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THE GATT CONSISTENCY OF EXPORT RESTRAINT ARRANGEMENTS

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The GATT Consistency of Export Restraint Arrangements

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CONTENTS:

I. Export Restraint Arrangements ("ERA's")

- A) Different Types of ERA's
- B) Reasons for the Use of ERA's

II. Non Government Measures

III. Governmental ERA's and GATT Obligations

A) Quantitative Restrictions of Exports

- 1. Article XI: Prohibition of the Use of Quotas or Other Measures by the Exporting Country
- 2. Article XIII: Discriminatory ERA's and the Importing Country's Obligation
- 3. Other Interpretations of Article XI

B) ERA's Establishing Floor Prices

C) Enforcement: Who Will Complain?

- 1. As Between the Parties or Participants in the ERA
- 2. Third Party Complaint
- 3. International Supervision or Surveillance

IV. Exceptions to GATT Obligations: Article XIX, Escape Clause

A) The Policies of Safeguards

B) Selectivity and MFN in Article XIX

C) Compensation Requirement of GATT Article XIX

V. Other GATT Exceptions

A) Price Undertakings and Settlements in Unfair Trade Cases

B) Article XX: General Exceptions

C) Article XXI: Security Exceptions

VI. Conclusions

INTRODUCTION

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

Indeed, the lack of adequate institutional structure for the GATT³ renders it even more vulnerable than many agreements to the problem of "relevance" in a world now substantially different from the one of its time of origin. Yet few practices have posed as large a problem for the policy objectives and rule language of GATT as those generally called "Voluntary Export Arrangements", "Voluntary Restraint Arrangements" or "Export Restraint Arrangements", (VER's, VRA's, ERA's, etc.). Despite extensive economic and policy criticism suggesting that ERA's are usually a fourth or fifth best choice⁴ (or worse) as a trade policy measure, these arrangements have proliferated to such an extent in world economic affairs that it appears that some nations prefer them to all other trade restraining devices. Why this is so has been the subject of comment elsewhere.⁵ Clearly it relates, inter alia, to the national constitutional structures of governments which inhibit the use of other measures (such as tariffs or quantitative restrictions, which may sometimes require parliamentary action or prerequisites specified in legislative delegations of power). It also relates to international rules such as that of GATT Article XIX (escape clause) which requires

an import restraining nation to "compensate" exporting countries with added trade concessions.

While the economic and other policy considerations surrounding the use of ERA's have been explored amply, there is remarkably little analytical examination of the related legal question of whether the ERA's are consistent with GATT obligations. Yet those legal questions can have considerable impact on the policy debate, as well as on the negotiating context of an attempt to revise the rules. It is the purpose of this article, responding to a request to that effect, to analyze this legal question -- namely, the GATT consistency of ERA's. The policy and economics of the use of these measures will be largely left to other works.

An answer to this legal question turns out to be rather complex. There are a number of different types of ERA's, and the GATT consistency of some of these differs from that of others. In addition, certain circumstances offer legal escapes for the use of ERA's which in other situations may not be GATT consistent. In sum, there is no simple overall answer. "It depends ..." is the best that can be said.

First it is necessary to explore some of the different characteristics of ERA's (Part I, below). Then the analysis will turn to non-government measures largely escaping GATT discipline (Part II), followed by a look at governmental measures (Part

III). After this the most significant GATT potential exception (the escape clause) will be explored (Part IV), followed by a brief look at other exceptions (Part V) and concluding with some final remarks (Part VI).

In this discussion we will always assume that all relevant participating governments are members or "contracting parties" to the GATT.

I. EXPORT RESTRAINT ARRANGEMENTS

A. Different Types of ERA's

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

The principal classification of importance is the distinction between those measures imposed by the exporting country government, and those imposed or effectuated totally by

non-government entities, such as enterprises or trade associations.

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

The government measures can include explicit government-to-government agreements (usually technically in treaty form) in which the exporting government agrees to limit exports to the other country to certain ways. In U.S. law and in some other countries these are termed "Orderly Marketing Agreements" or "OMA's".⁶ In some cases, a government on one side may explicitly agree with a non-government group on the other side (industry sector association, or group of firms, etc.) such that exports are restrained. The government might be that of the exporting country, or it might be that of the importing country. In most cases the agreement is deemed "informal" and not legally binding.

Finally, government measures can be informal or tacit. In such cases the usual pattern seems to be for the exporting country's government to make some sort of "statement" or explanation of intent, by which it will seek to assure that exports of a certain product to another country will be kept under certain limits. The Japanese restraints on auto exports to the U.S. market are a prime example.⁷

B. Reasons for the Use of ERA's

Why are these measures so attractive to governments and their trade policy officials? There are several reasons, some already alluded to. Informal measures often escape various restraints of national or international law. Thus a government, which under its constitution or statutory law had no formal authority to enter into an explicit international agreement, may find it feasible and reasonably effective to have an implicit or informal arrangement for the foreign limitation of exports. This allows both governments concerned to avoid the necessity of implementing legislation or complicated procedures (often requiring time delay, as well as rigidities on the power to remove the measures in the future). Furthermore, the possibility of "negotiating" ERA's on a selective rather than a Most Favored Nation (M.F.N.) basis is sometimes felt to be useful.⁸ Finally, it also tacitly allows avoidance of the GATT escape clause compensation requirement.⁹

The government of the exporting country may cooperate in an ERA for various reasons. First, such government may expect that such an arrangement, similar to an export cartel, will be "profitable". Economists have noted that the "monopoly rents" of a ERA are often captured by the exporting nation, and may function partly as a replacement to the compensation requirement. Secondly, the exporting country can be coerced by the government

of the importing country through threats of other forms of safeguard measures that would be more harmful to it. Finally, it can be persuaded or coerced to cooperate for non-trade policy reasons. 10

II. NON GOVERNMENT MEASURES

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

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

This is particularly the case of exports directed to the United States. Thus a non-government ERA restraining trade destined for the U.S. is very risky indeed.¹³ However, as a matter of international law, there is little that constrains this behavior. Thus, for importing countries which do not have anti-trust or other significant laws on competition, non-government ERA's may escape inconsistency with GATT rules and with national laws.

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

III. GOVERNMENTAL ERA'S AND GATT OBLIGATIONS

Turning to ERA's that involve government action, two basic types of arrangements must be evaluated: Those which impose quantitative restraints; and those (similar to part of the US -

Japan chips agreement) which involve price limits or floors.

A. Quantitative Restrictions of Exports

1. Article XI: Prohibition of the Use of Quotas or Other Measures by the Exporting Country

When the government acts explicitly to restrain exports to a particular country, then the risk of inconsistency with GATT rules is apparent. The most obvious provision of GATT relating to ERA measures is that of Article XI paragraph 1, which reads:

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

Most ERA's constitute such restrictions and, therefore, appear to be contrary to this provision.

Difficulties may arise when some ERA measures, although non-government in form, may closely approximate government action. A government may merely "encourage the voluntary restraint" of its exporting firms, and argue that the measure is essentially non-governmental in character. Some might argue that Japanese "administrative guidance" approaches this characterization. Other governmental approaches might tacitly condition certain government benefits (e.g. access to capital,

sympathetic "regulatory" decisions, tax measures, etc.) on "patriotic compliance" with a request to restrain exports.

This then raises a troublesome question as to which government activity becomes a measure recognized by the GATT rules as "governmental". GATT Article XI speaks of "other measures", and thus has within it the potential, in the hands of a GATT or other disputes panel with "creative inclinations", of a determination that informal governmental measures are nevertheless contrary to GATT.

Another difficulty of ERA's under Article XI may be their effects on competition. In 1950 the Contracting Parties unanimously approved a Working Party report on Article XI which concluded that "where export restrictions were in fact intended for the purpose of avoiding competition among exporters and not for the purpose set out in the exception provisions of Articles XI and XX, such restrictions were inconsistent with the provisions of the Agreement".¹⁸ This early approach, however, must be viewed in the context of the above mentioned 1960 GATT determination not to bring into GATT competence questions of anti-competition policy. In 1950 there still remained a hope that an ITO charter would come into being. In 1960, this hope had long since disappeared.

2. Article XIII: Discriminatory ERA's and the Importing Country's Obligation

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

Unless a case involves one or more exporting countries which create particular difficulties because of a dynamic and unforeseen increase in exports, it seems likely that the importing country will seek to protect its domestic industry against all the suppliers and that it therefore will have an incentive to act on a non-discriminatory basis. An example of this may be the 1984-85 VRA's on steel shipments to the U.S. which attempted to include all the major suppliers. Nevertheless, several difficulties may arise.

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

In any event, the use of ERA's may attract the analysis of Article XIII in some situations where the importing country's heavy hand suggests that the ERA's are not "voluntary", and that discrimination results from the importing nations actions, adding another exposure of GATT challenge to ERA practice.

3. Other Interpretations of Article XI

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

There are, however, few reasons to suppose that the prohibition in Article XI of export quotas is as limited in scope as only to protect supplies of other countries. It is also possible that the contracting parties did not link the prohibition of quota to a specific purpose, but wanted to prohibit the use of quantitative restrictions in general, irrespective of the possible purposes of the action, because

quotas (i) are relatively non-transparent, (ii) create too much uncertainty for exporters, (iii) cannot be "overcome" by greater efficiency by the producer-exporter. The 1960 GATT determination mentioned above reinforces this view.²³

B. ERA's Establishing Floor Prices

A few ERA's have been designed to prevent exports to one or more foreign markets below a certain floor price. Obviously this would offer competitive benefits to importing country producers, possibly even benefitting their exports to third markets or the competing downstream industries (since parts would be just as costly to foreign downstream competitions). The wording of Article XI seems broad enough to capture this practice, unless the price is maintained by use of an export tax, charge, or duty. The "other measures" language assists this argument. Likewise, the Article I and XIII non-discrimination rules could be invoked in the case of selective price floor ERA's.²⁴ Of course, as noted below, some of these arrangements may have a separate GATT justification. In particular, some of these arrangements may be justified as "settlement" agreements in unfair practices proceedings such as dumping or subsidy cases, sometimes called "price undertakings".

C. Enforcement: Who Will Complain?

The discussion above suggests that a government imposed

measure restraining exports can be contrary to GATT. In fact, there seems to be little doubt that (contrary to statements sometimes made in speeches or the literature) governmental ERA measures are often prima facie inconsistent with GATT. Perhaps GATT exceptions can be found to square the measures with the GATT, but that is a separable question (discussed in other sections below.) Thus, the initial indication is that most VRA's, OMA's etc are inconsistent with Article XI or other articles of the GATT.

The problem comes, however, in exploring the consequences of such breach of GATT. Two aspects of this can be explored: The rights and obligations of the two countries which are "parties" to the export restrain arrangement; and those of third parties.

1. As Between the Parties or Participants in the ERA

Who will complain? The government imposing the ERA measures is surely unlikely to complain against its own activity in GATT. The government of the country to which the restrained exports are otherwise destined is very likely to have been the seeker of the ERA measures, requesting the restraints as a "safeguard" measure to alleviate "injury" to its own competing industry. Thus a dilemma of the GATT rule, is the question of enforcement.

If the ERA is embodied in a legally binding instrument (which would be a "treaty" under international law definitions), this

agreement itself, as between its parties, may prevent any "GATT liability" of the parties towards each other. This is because the ERA agreement is later in time, and as between the parties to both it and the GATT, the later in time prevails under traditional international treaty law.²⁵ It can be argued that even if the later treaty was illegal because incompatible with the multilateral treaty, this would only involve liability toward third parties and not between the ERA participants.

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

It is possible that in some (probably very few) cases, the domestic law of either the exporting country or the importing country of the participants in an ERA measure would be so structured as to allow challenge to the measures or government activity by some private party who (such as an importing or exporting establishment) argues that it has been harmed. This was nearly (but not quite) the 1970's U.S. case of Consumers

Union v. Kissinger.²⁹

2. Third Party Complaint

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

In general the "harm" in this context is that the ERA measures between countries A and B harm country C either because they divert more exports (and competitive pressures) towards the C market, or because they cause prices for the products to C to be increased. However, these cases are seldom brought and have not yet succeeded.³¹

Third countries could furthermore be affected by an ERA when

this implies a warning to their exporters that "unilateral action" may be taken against them if their exports surge above certain levels (and especially warnings not to try to take advantage of the established ERA's with other countries). Such "warnings" may inhibit potential exporters, even if, in fact, it is not very likely that the protectionistic action will or can be taken.³²

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

3. International Supervision or Surveillance

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

IV. EXCEPTIONS TO GATT OBLIGATIONS: ARTICLE XIX, ESCAPE CLAUSE

A. The Policies of Safeguards

While free trade may benefit an importing country as a whole, it may also harm its domestic industry of the like or competing products. In order to give the domestic industry of the importing country time to adjust to the new situation, and also to lease some of the political pressure against free trade, Article XIX of the GATT allows contracting parties to take safeguard measures to temporarily restrain imports of the particular products and to protect its domestic industry for a

short period of time.³⁴

GATT Article XIX includes language which, when a GATT member can show the article XIX prerequisites are met (not too hard), allows such member to "suspend" its GATT obligations which resulted in the injury to the domestic industry. The rules of GATT so suspended would include GATT Article XI. Indeed, practice of nations amply confirms that import quotas are used under GATT XIX despite the prohibition of XI. Thus, nations could also use "other measures" or export restraints. Since most ERA measures are probably exercised in the context of a claim for "safeguards" purposes, i.e. to restrain import competition affecting an injured competing domestic industry, Article XIX could be the prime candidate for an analysis to show that ERA measures are consistent with GATT despite Article XI prohibitions.

The conceptual problem is that GATT Article XIX allows the importing nation to suspend its obligation and says nothing about the exporting nation. Thus at first view, it appears that Article XIX may not assist either participant to the ERA measure, since the action (i.e. the need for the GATT rule suspension) is performed by the exporting nation, not the importing nation as Article XIX implies. The question then becomes whether the language of Article XIX in such circumstance could be interpreted to authorize the exporting country to take ERA measures, at least when the importing nation (alleging injury to its industry) has

sought and asked for such measures. (This problem is not confined to the exception of Article XIX, but may occur under other possible exceptions listed below.)

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

B. Selectivity and MFN in Article XIX

One of the important debates of recent years about Article XIX of GATT, is whether measures under XIX must be imposed in a manner consistent with M.F.N. principles.³⁶ The principal argument in favour of selective safeguard measures is that there is no explicit M.F.N.-requirement in Article XIX, so that this provision does not prevent the suspension of the M.F.N.-requirement of Article I as part of the escape clause authority. Supporters of a non-discriminatory application of safeguards argue that Article XIX allows the suspension of an obligation in respect of a product, as opposed to a country, and refer to an Interpretative Note to Article 40 of the Havana charter, which is equivalent to Article XIX of the GATT, which provides that safeguards "must not discriminate against imports from any Member country". It is also argued that, as a matter of economic policy, the M.F.N.-requirement is much to be preferred. Clearly

a specific ERA measure, with just one exporting country (when more than one exists) would seem to contravene an Article XIX M.F.N. requirement. Thus, if Article XIX can be deemed to provide an exception for ERA measures, it may be argued that it does so only when a network of ERA measures is put in place which closely approximates an M.F.N. approach (if tariffs or quantitative restrictions were used instead).

C. Compensation Requirement of GATT Article XIX

Article XIX, paragraph 2, of GATT provides for consultation between the country that wants to take a safeguard measure and "the contracting parties having a substantial interest as exporters of the products concerned". Since paragraph 3 of this article authorizes a retaliatory response for the affected parties, it is accepted that the parties entitled to consultation can accept compensatory concessions by the country that wants to take a safeguard measure or obtain compensatory withdrawal of concessions. Providing protection for the domestic industry through the use of ERA's may tacitly allow avoidance of this compensation requirement.

Compensation is in practice not always given.³⁷ An explanation for this may be the costs of a retaliatory withdrawal of concessions for nations depending on imports and the fact that as a result of the already extensive tariff reductions made during the different tariff negotiations rounds, there is often

very little left to compensate, particularly if the trade item on which you are taking safeguard action is so huge as is the case in, for example, steel or automobiles.³⁸

As we noted previously, however, economists have observed that an ERA may increase the profitability of the exporting firms. These "monopoly rents" of an ERA thus partly function as a replacement of the "compensation requirement".

Recently, it has been suggested that auctioning the available import quotas would enable the importing country's government to capture these rents, thereby reducing the cost of the protection.³⁹ Since these monopoly rents can be an important inducement for the cooperation of the exporting countries, the use of such auction quotas may lead the exporting countries to refuse restricting their imports "voluntarily". Moreover, since auction quotas would appear to be administered by the importing country, they would probably amount to "normal" quantitative import restrictions instead of an ERA.⁴⁰

V. OTHER GATT EXCEPTIONS

Obviously an ERA may be legally justified under GATT despite Articles XI, I, XIII, etc. by other measures in GATT which provide exceptions. For example, the GATT contracting parties could always grant a waiver under GATT Article XXV. Balance of payments exceptions in GATT (including those for developing

countries) might (subject to an analysis similar to that of the escape clause above) be extended to exporting country actions requested by a balance of payments troubled importing country. Developing countries might likewise make a similar argument under clauses in Article XVIII. In addition it is theoretically possible that GATT Grandfather rights under the Protocol of Provisional Application would apply to a particular export restraint (in effect prior to the country's entry into GATT) and thus escape Article XI or XIII challenge.⁴¹ (Grandfather rights do not apply to Article I.)

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

A. Price Undertakings and Settlements in Unfair Trade Cases

The GATT rules and the GATT code rules on dumping and subsidies explicitly allow governments or firms to establish "price undertakings" (i.e. minimum exporting price assurances) as a method of suspending or settling an anti-dumping⁴² or countervailing duty⁴³ proceeding of an importing country. In addition, there is arguably "implied" authority in the dumping and subsidy rules to enter into at least certain types of agreements to "settle" or compromise such cases. A number of measures which might be included in the category of ERA's may be "justified" under these international rules of exception. If so justified, relief from both GATT Article XI rules and the non-

discriminatory principle of GATT Articles I and XIII would be claimed. It is not clear just how far such exception authority might extend to justify some ERA's. Clearly this authority should not be deemed unlimited. More elaboration of this question however, must await other works.

B. Article XX: General Exceptions

Article XX contains several general exceptions for the purpose of, for example, the protection of public morals and health. Generally speaking, the measures taken under this provision must be "necessary", so that the exception does not apply if its purpose could be served by a less restrictive alternative. Moreover, the actions are subject to a "soft MFN-clause". Although theoretically possible, it is not very likely that an otherwise illegal ERA will be justified by this article.

C. Article XXI: Security Exceptions

More important may (in practice) be the exception of Article XXI, based on a country's national security interests. It can be argued that, for example, a strong steel or automobile industry is vital to these security interests.⁴⁴ If so, measures contrary to specific GATT obligations, taken to protect these interest could qualify for this exception. Although Article XXI provides that the measure must be "necessary" for a country's security interests, it is primarily left to the judgment of the national

government whether there exists a less restrictive alternative.

It may, again, be conceptually difficult to apply this exception to ERA's and exempt the exporting country from its GATT obligations under Article XI on the basis of the security interests of the IMPORTING country. However, since under this provision the importing country would be allowed to take almost any protective measure, the use of ERA's could in these cases be defended as a less harmful action than the available alternatives.

VI. CONCLUSIONS

It seems clear that in many cases, export restraint arrangement (ERA's) are not consistent with GATT rules, particularly those of GATT Article XI. This is apart from a number of policy arguments why ERA's have damaging economic consequences. Yet in analyzing the legal issues, it must be recognised that there are a number of legal justifications which can be made under GATT rule exceptions, for certain ERA's. The most significant such legal exception is that of GATT Article XIX, the escape clause. Although it is not clear that Article XIX would legally justify an exporting nations deviation from GATT Article XI, nevertheless there is at least a plausible argument that it does so. Clearly ERA's are an important part of the general "safeguards" subject. This once again points to the need of a negotiated rule discipline that will explicitly

constrain the temptation to frequently use ERA's as a trade policy measure.

1. The author wishes to acknowledge the able assistance of Thijs Alexander and Ross Denton, University of Michigan post graduate students in law from the Netherlands and the United Kingdom, during 1987-1988.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat.A1 (Pts. V, VI), T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948) [Hereinafter cited as GATT] See, generally, John H. Jackson, "World Trade and the Law of GATT" (Bobbs Merrill Co., 1969) and Jackson and Davey, "Legal Problems of International Economic Relations: Cases, Materials and Text", especially pages 609-621. (2d ed., West Publishing Co., 1986)

3. Although the GATT agreement does not provide much institutional structure, Article XXV provides for Contracting Parties acting jointly. Moreover, Article XXX allows amending the GATT, but, because of the stringent vote and procedural requirements, the GATT is often deemed unamendable.

4. Jones, "The Political Economy of Voluntary Export Restraint Agreements", 37 *Kyklos* 82 (1984); Kostecki, "Export-Restraint Arrangements and Trade Liberalization", 10 *World Economy* 425 (1987); M. Morkre and D. Tarr, "Staff Report on Effects of Restrictions on United States Imports: Five Case Studies and Theory" (Washington, Federal Trade Commission, 1980); Greenaway and Hindley, "What Britain Pays For Voluntary Export Restraints" (Trade Policy Research Centre, Thames Essays No. 43, London, 1985); Hamilton, "Economic Aspects of Voluntary Export Restraints" in "Current Issues In International Trade" 99 (Greenaway ed., 1985); Murray, Schmidt and Walter, "On the Equivalence of Import Quotas and Voluntary Export Restraints", 14 *J. of Int'l Econ.* 191 (1983); Takacs, "The Non-Equivalence of Tariffs, Import Quotas and Voluntary Export Restraints". 8 *J. of Int'l Econ.* 565 (1978)

5. See, e.g., Hindley, "Voluntary Export Restraints and the GATT's Main Escape Clause", 3 *World Economy* 313 (1980); Petersmann, "Grey Area Trade Policy and the Rule of Law," *J.W.T.L.* (April 1988); Sauermilch, "Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade", 14 *Case W. Res. J. of Int'l L.* 83 (1982); Savage and Horlick, "United States Voluntary Restraint Agreements: Practical Considerations and Policy Recommendations", *XXI Stanford J. of Int'l Law* 281 (1985); Jan Tumlrir, "Protectionism: Trade Policy in Democratic Societies" (American Enterprise Institute, Washington, 1985)

6. See, e.g., Sec. 203 of the US Trade Act of 1974, 19 USC 2253(a) (1982)

7. See, *infra*, note 12.

8. See *infra* IV B, text accompanying note 35
9. See *infra* IV C, text accompanying notes 36-39
10. An example of this may be the Japanese acceptance of the Multi Fibre Arrangement in exchange for the reversion of Okinawa. see, generally, David B. Yoffie, "Power and Protectionism: Strategies of the Newly Industrializing Countries" 135-138 (Columbia University Press, New York, 1983). On the Issue of coercion, see also Hindley, *supra* note 5, 331-332 (1980)
11. Besides provisions regarding official import monopolies (Article II(4)) and state trading companies (Article XVII(1)(b)), which can still be regarded to be within the public domain, the only type of private behavior alluded to in the GATT is dumping. The GATT, however, does not prohibit dumping, but merely regulates the control of dumping by governments. (Article VI)
12. See, generally, Waller, "Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond", 14 *Law & Pol'y Int'l Bus.* 747 (1982); Lochmann, "The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws", 27 *Harv. Int'l L.J.* 99, 141-149 (1986); deKieffer, "Antitrust and the Japanese Auto Quotas", 8 *Brooklyn J.Int'l L.* 59 (1982); Matsushita and Repeta, "Restricting the Supply of Japanese Automobiles: Sovereign Compulsion or Sovereign Collusion", 14 *Case W. Res. J. Int'l L.* 47 (1982); and Hawk, "United States, Common Market and International Antitrust: A Comparative Guide" 300-106, 578-609, and 614-636 (Prentice Hall Law & Business, 1986)
13. See, e.g., *Consumers Union of the U.S. v. Kissinger*, 506 F.2d 136 (D.C.Cir. 1974), cert. denied, 421 U.S. 1004 (1975).
14. Havana charter ch. V, U.N. Doc. ICITO/1/4 (April 1948)
15. On the history of GATT, see John. H. Jackson, *supra* note 2, Ch. 2.
16. The Contracting Parties adopted a report by a group of experts in which the majority considered that it would be unrealistic to recommend a multilateral agreement for the control of international restrictive business practices, because "(t)he necessary consensus among countries upon which such an agreement could be based did not yet exist", GATT, 9th Supp. BISD 170, 171 (1961). See, generally, GATT, *Restrictive Business Practices*, Sales No. GATT/1959-2. The majority of the group of experts furthermore felt that they, as experts on restrictive business practices rather than on the legal aspects of GATT, were incompetent to judge whether these practices could be deemed to fall under any specific provisions of GATT. See also, John H. Jackson, *supra* note 2, § 14.1.

17. The most important in this context are the OECD and the UNCTAD Codes. See, generally, Barry Hawk, *supra* note 12, at 786-802; Joel Davidow, "The Implementation of International Antitrust Principles", in "Emerging Standards of International Trade and Investment", (S.J. Rubin and G.C. Hufbauer eds., Rowman & Allanheld 1984); "Legal Problems of Codes of Conduct for Multinational Enterprises" (N. Horn ed., Kluwer 1980)

18. GATT Contracting Parties, *The Use of Quantitative Restrictions for Protective and Other Commercial Purposes* 9 (Geneva, 1950)

19. It should be realized that the Most Favored Nation obligation of Article I is probably not broad enough to cover quotas. See John H. Jackson, *supra* note 2, at 322.

20. GATT Article XIII(2)(d); see John H. Jackson, *supra* note 2, at 322-327.

21. KostECKI, *supra* note 4, at 441; Sauermilch, *supra* note 5, at 116.

22. *Ibid.*

23. See, *supra*, note 16. On the issue whether the contracting parties intended to create a general elimination of quotas, see G. Curzon, "Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques" 130-135 (Michael Joseph Ltd., 1965) and W. Brown, "The United States and the Restoration of World Trade" 75-78 (Brookings Institutions, 1950)

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

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

26. Article 41 of the 1969 Vienna Convention on the Law of Treaties provides that :

"Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which

and purpose of the treaty as a whole."

27. Petersmann, *supra* note 5

28. Hindley, *supra* note 5, at 329.

29. See, *supra* note 13; After the antitrust issue was dismissed the case centered around the question whether the U.S. State Department officials had acted *ultra vires* in seeking the export limitations. The Court held that such was not the case, since the action by the Executive was lacking any "legally binding effects". See also *Sneaker Circus, Inc. v. Canter*, 457 F. Supp. 771 (E.D.N.Y. 1978).

30. If a GATT panel finds a *prima facie* nullification or impairment, e.g. in the case of a violation of a GATT obligation, it will normally recommend cessation of the measure complained against, unless the offending nation is able to carry the burden of proof against such recommendation, including a burden of proof that no nullification or impairment has occurred. See, generally, John H. Jackson and William Davey, *supra* note 2, at 351.

31. See, e.g., the E.C. complaint in GATT over the US-Japan Chips Agreement, 3 BNA Int'l Trade Rep. 1244 (Oct. 15, 1986); and the 1976 complaint (rejected) under the U.S. Section 301 procedure in which U.S. steel interests complained against an EEC-Japan ERA, see Jackson and Davey, *supra* note 2, at 809.

32. See, e.g., E.C. protest against U.S. warnings regarding imports of machine tools into the U.S., 4 BNA Int'l Trade Rep. 12 (Jan. 7, 1987)

33. 3 BNA Int'l Trade Rep. 1012 (Aug. 6, 1986) and 1244 (Oct. 15, 1986)

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

35. See, e.g., Hindley, *supra* note 5, at 328-332.

36. See M. Bronckers, "Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law" (1985); Koulen, "The Non-discriminatory application of GATT Article XIX(i): A Reply", *Legal Issues of European Integration* 89 (1983); Petersmann, "Economic, Legal and Political Functions of the Principle of Non-discrimination" (Book Review), 9 *World Economy* 113 (1986); and John H. Jackson and William Davey, *supra* note 2, at 428-435.

37. Robertson, *supra* note 34, at 23.

38. See, e.g., Japanese Voluntary Restraints on Auto Exports to the United States: Hearings before the Subcomm. on Trade of the House Committee on Ways and Means, 99th Cong., 1st Sess. 17,18 (1985) (Statement of Michael B. Smith, acting USTR); Hindley, supra note 5, at 327.

39. See, e.g., The Legacy of the Japanese Voluntary Export Restraints, Hearing before the Subcomm. on Trade, Productivity and Economic Growth of the Joint Economic Comm., 99th Con., 1st Sess. 78, 79 (1985) (Statement of G.C. Hufbauer); Bergsten, Elliot, Schott and Takacs, "Auction Quotas and the United States Trade Policy", 19 Pol'y Analyses in Int'l Econ. (I.I.E. Washington, 1987)

40. Auction quotas may raise difficult problems with regard to several GATT provisions, particularly the Articles II, VIII and XIII, the GATT Licensing Code and even the "Standstill" commitment of the Punta del Este Declaration. For a discussion of the GATT-consistency of auction quotas, see Bergsten, Elliot, Schott and Takacs, supra note 39, at 125-145.

41. Article 1(b) of the Protocol of Provisional Application of the General Agreement of Tariffs and Trade (55 U.N.T.S. 308 (1947)) exempts the contracting parties from certain obligations that are inconsistent with prior legislation.

42. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 7 (Geneva 1979), reprinted in GATT, 26th Supp. BISD 171-188 (1980)

43. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Article 4 (Geneva 1979), reprinted in GATT, 26th Supp. BISD 56-83 (1980)

44. See, e.g., Issues Relating to the Domestic Auto Industry: Hearings before the Subcomm. on International Trade of the Senate Finance Comm. (pte.II), 97th Cong., 1st Sess. 88 (1981) (Statement of Paul J. Fannin, Former U.S. Senator) and Lochmann, supra note 12, at 118-119.

