁹⁵ If United States' manufacturers respond with an average \$500 increase, the long-term domestic sales would be about 230,000 cars a year which

88. STAFF WORKING PAPER, *supra* note 23, at 50.

89. *Id.*

90. *Id.*

91. *Id.* If imports are limited, they would be less available and therefore much more difficult to purchase.

92. *Id.* When imported goods are restricted quantitatively, their prices rise in response to the limitation of supply. As a result, prices on comparable domestic products rise in response to the easing of competition. *See* L.A. Times, Sept. 24, 1980, § 2, at 2, col. 1.

93. *Id.*

94. AUTOMOTIVE NEWS, Sept. 1, 1980, at 38.

95. STAFF WORKING PAPER, *supra* note 23, at 50.

is less than normal.⁹⁶ The imposition of quotas directed at the Japanese automobile manufacturers is being contemplated by several Nations, including West Germany and the United States.⁹⁷ If import quotas are aimed exclusively at one Nation, however, there is still the possibility of a surge in imports from somewhere else.⁹⁸ One of the most debated and effective means of instituting quotas is the orderly marketing agreement. Although it has not been instituted by the United States Government, there is a strong likelihood that the President may eventually negotiate with the Japanese concerning the automobile import problem. The most widely used method of restricting imports in the world today is domestic content regulation. This type of regulation is a swift and effective measure that can be instituted by domestic legislatures.

2. *Domestic Content Laws.* Domestic content regulation usually requires that a certain percentage of the value of a domestically manufactured automobile be produced in that country.⁹⁹ The imposition of domestic content requirements improves automotive investment and creates more jobs in the nation in which they are imposed. Imposing content legislation has a substantial impact on international trade policy and could lead to retaliatory measures by affected countries. These measures could affect any gain in employment by a decrease in employment in non-automobile related industries subject to such retaliatory measures¹⁰⁰ Presently, such countries as Spain, Mexico and Australia¹⁰¹ require a high percentage of domestically produced content in each vehicle sold.¹⁰²

Although domestic content legislation is impressive at first

96. *Id.* This would result in a higher cost of domestically built cars and thus increase the chance that fewer cars will be purchased. *Id.*

97. *Id.* Several bills before the U.S. Congress are striving for imposition of quotas. H. R. 1954 would limit Japanese imports to 1.2 million units for the next three years and would add 5 per cent to that total for the following two years. H. R. 1999 would establish an overall import limit for three years of 1.7 million, with presidential authority to waive the quota. H. R. 2049 would limit foreign auto imports to 10 per cent of the domestic market for three years. H.R. 6492 (Mottl Bill) would limit imports of automobiles to 10 per cent of domestic consumption. This quota would run for five years and would be allocated by supplying country on basis of previous market shares. 1980 *Trade Hearings*, *supra* note 15, at 124.

98. *Id.*

99. See AUTOMOTIVE NEWS, Sept. 22, 1980, at 2.

100. *Id.* Retaliation measures taken by the exporting nation may affect products manufactured by other industries, thus employment levels will also be affected. *Id.* at 17.

101. *Id.* At the present time, 31 countries impose some form of content requirements.

102. *Id.*

glance, it can often be detrimental.¹⁰³ As mentioned above, domestic content regulation could increase automotive investment and employment levels, however, by restricting international competition, the regulations could result in increased domestic automobile prices, slow-down the transformation of the industry and retard the development of more fuel efficient vehicles.¹⁰⁴ The basic problems of the automobile industry may also be a result of tax and tariff inequities which give imports an unfair competitive advantage.¹⁰⁵

3. *Taxes.* International trade agreements, such as the Treaty of Rome,¹⁰⁶ allow nations to assess indirect taxes such as sales, excise or value-added taxes on imports¹⁰⁷ despite the GATT prohibition concerning the discrimination of imports through manipulative use of internal taxation systems.¹⁰⁸ These Nations are also allowed to rebate taxes at the time of exportation of the product.¹⁰⁹ All industrialized Nations, except for the United States, impose a border tax on imports.¹¹⁰ In Japan, there is a 15 per cent commodity tax on small cars and a 20 per cent commodity tax on large cars.¹¹¹ In recent years one of the most effective methods of negotiating on import problems has been the orderly marketing agreement.

4. *Orderly Marketing Agreements.* An orderly marketing agreement (OMA) is an arrangement between nations to limit exports of certain articles among the parties so as to avoid injuring domestic producers in the countries of one or more of the parties.¹¹² According to the terms of the agreement, one country agrees to limit its exports of a particular article to a certain level during the

103. AUTOMOTIVE NEWS, Sept. 1, 1980, at 238.

104. *Id.*

105. AUTOMOTIVE NEWS, *supra* note 77, at 10.

106. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered into force*, Jan. 1, 1958) (unofficial English translation). See dePass, *Value Added Tax: The Concept and Current Progress Towards Harmonization in the European Economic Community*, 9 CALIF. W. INT'L L.J. 5 (1979).

107. See dePass, *supra* note 106.

108. *Id.*

109. *Id.* This is allowed so that the tax levied by the importing country is the only tax that the goods bear. Thus, in theory, both the domestic and foreign goods receive equal tax treatment. *Id.*

110. AUTOMOTIVE NEWS, *supra* note 77, at 10.

111. L.A. Times, Sept. 24, 1980, § 2, at 2, col. 2.

112. See Leonard and Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 743 (1976) [hereinafter cited as Leonard].

period of the agreement.¹¹³ The other country would then agree to limit imports of the subject article to the same amount.¹¹⁴ The key element of the OMA is the quota; however, there may be special provisions for the regulation of exports and for review of and changes in the quota under certain circumstances.¹¹⁵

An exporting nation would most likely favor negotiating an OMA as opposed to having import restrictions imposed unilaterally against it. The OMA quota may be less restrictive due to the special conditions of the OMA. Although an OMA quota would most likely be outside the guidelines of GATT,¹¹⁶ the exporting Nation may also prefer an OMA because other GATT members, who may have their own problems with the exporting Nation, would be unsympathetic to a request for GATT action and therefore would be better off under an OMA.¹¹⁷

An OMA did not become identified as such until the Trade Act of 1974, in which section 203 of the Act authorized the President to "negotiate orderly marketing agreements" after receiving a report from the International Trade Commission (ITC) containing an affirmative finding that increased imports were causing injury to a domestic industry.¹¹⁸ The principal underlying an OMA, however, is implied in Article XIX of GATT.¹¹⁹ This provision has been interpreted by the Trade Act as to permit the United States Government to use OMA's to escape the legal consequences of violating GATT's prohibition against quotas.¹²⁰ Quotas are illegal under GATT, except under certain circumstances not covered by the kind of sweeping protection currently pending in Congress.¹²¹ In effect, the President is now able to negotiate voluntary international agreements which have the effect of limiting imports without violating international law and resorting to the unilateral imposi-

113. U.S. International Trade Commission Memorandum, submitted by General Counsel (Oct. 23, 1980). (Copy on file with the *California Western International Law Journal*.)

114. *Id.*

115. *Id.*

116. *Id.* Orderly marketing arrangements, however, have been devised to deal with "market disruption" under GATT although neither term appears in GATT. See Adams and Dirlom, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 *IND. J.* 570 (1976-1977).

117. *Id.*

118. 19 U.S.C. § 2253 (1976).

119. GATT, *supra* note 3, art. XIX.

120. *Id.*

121. A. LOWENFELD, *supra* note 5.

tion of import quotas.¹²² More recently Japan has voluntarily limited the number of automobiles exported to the United States under a device known as a voluntary restraint agreement (VRA).¹²³

5. *Voluntary Restraint Agreement.* The basic philosophy behind a VRA is the promotion of freer trade. A tariff or quota system limits the free flow of the economic system. A VRA is basically a series of nonlegal voluntary negotiations which enable foreign exporters to avoid strict government quotas.¹²⁴

Self-restraint by the Japanese, under the guidelines of the VRA, appears more favorable than other types of non-tariff measures since it would be less of a precedent for other non-escape clause methods used to escape from free trade commitments.¹²⁵ The VRA avoids the retaliatory measures that legislation, such as imposing unilateral import quotas, in breach of that the United States' obligations would allow.¹²⁶ The purpose of the recently instituted Japanese VRA was "to maintain the free trading system and assist in the development of the American economy."¹²⁷ The general policy responses of the importing Nations play an important role in the lingering effect of escape clause provisions under GATT, as they are the new focus on the import problem which have not been effectively dealt with under international law.

B. Domestic Policy Responses by Importing Nations

The Nations most affected by increased imports from Japan have been the United States and several countries in Western Europe. In 1973, the American automobile manufacturers responded to an influx of imports by implementing a world-wide car strategy involving investments on an international scale.¹²⁸ These investments were intended to be used to assemble components in different factories around the world by taking advantage of the benefits of each individual location.¹²⁹

The response by American manufacturers also centered

122. J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 688 (1977).

123. L.A. Times, May 2, 1981, at 1, col. 5. Japanese agreed to cut exports by 7.7 per cent or nearly 140,000 automobiles as part of a two-year program. *Id.*

124. A. LOWENFELD, *supra* note 5, at 197-254.

125. LAW JOURNAL, *supra* note 29.

126. *Id.*

127. L.A. Times, *supra* note 123, at 6, col. 1.

128. EUROPE, *supra* note 22, at 25.

129. *Id.*

around shifting from the production of large models to the smaller, more efficient models. Shifting to another product within the same industry is not ordinarily or necessarily injurious to that industry.¹³⁰ The automobile industry is unique, however, because of the amount of time (lead-time)¹³¹ associated with introducing new models and the large amount of capital investments required.¹³² Industry estimates of the need to alter production between 1975 and 1980 were not accurate in predicting the change in demand.¹³³ Due to the lead-time problem and unforeseen events such as the Iranian revolution and subsequent oil shortages, the American manufacturers' plans for producing and expanding small car output lagged behind the market and its needs.¹³⁴ This problem resulted in an investigation by the United States ITC under the guidelines of the United States Trade Act of 1974.¹³⁵

1. *United States International Trade Commission Investigation.*

The ITC is an independent governmental agency engaged in factfinding and analysis in relation to international trade.¹³⁶ The ITC is not under the control of the United States Congress nor the President, but is responsible to both for reporting its findings on international trade.¹³⁷ The Commission also administers certain United States foreign trade laws.¹³⁸

The current status of the international automobile industry called for a response by the ITC to the problems occasioned by increased imports. With the passage of the Trade Act of 1974, the ITC has been increasingly relied upon as an instrument for handling problems in the area of international trade.¹³⁹ This reliance has resulted from newer industrialized Nations of the world becoming more industrially efficient and, therefore, more competitive in the world economic market.¹⁴⁰

In response to the increasing numbers of automobiles im-

130. CERTAIN MOTOR VEHICLES, *supra* note 34, at 30.

131. *Id.* A shift in the auto industry must be anticipated at least three to five years in advance in order that the shift can be accommodated. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Trade Act, *supra* note 6.

136. Leonard, *supra* note 112, at 720.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 271.

ported into the United States, on June 12, 1980¹⁴¹ the United Auto Workers (UAW)¹⁴² filed a petition with the ITC for import relief pursuant to section 201 of the Trade Act of 1974.¹⁴³ The Ford Motor Company took similar action on August 4, 1980.¹⁴⁴ These petitions were filed for the purpose of securing some type of temporary relief for the ailing United States automobile industry.¹⁴⁵ The ITC, in November, 1980, rejected the petition from imports of cars built in Japan.¹⁴⁶ The Commission determined that "on-the-highway passenger automobiles . . . are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industries producing articles like or directly competitive with the imported articles."¹⁴⁷ The Commission's investigation indicated that the decline in demand for new automobiles was not substantially due to increased imports but to the general recessionary conditions in the American economy.¹⁴⁸

The increase in the number of Japanese automobile exports to Europe has caused a growing sensitivity to the problem in the EEC.¹⁴⁹ The ITC recognized that predictions about what types of restrictions the EEC might apply and whether exports might be diverted to the United States were too speculative in helping the Commission come to a determination.¹⁵⁰ Most likely, the response by the European Nations would be affected by the developments in

141. PREHEARING REPORT, *supra* note 2, at A-1.

142. International Union, United Automobile Aerospace and Agricultural Implement Workers of America.

143. 19 U.S.C. § 2251(a)(1). The UAW asked for five year temporary relief and for higher tariffs on imported cars from the current 2.9 per cent to 20 per cent. In addition, they asked for quotas to be set at the 1975-1976 import levels. See AUTOMOTIVE NEWS, Sept. 29, 1980, at 6.

144. PREHEARING REPORT, *supra* note 2, at A-2. The Ford petition paralleled but did not duplicate the UAW petition. Ford desired a system of minimum annual quotas to help foreign manufacturers locating in the United States. General Motors has advocated voluntary self-restraint for the Japanese and Volkswagon of America has remained neutral in that they are an importer and a member of the domestic industry. See AUTOMOTIVE NEWS, Sept. 29, 1980, at 6.

145. *Id.* The remedy recommended by the I.T.C. should be designed with the goal of helping United States auto producers generate the financial resources and provide the opportunity needed to proceed with their investment plans.

146. Wall St. J., Nov. 12, 1980, at 9, col. 1.

147. CERTAIN MOTOR VEHICLES, *supra* note 34, at 1.

148. *Id.* at 21.

149. *Id.* at 156.

150. *Id.*

the United States, especially the determination of the ITC.¹⁵¹ For example, as a result of the Commission's determination, some members of the EEC have recently held negotiations with Japanese automobile manufacturers.¹⁵²

2. *Response of the European Community.* In Europe, the automobile industry realized after 1973 that it must rationalize and re-group.¹⁵³ The Governments of Great Britain, France, and Italy have allowed their manufacturers to enter into self-restricting agreements,¹⁵⁴ or what have been termed as "de facto, non-governmental" restraints, with the Japanese.¹⁵⁵ As recently as January of 1981, the Japanese government announced that it would request that Japanese automobile manufacturers hold exports to West Germany, Belgium, the Netherlands and Luxemburg to only moderate increases in 1981.¹⁵⁶ The United States, despite continuous demands upon Japan to control automobile exports, has been unsuccessful in coming to any agreement with the Japanese.¹⁵⁷

The Commission of the European Communities has come under great pressure to restrict Japanese imports.¹⁵⁸ The Commission has admitted that its policy toward the Japanese imports needs to be revised and has recognized that a system must be instituted that will harmonize national voluntary restraint negotiations.¹⁵⁹ Once the European Community harmonizes its voluntary restraint arrangements, it could then extract some concessions from the Japanese by use of the community's joint bargaining power.¹⁶⁰

With the increased usage of domestically imposed methods of limiting imports, comes the legislative means to institute these restrictions. It appears, as mentioned above, that the current status of international trade has bypassed the usefulness of certain GATT provisions. The United States has been the initiator, among devel-

151. *Id.*

152. L.A. Times, Jan. 30, 1981, § 4, at 2, col. 1.

153. EUROPE, *supra* note 22, at 25.

154. *Id.* The markets of Great Britain, France and Italy had been traditionally open to imports.

155. L.A. Times, *supra* note 152.

156. *Id.*

157. *Id.*

158. EUROPE, *supra* note 22, at 26. In July of 1980, the Committee of Common Market Car Manufacturers wrote a public letter to the Commission pointing out the rapid increase in imports. *Id.* at 26-27.

159. *Id.* at 27. A policy document presently exists which provides the vague outlines of a plan.

160. *Id.*

oped Nations, with regard to the creation of domestic import trade statutes.

V. THE DEVELOPMENT OF A DOMESTIC IMPORT TRADE STATUTE: THE UNITED STATES TRADE ACT OF 1974.¹⁶¹

It is accepted practice under GATT that some form of temporary protection be extended as a "safeguard" to prevent the demise of a domestic industry threatened by imports.¹⁶² Problems in the area of safeguards were increased by changes in United States law under the Trade Act of 1974.¹⁶³ These changes have made it easier for an American industry to qualify for safeguard action.¹⁶⁴

A. *United States Trade Act of 1974*

The Trade Act of 1974 evolved from the Trade Expansion Act of 1962¹⁶⁵ as an effective means of relaxing the criteria for determining injury to a domestic industry.¹⁶⁶ The Trade Act of 1974 extended the powers of the ITC beyond the tariff area.¹⁶⁷ As a result, relief was no longer tied to tariff action.¹⁶⁸ The Trade Act of 1974 was apparently the result of Congressional concern with the difficulties facing the United States in the area of international trade, including payment deficits, fundamental inequities in the world trading system, and a lack of reciprocity in international economic relations.¹⁶⁹ In responding to world economic trends of recent years, particularly those actions taken by the Organization of Petroleum Exporting Countries,¹⁷⁰ the Trade Act of 1974 has be-

161. Trade Act, *supra* note 6. All section references will be to the Trade Act of 1974 unless specified otherwise.

162. CLINE & KAWANABE, *supra* note 63.

163. *Id.* at 203.

164. *Id.*

165. 19 U.S.C. § 1901 (1970).

166. Leonard, *supra* note 112, at 721.

167. F. V. MEYER *supra* note 42 at 90. Prior to Trade Act of 1974, domestic industries injured by a substantial increase in imports almost always obtained relief through tariff action. *Id.*

168. Tariff action has been supplemented by orderly marketing agreements, a form of import quotas, and by adjustment assistance. Until the passage of the Trade Act of 1974, these methods had been used sparingly. Under the GATT, however, relief still remains tied to tariff action.

169. Minchew, *Expanding Role of the United States International Trade Commission*, 27 MERCER L. REV. 429, 432. See REPORT OF THE COMM. ON FINANCE, U.S. SEN. TRADE REFORM ACT OF 1974, S. REP. NO. 93-1298, 93rd Cong., 2d Sess., at 15.

170. With respect to the production and pricing mechanisms of Middle East oil reserves.

come an extremely useful instrument in effecting domestic adjustment to these trends.

1. *Section 201.* The Congressional legislation which implemented Article XIX of GATT is section 201¹⁷¹ of the United States Trade Act of 1974. In instituting section 201, Congress provided a fair and reasonable test designed to determine whether a domestic industry was being adversely affected as a result of increased imports.¹⁷² The determination is made by the ITC rather than by relying on ad hoc agreements for individual industries.¹⁷³

The main goal of section 201 is to provide authorization for the ITC to conduct investigations that determine whether relief should be granted to a domestic industry.¹⁷⁴ The thrust of the investigation is "to determine whether an article is being imported into the United States in such increased quantities¹⁷⁵ as to be a substantial cause¹⁷⁶ of serious injury, or the threat thereof, to the domestic industry producing an article similar to or directly competitive with the imported article."¹⁷⁷ The Commission is permitted to recommend import relief in the form of higher tariffs, tariff quotas, quantitative limits, orderly marketing agreements or adjustment assistance.¹⁷⁸

The interpretation of section 201 is of serious concern to industries of other Nations involved in international trade as well as to those so involved in the United States. The decisions made by the ITC in the United States will have a substantial world-wide impact on the way other Nations handle the problem of increased imports

171. 19 U.S.C. § 2251 (1976).

172. 1974 NEWS, *supra* note 54, at 7203.

173. *Id.*

174. 19 U.S.C. § 2251(a)(1)(1976). Petitions for eligibility for import relief may be filed by any entity which is representative of an industry, including a trade association, firm, certified or recognized union, or group of workers. This petition must include a specific statement describing the purposes for which import relief is sought. Under 19 U.S.C. § 2251(b)(1), requests for investigation can be made to the I.T.C. by the President, Special Representative for Trade Negotiations, or upon resolution by either the Committee on Ways & Means of the House of Representatives or the Committee on Finance of the Senate, or upon the motion of the I.T.C. *Id.*

175. Under the Trade Act of 1974, either an absolute increase or an increase relative to domestic production will satisfy the criterion. The Commission usually examines import trends over a period of years. *See* Leonard, *supra* note 112, at 738.

176. 19 U.S.C. § 2251(b)(2)(c)(4). A cause which is important and not less than any other cause.

177. 19 U.S.C. § 2251(b)(1).

178. Trade Act, *supra* note 6, at § 203; *see* CLINE & KAWANABE, *supra* note 63, at 203.

and upon the way these Nations are affected by those decisions.¹⁷⁹ In recent years, domestic industries have taken an active interest in escape clause provisions. Numerous cases before the ITC have tested the requirements of section 201 and Article XIX.¹⁸⁰ The current problem of increased imports does not appear to be restricted to the automobile industry. Two leading examples of product areas affected by the United States safeguard provisions are television sets and shoes.¹⁸¹ The ITC recommended that tariffs on imported television sets be raised from five per cent to twenty-five per cent, and that a combination of tariffs and quotas be imposed on shoe imports.¹⁸²

In 1977, increased importation of Japanese color television sets was greatly criticized in the United States. During 1976, Japan shipped approximately three million color television sets to the United States,¹⁸³ representing two and one-half times as many sets as had been sent the previous year.¹⁸⁴ The American color television industry advocated for protectionist measures and the ITC responded to these requests in March of 1977.¹⁸⁵ The ITC investigation resulted in a finding that the increase in American imports from Japan was the direct cause of the domestic industry suffering injury.¹⁸⁶ The Japanese manufacturers eventually agreed to limit their color television exports. The administration of section 201 is accomplished by means of a structured set of procedures which are used by domestic industries to protect themselves from the potential harm occasioned by increased imports.

179. *Id.* at 204.

180. Minchew, *supra* note 169, at 434. *See, e.g.*, U.S. INTERNATIONAL TRADE COMMISSION, BIRCH PLYWOOD DOOR SKINS: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-1, PUBLICATION 743 (October 1975); U.S. INTERNATIONAL TRADE COMMISSION, CIGAR WRAPPER TOBACCO: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-3, PUBLICATION 744 (November 1975).

181. CLINE & KAWANABE, *supra* note 63, at 204.

182. *Id.* The response of President Carter's Administration was to negotiate with Japan in establishing voluntary export quotas for television imports and with Taiwan and Korea for shoes. The Administration was aware that if they did not negotiate a voluntary restraint with Japan, Korea and Taiwan, then Congress would have likely enforced the recommendations made by the I.T.C. *Id.*

183. 75 CURRENT HIST. 145, 146 (Nov. 1978).

184. *Id.*

185. *Id.*

186. *Id.*

B. Procedures and Effects in the Administration of Import Trade Statutes

In order to affirmatively determine that relief is necessary, section 201(b)(1) requires that the domestic industry be seriously injured or threatened by an absolute increase in the number of imports, and that these imports must be the substantial cause of that injury.¹⁸⁷ In reaching such a determination, the Commission should take into account certain economic factors,¹⁸⁸ including significant idling of productive facilities in the industry,¹⁸⁹ the inability of a significant number of firms to operate at a reasonable level of profit,¹⁹⁰ and significant employment or under-employment in the industry.¹⁹¹ A failure to make an affirmative showing concerning any of the criteria defeats the particular petition that has been submitted to the ITC.¹⁹²

Section 201 also provides procedures for dealing with the ITC findings.¹⁹³ Petitions filed by the UAW and Ford were reviewed during hearings held in October and November of 1980, and the ITC recommended that no action be taken with respect to automobile imports. If an affirmative finding for relief had been made, the ITC would then have advised the President as to what type of relief would have been appropriate.¹⁹⁴ The President, in his determination of appropriate measures, is not bound by the ITC recommendation.¹⁹⁵ The imposition of any relief measures available to the President or the ITC would create international legal issues. Prior to instituting any import restrictions, an importing Nation must take into account the international legal significance of its actions.

VI. INTERNATIONAL LEGAL IMPLICATIONS OF DOMESTIC IMPORT RESTRICTIONS

The escape clause provision of the Trade Act of 1974 was cre-

187. 1974 NEWS, *supra* note 54, at 7264.

188. *Id.* at 7265.

189. 19 U.S.C. § 2251(b)(2)(A)(1976).

190. *Id.*

191. *Id.*

192. CERTAIN MOTOR VEHICLES, *supra* note 34, at 52.

193. 19 U.S.C. § 2251(d)(1976).

194. 19 U.S.C. § 2251(d)(1)(A) and (B)(1976). The I.T.C. shall recommend tariffs, import restrictions or adjustment assistance.

195. 19 U.S.C. § 2253(a)(1976). Five types of relief are available to the U.S. President: he may (1) impose or increase tariffs, (2) proclaim a tariff or quota system, (3) proclaim quantitative restrictions, (4) negotiate orderly marketing agreements, or (5) provide relief in the form of some combination of the above. *Id.*

ated in order to deal more effectively with the problem of increased imports. The justification for this type of clause is the necessity to soften the dislocating impact of more liberal trade by providing temporary relief so that there could be an adjustment to stronger competition by industries, firms and individuals.¹⁹⁶ While meeting the underlying purpose, this rationale for implementing the escape clause probably fails under the strict criteria of Article XIX.¹⁹⁷ For example, GATT limits relief measures to imposing or increasing tariffs whereas section 201 of the Trade Act allows other, more effective, measures. GATT, however, is binding on all signatory Nations and if the import relief proposed is not within the standards of GATT, the importing Nation is required to compensate the other GATT members or it is subject to retaliation.¹⁹⁸

GATT specifically requires that if a member makes an affirmative determination, any restriction imposed by that Nation must be observed by all nations which export that product.¹⁹⁹ This obligation is referred to as the MFN clause and prohibits a nation from restricting imports from one Nation while imposing no restrictions on the same import from other Nations.²⁰⁰

Article XIX entitles a GATT member exporting Nation to be compensated by eliciting an equivalent concession or compensatory concessions from the Nation invoking the escape clause.²⁰¹ These compensation measures could be avoided through bilateral agreements, such as an OMA, negotiated between the Nations involved.²⁰² The United States could also avoid granting compensatory concessions or facing foreign retaliation where the appropriate remedy may be under American law for which no compensation or rehabilitation may be in order.²⁰³ The imposition of particular types of restrictions, however, would be in direct violation of GATT terms and could result in international trade conflicts.

196. Budott, Jovits, Lavet, *Imports, Exports and Related Matters - International Trade Commission*, 10 L. & POL'Y INT'L BUS. 1, 33 (1978).

197. *Id.*

198. *Id.*

199. GATT, *supra* note 3, art. 1, 4 BISD.

200. According to the MFN clause of GATT, any restriction of imports by one member nation must apply to all nations who export the same product to that nation. If only one nation is identified with respect to the restriction, then the restriction would appear to constitute an action discriminatory in favor of one MFN nation and against other MFN nations.

201. Easton, *supra* note 52, at 67.

202. *Id.*

203. 1974 NEWS, *supra* note 54, at 7266, 7267.

A. Consequences of Imposing Certain Types of Import Restrictions

1. *Quantitative Restraints.* The imposition of quantitative restraints would constitute a violation of GATT, and therefore a violation of international trade obligations.²⁰⁴ Parties to GATT are bound by agreement in Article II, paragraph 1, not to institute “prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures.”²⁰⁵ In the United States, for example, an attempt by Congress to impose quantitative restrictions²⁰⁶ would tend to nullify and impair previous American trade concessions in the automobile sector.²⁰⁷ The effect on domestic trade concessions would be to give trading partners, such as Japan, justification under GATT²⁰⁸ to suspend substantially equivalent concessions. The suspension of concessions would, under international law, legally entitle trading partners to use retaliatory measures which might result in an unpredictable and complicated trade war.²⁰⁹ The imposition of quantitative restrictions is inconsistent with international obligations under GATT.²¹⁰ In effect, GATT would be violated for the sole purpose of helping a domestic industry secure a greater part of the world market.

2. *Domestic Content Regulations.* The imposition of domestic content laws would also constitute a violation of GATT.²¹¹ Imposing content laws amounts to the use of a nation’s legal system to protect its industry at the expense of the foreign industry.²¹² A domestic law requiring manufacturers to use certain quantities of domestic components in the manufacturing process would be a violation of the international obligations of GATT.²¹³

GATT obligations are taken seriously by the member Nations. Commitments are expected from all trading partners, and those

204. GATT, *supra* note 3, art. XI, 4 BISD.

205. *Id.* art. II, 4 BISD.

206. *See* H.R. 6492.

207. 1980 TRADE HEARINGS, *supra* note 15, at 124. (Statement of the American Imported Automobile Dealers Association.) The Japanese have no quotas *per se* on U.S. exports to Japan, but could retaliate by imposing quotas on United States exports to Japan. *Id.*

208. GATT, *supra* note 3, art. XXIII (2), 4 BISD.

209. 1980 TRADE HEARINGS, *supra* note 15, at 124.

210. *Id.*

211. *Id.*

212. *Id.*

213. GATT, *supra* note 3, art. III, par. 5, 4 BISD.

same Nations expect equal commitments from their trading partners. There appears to be little doubt that restrictions on the importation of automobiles, whether by quota or domestic content regulation, are inconsistent with GATT obligations.²¹⁴

VII. CONCLUSION

Since the end of World War II, there has been a significant increase in the volume and liberalization of international trade. At times, serious adjustment problems and inequities have resulted from the differential effects of international trade flows. Manufacturers and workers within inefficient and import-competing industries must often bear some of the costs of aggregate long-term national gains. These conditions often give rise to strong political pressures for protectionism.

Current trade policies with regard to the automobile industry, in North America and within the EEC, reflect an underlying sense of crisis. The trade problems associated with the automobile industry appear to have strained the capacity of existing international arrangements to meet national needs, and protectionist forces in many Nations are clamoring for protection of their automobile industries from increased imports. Although the United States Government has pursued liberalized trade practices and avoided protectionist measures in the past, it cannot ignore employee layoffs and the decline of domestic sales. These conditions have generally resulted from the flood of Japanese imported automobiles into the American market.

The openness of trade policies in such nations as Great Britain, West Germany and the United States has aroused protectionist factions in their respective nations. The most viable legal basis for imposing restrictive measures under international law is the escape clause or safeguards provision found in GATT. Article XIX, in particular, allows an importing Nation to temporarily suspend obligations and withdraw or modify trade concessions if increased imports cause or threaten to cause injury to the domestic industry.²¹⁵ This avenue, however, has been for those Nations subject to increased imports of automobiles. GATT creates too many loopholes which provide methods for avoiding rules,²¹⁶ resulting in the crea-

214. 1980 TRADE HEARINGS, *supra* note 4, at 125.

215. AUTOMOTIVE NEWS, Oct. 8, 1980, at 16.

216. *Id.*

tion of more acceptable and effective safeguards by individual Nations.

A prime example is section 201 of the United States Trade Act of 1974. Pursuant to procedures of the Act, the ITC determined that increased imports were not the sole cause of injury to the United States automobile industry.²¹⁷ This determination, however, is only a recommendation and the President may choose to impose restrictive measures on his own. If he should decide to impose restrictions, pursuant to section 201, and other than those provided for in GATT, it could spark negotiations on the applicability of GATT's present safeguards provision and whether passage of a new Safeguards Code is imperative.

GATT was originally intended to permit only tariffs as restrictions on trade, but this policy has not succeeded.²¹⁸ It is now necessary to recognize the use of quantitative restraints, orderly marketing agreements and other non-tariff barriers in order to regulate their use.²¹⁹ As a result, the safeguards provision of GATT must be substantially revised²²⁰ so that it can be used as a vehicle in supervising international trade among the contracting parties.

Despite the ITC decision and the refusal of the United States to invoke Article XIX or institute restrictions, the automobile import problem may eventually be solved. The internationalization of the industry and the introduction of the "world car" have tended to circumvent the problems occasioned by increased imports. The necessity to impose restrictions or invoke safeguards may be unnecessary if the production of the "world car" is successful. On the other hand, the automobile manufacturers may still desire the use of safeguards provisions to temporarily relieve their industries from the problems created by increased imports.

Jed Weinberg

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* See generally POLICY STATEMENT, *supra* note 65, at vii, viii. The Safeguards Code should allow for the creation of conditions by governments that would allow the private sector to undertake adjustments and innovations in order to avoid trade restrictions for any extended period in any industrial sector. Furthermore, industry and government must be committed to make the necessary adjustment within a reasonable period of time. This international code should be composed of clear rules prescribing when restrictions against imports can be imposed, how long they should last, and what forms they should take. *Id.*