

IS TAIWAN READY FOR THE CHALLENGE OF THE WTO?

--- *AN EXAMINATION OF TAIWAN'S IMPORT SAFEGUARD CLAUSES*

FROM A COMPARATIVE PERSPECTIVE

by

HSIAO-TING CHEN

LL.B., The National Taiwan University, 1998

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

Faculty of Law

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

April 2000

© Hsiao-Ting Chen, 2000

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Faculty
~~Department~~ of Law

The University of British Columbia
Vancouver, Canada

Date April 26, 2000

ABSTRACT

The Agreement Establishing the World Trade Organization (WTO) came into force on January 1, 1995. Its comprehensive scope will hasten the trade liberalization process and facilitate world trade in the future. On the other hand, it is possible that some domestic industries will face stringent and unexpected competition from their foreign counterparts. Consequently, an import safeguard clause is arguably necessary to function as a safety valve to alleviate the shock of trade liberalization. Such a clause could provide a means by which domestic industries are able to make structural adjustments to compete with foreign businesses successfully in the long term.

Given the importance of developing an effective import relief system, the primary purpose of this thesis is to provide a useful analysis of and concrete suggestions for new safeguard rules for Taiwan, in accordance with the norms of GATT/WTO. Reference will also be made to the safeguard systems and related rules and policies of the European Union and the United States, which have long-standing safeguard systems. Through comparison, this research will evaluate whether the new safeguard rules of Taiwan contain any inappropriate provisions and whether the legislation is sufficient to meet the challenges anticipated after Taiwan joins the WTO. The research will also discuss whether it is appropriate for Taiwan to emulate the same safeguard rules of other selected countries (like the U.S. and EU) to solve related problems, or whether such rules need to be changed to suit the economic situation of Taiwan.

In general, the current import safeguard clauses of Taiwan are consistent with WTO principles, although there are some procedures that probably need to be amended. Reinforcing trade adjustment assistance and establishing dispute settlement channels should also be the focus of future improvements for Taiwan's import safeguard system.

TABLE OF CONTENTS

ABSTRACT	ii
TABLE OF CONTENTS	iii
LIST OF TABLES	vi
ACKNOWLEDGMENT	vii
CHAPTER 1 INTRODUCTION	1
CHAPTER 2 TRADE LIBERALIZATION, INDUSTRIAL ADJUSTMENT AND IMPORT RELIEF	7
I. The Conflicts between Industrial Adjustment and Trade Liberalization	7
II. The Rationale for the Safeguard Clause	10
CHAPTER 3 THE SAFEGUARD CLAUSE IN THE GATT/WTO MECHANISMS	13
I. The rules and procedures of Article XIX of the GATT	13
A. <i>Origin of Article XIX</i>	13
B. <i>Application</i>	14
1. Substantial requirements	14
2. Procedural requirements	18
C. <i>Experiences of applying Article XIX</i>	20
II. The Agreement on Safeguards in the Uruguay Round	23
A. <i>The flaws of Article XIX and the Uruguay Round Reforms</i>	23

<i>B. The application of the WTO Agreement on Safeguards and Article XIX</i>	33
<i>C. Other safeguard clauses in specific areas</i>	34
III. Conclusion	37

CHAPTER 4 THE ANALYSIS AND COMPARISON OF SAFEGUARD MEASURES IN THE U.S. AND THE EU

I. The Evolution of Safeguard Measures in the United States and the European Union	42
<i>A. United States</i>	42
<i>B. European Union</i>	45
II. A Comparison between Safeguard Measures in the United States and the EU	46
III. Dispute Settlement in Safeguard Cases	69
IV. Conclusion	73

CHAPTER 5 THE IMPACTS ON TAIWAN'S LOCAL INDUSTRIES AND IMPORT RELIEF AFTER JOINING THE WTO

I. Background and history of trade liberalization in Taiwan	77
<i>A. The history of trade liberalization in Taiwan (1950 to the present)</i>	77
<i>B. Why Taiwan should join WTO</i>	85
<i>C. The process of Taiwan joining the WTO</i>	88
II. The impacts and challenges to Taiwan's local industries after its joining the WTO	89

A. <i>Impacts and potential challenges to local industries after Taiwan's entry</i>	89
B. <i>The necessity of an import relief system for Taiwan's local industries</i>	94
C. <i>Special economic issues between Taiwan and the PRC after both become WTO members</i>	96
III. The import relief system of Taiwan	101
A. <i>An analysis of the import relief system of Taiwan – the <u>Foreign Trade Act</u>, the <u>Rules for Handling Import Relief Cases</u> and the <u>Rules for Relieving Import Injury of Agricultural Products</u></i>	101
1. <i>Origins</i>	101
2. <i>Analysis of the Rules for Handling Import Relief Cases</i>	105
3. <i>Rules for Relieving Import Injury of Agricultural Products</i>	121
B. <i>The effect of practice</i>	122
IV. Comparing the divergences of safeguard measures between Taiwan and other countries	123
V. Suggestions to improve the current import relief system of Taiwan	128
CHAPTER 6 CONCLUSION	142
BIBLIOGRAPHY	148
APPENDIX 1	160

LIST OF TABLES

TABLE 1	FREQUENCY OF GATT ARTICLE XIX ACTIONS, 1950-1988	22
TABLE 2	THE FACTORS OF DETERMINING SERIOUS INJURY	57
TABLE 3	TYPES OF IMPORT RELIEF IN U.S. AND EU	63
TABLE 4	TAIWAN: ECONOMIC INDICES	83
TABLE 5	TAIWAN: TRADE STATISTICS	84
TABLE 6	TAIWAN'S CONCESSIONS FOR ENTERING THE WTO	93
TABLE 7	TRADE FLOW STATISTICS BETWEEN TAIWAN AND CHINA	99
TABLE 8	IMPORT RELIEF CASES OF THE RRIAP	123
TABLE 9	COMPARISONS OF THE SAFEGUARD CLAUSES	125

ACKNOWLEDGMENT

I would like to thank the University of British Columbia Law Faculty, particularly Professor Robert Paterson and Professor Pitman Potter, for their valuable comments and supports. I am very grateful to my special friend in Taiwan, Chung-I Lin, who has helped me to collect Taiwan's materials and information in connection with this project. I would also like to thank Irene U. Plett, for her careful and patient writing assistance. My friends in UBC, including Chia-Chi Lin, Amy Liao and Shuguang Dong, have also given me many supports and encouragements.

Finally, I would like to thank my parents, without their supports, this work would not have been possible.

Hsiao-Ting Chen

Vancouver

April 2000

Is Taiwan ready for the challenge of the WTO?

-- *An examination of Taiwan's import safeguard clauses
from a comparative perspective*

By Hsiao-Ting Chen

Chapter 1 Introduction

Taiwan's Foreign Trade Act was first promulgated in February 1993. With this legislation, Taiwan's government finally had a legal source for establishing and implementing its own trade policies and strategies.¹ It also was significant that Taiwan was establishing rules for its trade, which would apply once it becomes a member of the World Trade Organization ("WTO").² In particular, Article 18 of the Foreign Trade Act³ is thought to have a positive function in protecting domestic industries facing severe competition from imports. The import safeguard system set up by Article 18 might help Taiwan effectively deal with threats resulting from foreign competition, and avoid possible economic injuries, while promoting trade policies that would meet

¹ The Foreign Trade Act is the principle regulatory instrument for Taiwan's foreign trade. It contains 37 articles and has been revised twice (in 1993 and 1997). The Act endows administrative agencies authority to establish various kinds of trade regulations, for example Rules for Handling Import Relief Cases and Implementing Regulation on the Imposition of Countervailing and Antidumping Duties. See International Trade Commission of the Ministry of Economic Affairs, *Related Import Relief Regulations (Xiang Guan Jin Kou Jiu Ji Gui Ding)* (Taiwan, ROC: The Ministry of Economic Affairs, 1998) at 1.

² "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand," over 125 states created the WTO on April 15, 1994. GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in 33 I.L.M. 1125, 1144 (1994). The first day of WTO operation was January 1, 1995. See David E. Sanger, U.S. Threatens \$2.8 Billion of Tariffs on China World Trade Exports, N.Y. Times, Jan. 1, 1995, at 14.

³ Article 18, para 1 of Foreign Trade Act: "In case of the increase in the import volume of a commodity causing or threatening to cause serious injury to the domestic industry which produces like or directly competitive products, the authority in charge of the said industry, the said industry, its associations, or related organizations may apply to the competent authority for investigation of the injury and for import relief."

international demands for trade liberalization on the part of Taiwan.

Therefore, based on the authority of the Foreign Trade Act,⁴ Taiwan passed its first safeguard clause — Rules for Handling Import Relief Cases — in 1994, renewing it in December 1998.⁵ The original idea for establishing such a clause referred to the norms of the WTO and the experience of other advanced trading partners such as the United States and the European Union.⁶ The safeguard clause originally contained in Article XIX of the General Agreement on Tariffs and Trade (“GATT”)⁷ authorized temporary import restrictions if imports of a particular product caused or threatened to cause serious injury to a competing domestic industry. Safeguards are distinct from other trade remedies such as anti-dumping, countervailing laws and other unfair trade practices. Safeguards deal with fair competition that simply becomes too powerful. Domestic industries can seek to apply the safeguard clause to obtain temporary protection, and use this relief to adjust their internal structures and competitiveness. The safeguard clause plays a positive role in the process of trade liberalization, because its purpose is not only to protect industries, but also to provide an opportunity for industries to promote their own capabilities.

⁴ Article 18, para. 3 of Foreign Trade Act authorizes the Ministry of Economic Affairs (hereafter the MOEA) to draft regulations governing the process of applications for import relief. Then the MOEA should submit the draft to the Executive Yuan for approval and subsequent promulgation.

⁵ Rules for Handling Import Relief Cases (Huo Pin Jin Kou Jiu Ji An Jian Chu Li Ban Fa) was first promulgated by the Executive Yuan in 1994 and contains 29 articles. See International Trade Commission of the Ministry of Economic Affairs, *supra* note 1, at 14.

⁶ International Trade Commission of the Ministry of Economic Affairs, *Rules for Handling Import Relief Cases: legislative purpose and introduction* (Huo Pin Jin Kou Jiu Ji An Jian Chu Li Ban Fa: Li Fa Mu Di Ji Jie Shao) (Taiwan, ROC: The Ministry of Economic Affairs, October 1994) at 1.

⁷ GATT, opened for signature, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. GATT was further modified and supplemented and was adopted as Annex 1A of the WTO Charter. 33 I.L.M. 1125, 1127 (1994).

To date, Taiwan is still not a member but only an observer in the WTO.⁸ Motivated by a desire to enter this economic organization as soon as possible, Taiwan's government has struggled to make bilateral and multilateral trade agreements with many countries over the years. Moreover, Taiwan has also had to reform its trade-related laws to meet the requirements for entering the WTO.⁹ Since Taiwan's economic policies tended to open up its internal markets, especially in past decades, various industries have protested against freer trade policies and expressed concerns about their profitability. This situation resulted in many political tensions. As a result, an import relief system can be seen as having a positive role in protecting Taiwan's local industries as they proceed on their way to liberalization.¹⁰

Even though the Rules for Handling Import Relief Cases have already been

⁸ In early 1965 Taiwan requested and was granted observer status at sessions of the General Agreement on Tariffs and Trade (GATT 1947). In 1971, this status was removed, following a decision by the UN General Assembly that recognized the People's Republic as the only legitimate government of China. In 1946, China's Nationalist Party, also called the Kuomintang (KMT) government, using the name of the Republic of China (ROC), joined the preparatory committee of the International Trade Organization which was held in London. In 1947, ROC signed the GATT agreement and became one of 23 original Contracting Parties to GATT. However, in 1949, the Chinese Communist Party founded the People's Republic of China (PRC) and the KMT government was defeated and fled to Taiwan Island. Mainland China was overtaken by the Chinese Communist Party after that civil war. Since Taiwanese authorities could not effectively fulfill their obligations to GATT (including the areas of Mainland China) and since Taiwan's exports were few at that time, Taiwanese authorities notified the United Nations that China would withdraw from GATT in 1950. In 1965, Taiwan was once again permitted to join the activities of GATT as an observer. However, in 1971 Taiwan lost its political status in the United Nations and was not recognized as a representative of China and Communist China became the only legitimate representative of China in the UN. GATT referred to the UN's decision and then cancelled Taiwan's observer status in GATT. Following the quick economic development of Taiwan, Taiwan officially began an attempt to re-join GATT in 1987. On January 1, 1990, Taiwan submitted its formal application to join the GATT and was granted as an observer status. After the WTO entered into force in 1995, Taiwan also changed the direction of its application process with the WTO. See Y. Feng, "Taiwan and GATT" (1990) 13:1 World Econ. 129; Board of Foreign Trade, the Ministry of Economic Affairs, Taiwan, ROC, "The Present Schedule of Taiwan's Entry to the WTO" (March 2000).

See http://www.moeaboft.gov.tw/global_org/wto/wto_index.htm.

⁹ Tsai Ying-Wen, "Legal and Economic Transformation After Taiwan Enters the WTO (Taiwan Jia Ru WTO Hou Di Fa Lv Han Jing Ji Bian Ge)" (1997) 213 Lawyer Magazin 2-3.

¹⁰ Huang Zhi-Hui, "The Evolution and Development of Import Relief System (Jin Kou Jiu Ji Zhi Du Zhi Fa Zhan Han Yan Jin)" (1995) 30 Export Processing Zone Concentrates 10.

revised once, the import safeguard system of Taiwan remains a very new field for Taiwanese industries. Until now, no domestic industry has applied for this relief.¹¹ Therefore, the practical application of import safeguards in the future may be fraught with difficulties. Some contents of the safeguard rules still remain debatable; the special safeguard mechanism is not very mature. Some related regulations, for example, adjustment policies, have not yet been established or are still only draft regulations. Furthermore, the connections between these safeguard rules, their procedures, and the systems of investigation are still unclear.

The primary purpose of this thesis is to provide a useful analysis of and concrete suggestions for the new import safeguard rules of Taiwan, in accordance with the norms in GATT/WTO. Reference will also be made to the safeguard systems and related rules and policies in the EU and the U.S., which have long-standing safeguard systems. My research will focus on the importance of a reasonable and constructive safeguard clause. The role and positive functions of safeguard measures are expected to be clarified. I will evaluate whether the new safeguard rules of Taiwan contain any inappropriate provisions and whether the legislation is sufficient to meet the challenges anticipated after Taiwan joins the WTO. My research will compare safeguard measures of Taiwan and other countries, and discuss whether it is suitable for Taiwan to emulate the same safeguard rules of those countries to solve related problems, or whether the rules need to be changed to suit the economic situation of Taiwan. A further purpose of this research is to attempt to contribute some useful ideas for reforming or

¹¹ The International Trade Commission of Ministry of Economic Affairs, Taiwan, ROC, Investigation Cases: Safeguards, see <http://www.moeaitc.gov.tw/itc-e/investigation/index.htm>.

counteracting the shortcomings of the existing safeguard rules of Taiwan. Possible solutions to disputes in import relief cases will also be discussed.

Since this thesis intends to study whether Taiwan's domestic safeguard measures conform to the requirements of GATT and the basic spirit of the Agreement on Safeguards in the WTO, I will use a comparative method to discuss the differences of laws between Taiwan and the GATT/WTO. Further, the European Union and the United States are also selected for comparison as they have used safeguard measures most frequently in past years and have extensive experience with safeguard rules. The EU and the U.S. are also Taiwan's major trading partners. As a result, there are substantial advantages in examining the safeguard measures of these countries. Some specialized topics will be considered to construct the comparison: transparency, the injury standard, types of safeguards, objects, the duration of a safeguard action, progressive liberalization, industry adjustments and notification and consultation. Related import relief regulations, articles, statistics, cases and materials in the GATT/WTO, European Union, United States and Taiwan will be used in this study.

The structure of this research is as follows: Chapter One will explain the purpose, motive, scope and method of this thesis. Chapter Two will discuss the relationships between trade liberalization, industry adjustment, and safeguard measures. Chapter Three will analyze Article XIX of the GATT and the WTO Agreement on Safeguards. Safeguard provisions in special areas, such as agriculture, textiles, and services, will also be discussed. The flaws of and improvements to Article XIX will be the focus of this chapter. Chapter Four will examine different domestic safeguard provisions and

safeguard experiences in the U.S. and the EU. Chapter Five, the most important part of the thesis, returns the focus to Taiwan. Firstly, it will introduce the past economic and trade developments in Taiwan and explain the reasons for Taiwan wanting to re-enter the WTO. Secondly, it will discuss the potential impacts on domestic industries following Taiwan's entry, and special economic matters in relation to China (the People's Republic of China, "PRC") concerning WTO issues. Finally, based on the discussions in the former chapters, the thesis will examine the safeguard rules in Taiwan from a comparative perspective, analyzing possible weaknesses of the new safeguard rules of Taiwan and considering the possibilities for the reform of these laws.

Chapter 2

Trade Liberalization, Industrial Adjustment and Import Relief

I. The Conflicts between Industrial Adjustment and Trade Liberalization

According to liberal economic theory, free trade allows countries to specialize their productions based on comparative advantages thereby increasing the efficiency of resource utilization and promoting the welfare of their citizens.¹² Through the process of trade liberalization, trade restraints should gradually be eliminated to make domestic markets more open. Trade liberalization not only helps a country to create a competitive environment in the form of an open market, but also enables suppliers to improve their productivity and their management abilities. With less political or other artificial interference in production choices, producers can produce goods efficiently. Thus, people in every location can expect to pay less for the goods they consume.¹³ The welfare of the people of the entire world can be enhanced.

These kinds of ideals can also be seen in the purpose of GATT/WTO. The GATT agreement states that "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of

¹² Michael J. Trebilcock and Thomas M. Boddez, "The Case for Liberalizing North American Trade Remedy Laws" (1995) 4:1 Minn. J. Global Trade 9-10; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Savage, Md.: Rowman & Littlefield, 1993).

¹³ See generally D. Snider, *Introduction to International Economics* (Homewood, Ill.: R. D. Irwin, 1979) at 19-92.

goods.”¹⁴ The WTO Agreement refers to additional objectives, such as optimal use of the world’s resources, sustainable development, environment protection, and special consideration for developing countries. Reciprocal and non-discriminatory principles are also stressed as part of the WTO’s goal to reduce tariffs and other barriers for the purpose of trade liberalization.¹⁵ By considering these ideals, we can understand the expected advantages and possible economic developments that free trade will bring.

In order to obtain the most benefits to the economy in a free trade environment open to international competition, every country must increase its own competitiveness to maximize its comparative advantage.¹⁶ However, following the transformation of domestic productive factors, industrial adjustment has become a necessary step in the process of raising competitiveness. On the one hand, the government should encourage industries that are more competitive to compete with foreign producers but, on the other hand, the government may also want to help weaker industries that are undergoing technical or productive transformations. The removal of trade barriers usually results in protests from weaker industries that do not want to make the necessary adjustments. As adjustment measures sometimes take the form of closing down a “sunset industry”¹⁷ altogether increase in unemployment, the resultant will likely create political stress for the domestic government. Weak industries may frequently use their political power to affect government policies to prohibit or limit foreign competitive products. Nowadays,

¹⁴ GATT Preamble, legal text see <http://www.wto.org/wto/legal/finalact.htm>.

¹⁵ Agreement Establishing the World Trade Organization (WTO Agreement), legal text see <http://www.wto.org/wto/legal/finalact.htm>.

¹⁶ Bergsten & Cline, “Trade Policy in the 1980’s: An Overview” in *Trade Policy In The 1980s* (Washington, DC: Institute for International Economics, 1983) at 59-61.

¹⁷ A sunset industry is an industry growing slowly or declining.

such prohibitions or limitations usually need to use the exceptions or escape clauses that are permitted under the WTO to achieve their purpose.

Generally speaking, the aim of the WTO is to achieve global trade liberalization through the reduction of tariffs, the elimination of other trade barriers and the prohibition of discrimination against foreign goods. Members must also abide by the principles of most-favoured-nation treatment (“MFN”),¹⁸ national treatment,¹⁹ and the ban on quantitative restraints.²⁰

Concessions granted as a result of these agreements can, however, have adverse impacts on domestic markets. On some occasions, the obligations of these agreements may conflict with national policies or impede the pursuit of policy goals. If the situation is emergent, the government may have to derogate or withdraw its obligations from the agreement. Since the WTO now represents the basic rules for the conduct of international trade, every Member must follow its spirit and compete subject to its rules. It is preferable that such steps as derogations or withdrawals from obligations in the WTO should be implemented under specified rules within the agreement, rather than arbitrarily. Without such a procedure, derogations could undermine the faith of other signatories to the agreement, thereby weakening its overall effectiveness.²¹

¹⁸ MFN principle requires a party which offers any country a special reduced tariff must extend the new tariff to all members of the GATT, without demanding any special concession from them in return. See Article I of GATT.

¹⁹ National treatment principle requires domestic laws which affect international trade to treat goods imported from GATT signatories equally on internal taxation and regulation. See Article III of GATT.

²⁰ “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...” See Article XI of GATT.

²¹ David Robertson, *GATT Rules for Emergency Protection*, Thames Essay, No. 57 (London: Trade Policy Research Centre, 1992) at 26.

Under the mechanism of GATT/WTO, there are many provisions that permit signatories to derogate from their international obligations.²² Article XIX of GATT, usually called the safeguard clause, is a very important escape measure for emergency safeguard action on particular products. It helps injured industries adapt to adjustments to the economic structure during periods of severe competition. Article XIX is distinct from other trade remedy measures, such as those aimed at dumping, subsidies and other unfair trade practices. While the anti-dumping and countervailing duty laws are designed to counter existing distortions in efficient trade patterns, the safeguard clause is used to impose restrictions against fairly traded goods.

II. The Rationale for the Safeguard Clause

The objective of temporary protection is arguable not protectionist. On the contrary, the spirit of the safeguard clause is closely related to trade liberalization. Acting as a lubricant, the safeguard clause provides timely relief for governments to reduce excess pressure arising from the process of trade liberalization, thus maintaining their commitment to making trade concessions. Unforeseen developments may result in serious economic and social injuries unless a structure is in place that allows some breathing space for adjustment by the threatened sectors of the domestic economy. Negotiating a balance between economic gain and economic harm involves political risks that test the willingness of governments to open their markets.²³ Concern about

²² These special provisions in the GATT, including Article VI, XI, XII, XVI, XVIII, XIX, XXI, XXIV, XXV, and XXVIII, constitute exceptions to the MFN principle and provide safeguards. Details see Augustin Tan, "Payments Imbalances, Sudden Surges and Safeguards" (1989) 12 World Econ. 326-327.

²³ Alan O. Sykes, "Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause"

such risks could deter governments from making a significant commitment to liberalized trade.²⁴ Accordingly, the existence of a safeguard clause could actually induce governments to enter into international economic agreements.

Using safeguard measures may also involve political interests.²⁵ Although increased imports may cause economic injury to domestic industry, imports would also benefit domestic consumers. Governments cannot resolutely apply import restraints and neglect the interests of domestic consumers. The political influence of domestic industries is usually stronger than that of consumers or importers. In addition, if the social stress of unemployment results from severe import competition, governments may utilize every kind of escape clause to reduce these political risks.

Another rationale for the safeguard clause is based on the concept of positive adjustment.²⁶ A benefit of trade liberalization is that it can invigorate domestic industries, improving their capabilities to meet the new competitive environment. However, it may also result in labour problems or layoffs. Because the benefits of increased imports are shared by the entire nation, it is unfair for some domestic industries to bear the costs of the adjustment on their own. For reasons of equity, the injured industries should be given an appropriate time to adjust their competitiveness.²⁷ Safeguard actions enable those injured industries to invest in new technology and modern equipment which will later allow them to compete successfully in the

with Normative Speculations" (1991) 58 U. Chi. L. Rev. 274-275.

²⁴ Alasdair I. MacBean, "How to Repair the 'Safety Net' of the International Trading System" (1978) 1 World Econ. 150-152.

²⁵ *Id.*, at 151.

²⁶ George D. Holliday, "The Uruguay Round's Agreement on Safeguards" (1995) 29 Journal of World Trade 156.

²⁷ Charles P. Kindleberger, *International Economics* (Homewood, Ill.: R.D. Irwin, 1973) at 113.

international marketplace. This is the economic reason for applying safeguard measures.²⁸

A vivid description of the features of the safeguard clause has been made by Martin Wolf, who explains the rationale of this provision:

An international agreement to liberalize trade needs a strong boiler to contain the protectionist steam, but there must be an effective safety valve, too, for those times when the pressure gets too great and the alternative to controlled escape would simply be an uncontrolled explosion. Without safeguards there would be little liberalization; with safeguards that are too readily available, the liberalization would be worth little.²⁹

The safeguard clause, described as a "safety valve" by Wolf, can guard the passage toward liberalization, preventing protectionism from getting out of hand and thus undermining the multilateral trade agreements. On this basis, safeguards only allow legitimate escapes in particular situations. In other words, the safeguard clause should be seen as a legitimate tool to facilitate trade liberalization and not a weapon of protectionism.

²⁸ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (The University of Michigan Press, 1989) at 150. However, some scholars questioned this positive function and argued that safeguard actions result in a lot of adjustment costs. Discussions see Michael J. Trebilcock and Thomas M. Boddez, *supra* note 12, at 20-21; see also Alan O. Sykes, *supra* note 23, at 263-265.

²⁹ Martin Wolf, *Emergency Protection and its Selective Application, The European Community and the Uruguay Round Negotiations* (London: Macmillan, 1986).

Chapter 3

The Safeguard Clause in the GATT/WTO Mechanisms

As noted above, the safeguard clause plays an important role in an import relief system. Safeguard measures were previously nothing more than various measures of import restraints (e.g. tariffs and quantity restraints). However, after the safeguard clause was revised, it not only preserved the original nature of import relief, but also enhanced the function of industry adjustment. This kind of transformation separated the safeguard clause to some extent from protectionism, which concentrates on import restraint measures. It also gave the safeguard clause more positive meanings.

Based on such recognition of the meaning of safeguards, this chapter will focus on the background, evolution, substantive and procedural requirements, flaws and possible changes relating to the safeguard clause. This chapter will also analyze Article XIX of GATT and the WTO Agreement on Safeguards.

I. The rules and procedures of Article XIX of the GATT

A. Origin of Article XIX

The United States was the moving force behind the inclusion of an emergency provision in the Havana ITO Charter (Article 40)³⁰ and in Article XIX of the GATT.

³⁰ Wilcox C., *A Charter for World Trade* (New York: Macmillan Co., 1949) at 182-183. The negotiations for creation of a new trading system, the International Trade Organization (ITO), were originally discussed at the Bretton Woods Conference but did not begin in earnest until after the United Nations adopted a resolution to draft the ITO Charter in 1946. The ITO was intended to be a permanent organization that would govern international trade, enforce rules against unfair trade barriers and

With the failure of the ITO, however, the text of the safeguard clause contained within GATT then became operative.³¹ Since it was pressure from the U.S. that produced Article XIX of the GATT, it was to a large extent based on the development of the escape clause in U.S. treaty practice and federal laws.³²

B. Application

1. Substantial requirements

In general, the content of Article XIX is quite brief and vague (See Appendix 1). As one of the leading legal authorities on the GATT has stated, "the language of Article XIX is extraordinarily oblique, even for the GATT language, and interpretations of it are often explainable only by reference to the historical development of the language and the practice under it."³³ This lack of precision facilitated many grey area measures, and undermined the mechanism of the GATT. Thus, it is useful to analyze the text of Article XIX before discussing its weaknesses.

practices, and settle trade disputes between member nations much as the WTO does today. The draft ITO Charter, also called Havana Charter, was ultimately submitted to the nations for ratification but the U.S. Congress refused to approve it. Subsequently, no other nation desired to enter the ITO. By default, the GATT, which was initially intended to apply provisionally for several years and then be submitted to control of the ITO, became the dominant treaty system. Havana Charter was opened for signature on Mar. 24, 1948, reprinted in United Nations Conference on Trade and Employment: Final Acts and Related Documents 3, 47 UN Doc. ICITO/1/4 (1948). See also Sylvia Ostry, "China and the WTO: The Transparency Issue" (1998) 3 UCLA J. Int'l L. & Foreign Aff. 1-2.

³¹ J. Jackson, *World Trade and the Law of GATT* ch.23 (Indianapolis: Bobbs-Merrill, 1969) at 553-554.

³² The first escape clause was established in a 1942 trade agreement between U.S. and Mexico. During 1945-46, U.S. proposals for the ITO Charter contained a provision patterned closely after the escape clause in that 1942 agreement. Otherwise, the inclusion of such an escape clause was a significant factor in U.S. Congress' action in 1945 to authorize U.S. participation in the GATT. See Jackson, *Id.* at 553. See also Jorge F. Perez-Lopez, "GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries" (1991) 23 Case W. Res. J. of Int'l L. 520.

³³ See Jackson, *supra* note 31, at 557.

Some substantial prerequisites must be met for importing countries invoking Article XIX:

1. “Products are imported into its [the importers] territory in increased quantities.”

This prerequisite is usually not difficult to meet because of the availability of statistics. The phrase “increased quantities” has been interpreted as including an “increase relative to domestic production.”³⁴ Therefore, it is possible to invoke Article XIX in a situation in which domestic production of an imported commodity and the imports of the commodity both decrease, but the proportion of imports compared to domestic production increases.

2. The increased imports are a result both of an “unforeseen development” and an “obligation incurred under GATT”.

The meaning of this requirement has been little discussed since the Hatters’ Fur case. In that case, Czechoslovakia challenged the U.S.’ withdrawal of a negotiated trade concession for hatters’ furs. Czechoslovakia argued that the change in fashion regarding women’s hats could be foreseen, so the U.S. could not invoke Article XIX. However, the GATT Working Party felt that although

³⁴ A Working Party report adopted at the Second Session of the GATT Contracting Parties in Sep. 1948 stated that the meaning of increased quantities should include the relative increase. See GATT BISD V.2, p.44-45 (1952); in Havana Charter, Art. 40, the meaning of relative increase is also included. See GATT/1970-1, p.106, cited by Patrizio Merciai, “Safeguard Measures in GATT” (1981) 15 J. World Trade L. 44.

fashions are subject to constant change and the United States had known this when it granted the trade concession, it could not have foreseen the degree to which the fashion change would lead to increased imports. In the final result, the GATT Working Party concluded that the U.S. had satisfied the "unforeseen development" criteria.

Further, if we examine the logic of the argument made by the U.S. in this case, it can be concluded that any injury resulting from a trade concession can be thought of as "unforeseen." As the U.S. government argued: "it was impossible for a state to make concessions in the situation in which serious injuries were predicted to occur."³⁵ In other words, if a country is willing to make a trade concession, it is obvious that this country cannot predict any serious injury that could arise. Therefore, the term "unforeseen development" in Article XIX does not have any practical function. Since the Hatters' Fur Case, nations can apparently justify safeguards based on any substantial increase in imports, even foreseeable increases, because the degree of a given import's impact will always be "unforeseeable".

As for the term "GATT obligations," Article XIX does not clearly specify which obligations should be included. Based on the report of the GATT Preparatory Committee, "GATT obligations" include not only the obligation of tariff reduction mentioned in Article XIX, but also the obligation to eliminate or

³⁵ See J. H. Jackson & W. J. Davey, *Legal Problems of International Economic Relations* (St. Paul, Minn.: West Pub. Co., 1986) at 556.

reduce quantity restraints.³⁶

3. "The increased imports cause or threaten to cause serious injury to domestic producers of like or directly competitive products."

The term of "serious injury" in Article XIX is inherently ambiguous, and thus the country invoking the safeguard clause has a relatively easy time defending itself on this issue. In order to understand what are the standards for a "serious injury," a case-by-case analysis is required. Some commentators think that the "material injury" language in GATT Article VI is something less than the "serious injury" requirement in Article XIX as to the required degree of injury.³⁷ If there were more objective criteria, Contracting Parties could perhaps feel that safeguard measures were less arbitrary and selective.

As for the domestic producer, Article XIX cannot be invoked where imports of a product merely prevent a domestic manufacturer from establishing a new industry. For example in the Hatters' Fur Case³⁸, the GATT Working Party implied that domestic producers already existed in the market when the prejudice

³⁶ London Report, First Session of the Preparatory Committee (1946) at 10.

³⁷ Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan for the Trade Policy Research Centre, 1980) at 78. Besides, the GATT Group of Experts thought that the concept of material injury is equivalent to that of substantial injury. But the Trade Committee of OECD did not agree with that and thought that such interpretation may limit the possibility of determining an injury. See J. F. Beseler and A. N. Williams, *Anti-dumping and Anti-Subsidy Law: The European Communities* (London: Sweet & Maxwell, 1986) at 160. Refer to U.S. views, the term "material injury" is generally defined "harm which is not inconsequential, immaterial, or unimportant;" the term "serious injury" is defined as "a significant overall impairment in the position of a domestic industry." The U.S. Congress also adopted a lower standard to explain the meaning of "material injury." See S. Rep. No. 249, 96th Cong., 1st Sess. 90-91(1979); Trade Agreement Act of 1979, Pub. L. No. 96-39, 93 Stat. 133(1979), 101, 19 U.S.C. §1677(7).

³⁸ J. H. Jackson & W.J. Davey, *supra* note 35, at 559.

occurred.³⁹ However, in a dumping case, a party can seek relief if the establishment of a domestic industry is materially retarded by the product which is imported at abnormal value.⁴⁰

As to causation, Article XIX applies when a serious injury: (1) is related to previous GATT obligations; (2) relates to unforeseen developments; and (3) is the result of increased imports.⁴¹ Article XIX does not specify which party has the onus of proof in a given case. In practice, the GATT Working Parties have sometimes required the exporting country to prove that the safeguard measures taken by the importing country were ill-founded.⁴²

2. Procedural requirements

Before the party invoking Article XIX takes safeguard action, it should notify the contracting parties who have a substantial interest as exporters of the product concerned and provide an opportunity to consult in respect of the proposed action.⁴³ The consultation may include issues of legitimacy of the action, scope of the measures and compensation. The purpose of this requirement is to dissuade the invoking party from preparing safeguards, and also to persuade the exporting party to raise the price of products or export restraints to avoid trade disputes. In critical circumstances, however, a contracting party may take safeguard action instantly without giving written notice to

³⁹ Kenneth W. Dam, *The GATT: Law and The International Economic Organization* (Chicago: University of Chicago Press, 1970) at 101-103.

⁴⁰ GATT, Article VI, paragraph 1.

⁴¹ *Id.*

⁴² Gerald M. Meier, "Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations" (1977) 18 Harv. Int'l L. J. 516.

⁴³ GATT, Article XIX, paragraph 2.

other contracting parties, if the delay might cause damage that is difficult to repair.⁴⁴

If the parties cannot reach agreement during the consultation, the party invoking the escape clause can still take safeguard actions directly. However, the other affected parties can take retaliatory measures at the same time.⁴⁵ To avoid retaliatory action from exporting parties, importing parties taking safeguard actions can compensate them in advance for the anticipated loss.⁴⁶ The purpose of this is to satisfy the spirit of fairness. It can be seen that there are some negative effects for the country invoking safeguards due to the risk of retaliatory action and requests for compensation.

As to the types of safeguard measures, assuming that all of the substantial conditions above have been met, the party invoking Article XIX may suspend a trade obligation in whole or in part, or withdraw or modify a concession.⁴⁷ Also, it is generally thought that quantitative restrictions, raising tariffs, and lessening preferential tariffs also can be used as safeguard measures.⁴⁸ In practice, quantitative restrictions have been imposed about twice as often as the raising of tariffs.⁴⁹

If one wants to apply Article XIX, there are some principles that should be followed: Firstly, it is generally held that the invoking party's measures must not discriminate between exporting countries, in compliance with the most favoured nation

⁴⁴ *Id.*

⁴⁵ GATT, Article XIX, paragraph 3.

⁴⁶ It is accepted that the parties entitled to consultation can accept compensatory "concessions" by the safeguard-acting country. See John H. Jackson, "Export-Restraint Measures and the GATT" (1988) 11 *World Econ.* 495.

⁴⁷ GATT, Article XIX, paragraph 1(a).

⁴⁸ Edmond McGovern, *International Trade Regulation: GATT, the United States and the European Community* (Exeter [Devon]: Globefield Press, 1986) at 292.

⁴⁹ Christopher W. Derrick, "The Evolution of the Escape Clause: The United States' Quest for Effective Relief from Fairly Traded Imports" (1988) 13 *N. C. J. of Int'l L. & Com. Reg.* 350-351.

obligation found in Article I of GATT.⁵⁰ In other words, a safeguard measure must be applied to all imports of a particular product, no matter which country it originates in. Secondly, the withdrawal of the concession must only be “to the extent and, for such time as may be necessary to prevent or remedy” the injury.⁵¹ There is general agreement that safeguard measures are not meant to protect domestic producers for an unlimited period of time.⁵² Instead, they are emergency measures, temporary by definition, and should be progressively liberalized during the period of their application. Thus, Article XIX is not meant to protect domestic industries from the consequences of international free trade indefinitely.

C. *Experiences of applying Article XIX*

Article XIX has not been invoked as often as one might expect. Although GATT was signed in the fall of 1947, the first instance of action under Article XIX was not reported until early 1950. Over the 39-year period from 1950 through 1988, Article XIX was invoked only 138 times.

Analysis of the above statistics reveals that Australia, the U.S., Canada, and the European Economic Community (“EEC”) are the countries which invoked Article XIX most frequently from 1950 to 1988. As of December 1, 1993, only 150 actions under Article XIX were reported to the GATT Secretariat, many of which have already been terminated.⁵³ The average number of applications under Article XIX per year is only

⁵⁰ Alan C. Swan, “The Escape Clause and the Safeguards Wrangle” [1989] B.Y.U. L. Rev. 435.

⁵¹ GATT, Article XIX, paragraph 1(a).

⁵² Swan, *supra* note 50, at 438.

⁵³ GATT Secretariat, *Analytical Index: Guide to GATT Law and Practice* (1994) at 500, cited by Ernesto

3.4. This compares to the much larger numbers of anti-dumping cases: an average of 164 per year.⁵⁴

There are numerous reasons why Article XIX has been infrequently used. Some countries may have perceived that the standard of “serious injury” was too strict. There may have been fears that the consequences of taking safeguard measures – compensation or retaliation – could harm existing trade advantages. Some countries may have strategized that it would be easier and less costly to be selective when taking safeguard actions. Therefore, most countries used other easier and more flexible ways to protect domestic industries than Article XIX, for instance grey area measures (such as voluntary export restraints) or anti-dumping and countervailing duties.⁵⁵

M. Hizon, “The Safeguard Measure / VER Dilemma: The Jekyll and Hyde of Trade Protection” (1994) 15 Nw. J. Int’l L. & Bus. 75, at 109.

⁵⁴ J. Michael Finger, “Legalized Backsliding: Safeguard Provisions in GATT”, in Will Martin and L. Alan Winters ed., *The Uruguay Round and the Developing Countries* (New York: Cambridge University Press, 1996) at 318.

⁵⁵ In 1979-1988, there were only 0.5% cases concerning Article XIX; others were: 76.9% (anti-dumping duties), 18% (countervailing duties), and 4.6% (other escape clauses). See Robertson, *supra* note 21, at 6.

Table 1. Frequency of GATT Article XIX Actions, 1950-1988

	1950 ~ 1959	1960 ~ 1969	1970 ~ 1979	1980 ~ 1988	Total	% of Total
Australia	2	15	17	5	39	28%
USA	11	3	10	4	28	20%
Canada	2	3	13	4	22	16%
EEC	N/A	N/A	3	11	14	10%
Other developed countries	4	11	5	3	23	17%
Developing countries	N/A	3	1	8	12	9%
Total	19	35	49	35	138	100%

Note: * Other developed countries: Austria, Spain, Greece, France, Germany, Italy, Finland, Iceland, New Zealand, Norway, Switzerland.

* Developing countries: Chile, Israel, Nigeria, Peru, Rhodesia, South Africa.

Sources: 1. GATT, MTN.GNG/W/7, 1987, p.50.

2. Jorge F. Perez-Lopez, "GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries" (1991) 23 Case W. Res. J. Int'l L. 517, at 524-525.

II. The Agreement on Safeguards in the Uruguay Round

A. *The flaws of Article XIX and the Uruguay Round Reforms*

As mentioned above, Article XIX of the GATT permits contracting parties to escape their GATT obligations and raise trade barriers to safeguard any of their producers seriously injured by an increase in imports. However, Article XIX was rarely invoked for various reasons. One of the main reasons is that many countries use safeguards selectively, shutting out only certain countries or suppliers.⁵⁶ Many academics and government officials argued that Article XIX needed revision. For example, some critics claimed that Article XIX was merely a legal mask used by developed countries to erect protectionist measures against imports from developing nations.⁵⁷ Developed countries contend similarly that their trading partners abuse Article XIX for protectionist ends.⁵⁸ These criticisms of Article XIX led to various reform proposals to constrain the circumstances in which Article XIX may be invoked and the protective devices that may be employed.⁵⁹

The Uruguay Round of GATT negotiations attempted to deal with the safeguard

⁵⁶ For example, there were a number of voluntary export restraints on Japanese exports of automobiles to the United States during the 1980s. Martin Wolf, "Why Voluntary Export Restraints? An Historical Analysis" (1989) 12 *World Econ.* 279-280.

⁵⁷ Gary Sampson, "Safeguards", in J. Michael Finger and Andrzej Loechowski, eds, *The Uruguay Round: A Handbook on the Multilateral Trade negotiations* (Washington DC: The World Bank, 1987) at 143, 147.

⁵⁸ J. David Richardson, "Safeguards Issues in the Uruguay Round and Beyond", in Robert E. Baldwin and J. David Richardson, eds, *Issues in the Uruguay Round* (National Bureau of Economic Research, 1988) at 24.

⁵⁹ Alan O. Sykes, "GATT Safeguards Reform: The Injury Test" in Michael J. Trebilcock and Robert C. York, eds, *Fair Exchange: Reforming Trade Remedy Laws* (C.D. Howe Institute, 1990) at 203.

problem.⁶⁰ A new Safeguards Agreement encourages all signatories to use GATT rules when applying safeguards and to refrain from using grey area measures.⁶¹ Though the Uruguay Round was said to have “addressed but failed to resolve ongoing problems with the Safeguard Clause,”⁶² the Agreement on Safeguards nevertheless reached several important areas of consensus, as follows.

1. The substantial conditions of safeguard action

The criteria and procedures for invoking Article XIX are simple and few. This simplicity not only resulted in difficulties for importing parties when invoking safeguards, but it also resulted in disputes between countries about the interpretation of Article XIX. Disputed questions included, for example: How much import volume will result in serious injury? What is the true cause of the injury? How can injury be determined? While some contracting parties have gone to great lengths to define these terms (e.g. serious injury or increased imports) in domestic legislation or to establish investigative procedures, others have not done so.⁶³

In order to unify the interpretation and eliminate unnecessary conditions in Article

⁶⁰ Improving the safeguard issues has become one of the most important topics since the Tokyo Round. Several rounds of discussion revealed disagreements on key issues. Selectivity in the application of safeguards was the most contentious issue, but there were others as well. See Merciai, *supra* note 34, at 55-57.

⁶¹ Agreement on Safeguards, Results of the Uruguay Round of Multilateral Trade negotiations, The Legal Texts, GATT Secretariat, Geneva, June 1994, pp. 315-324.

⁶² Eric C. Emerson, “Voluntary Restraint Agreements and Democratic Decision-making” (1991) 31 Va. J. Int’l L. 281, 298. See also Sampson, *supra* note 57, at 143. (Article XIX of GATT has been characterized as “the Achilles heel of multilateral trade negotiations for the past fifteen years and will continue to be so for the years to come.”)

⁶³ Jorge F. Perez-Lopez, *supra* note 32, at 527.

XIX,⁶⁴ the Agreement on Safeguards re-defines the terms and conditions for applying safeguard action. Important amendments include: (1) “unforeseen developments” and “the effect of the obligations incurred under Article XIX of the GATT Agreement” have been deleted from the substantial conditions;⁶⁵ (2) absolute or relative quantities of domestic production must be considered when estimating the “increased imports”;⁶⁶ (3) the terms “serious injury” and “threat of serious injury” are defined;⁶⁷ and (4) causality between increased imports and serious injury is emphasized.⁶⁸ The Agreement on Safeguards broadens the conditions of invoking safeguards, in that the serious injury is no longer required to be related to previous GATT obligations and unforeseen developments. As long as the serious injury is the result of increased imports, causation can be established. Nevertheless, commentators speculate that the high injury standard for safeguard actions will continue to be a disincentive for using the clause, as it is easier to prove injury in dumping or subsidization situations.⁶⁹

2. The matters of MFN and grey area measures

Because the language of Article XIX does not explicitly apply the principle of non-discrimination, some have argued that Article XIX legally and technically allows

⁶⁴ After the *Hatters' Fur* case, it was suggested that the term “unforeseen development” be eliminated from Article XIX prerequisites. Ruth E. Olson, “GATT-Legal Application of Safeguards in the Context of Regional Trade Arrangements and its Implications for the Canada-United States Free Trade Agreement” (1989) 73 Minn. L. Rev. 1488, 1502.

⁶⁵ Article II, paragraph 1 of Agreement on Safeguards.

⁶⁶ *Id.*

⁶⁷ Article IV of Agreement on Safeguards. Serious injury means a significant overall impairment and should be evaluated by all relevant factors of an objective and quantifiable nature.

⁶⁸ Article II, paragraph 1 of Agreement on Safeguards.

⁶⁹ George D. Holliday, *supra* note 26, at 160.

discrimination.⁷⁰ However, 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.⁷¹ In other words, the objects that are punished should be specific products from all sources, without discriminating between countries.

Nevertheless, the history of GATT practice appears to be that many Contracting Parties tend to depart from the MFN principle when safeguarding their domestic industries.⁷² The overflows of grey area measures ("GAMs") such as orderly marketing agreements ("OMAs"), voluntary export restraints ("VERs") or voluntary restraint arrangements ("VRAs") explain this phenomenon. The main characteristic of GAMs is that they are generally bilateral and not very transparent, enabling them to escape scrutiny in GATT. The popularity of GAMs with both importing and exporting countries usually involves political or economic factors. Politically, the importing country does not need to face the compensation requirements or the risk of retaliation, since the exporting country is technically volunteering to impose export restraints.⁷³ In addition, these agreements often appear to be a cost-free way of protecting domestic producers against foreign competitors. The willingness of the exporting country to accept GAMs usually results from the powerful political and economical pressures of

⁷⁰ Gary Clyde Hufbauer and Howard F. Rosen, *Trade Policy for Troubled Industries* (Washington: Institute for International economics, 1986) at 57. See also Ruth E. Olson, *supra* note 64.

⁷¹ They refer to an interpretation note to Article 40 of the Havana Charter, equivalent to Article XIX of GATT, which provides that safeguards "must not discriminate against imports from any member country". John H. Jackson, "Export-Restraint Measures and the GATT", *supra* note 46, at 495.

⁷² Discriminatory Article XIX safeguard measures are and have been quite common in GATT practice. See Macro C.E.J. Bronckers, "The Non-Discriminatory Application of Article XIX GATT: Tradition or Fiction?" [1981/2] *Legal Issues Eur. Interaction* 35,53. See also Alan C. Swan, *supra* note 50, at 431,435.

⁷³ Alan O. Sykes, *supra* note 23, at 295-298.

the importing country.⁷⁴ In addition, GAMs sometimes provide the exporting nations some economic compensation. For example, the exporting country may conform to a VER because the country might be able to increase the price of its products in the restricted market.⁷⁵

Further, unlike formal measures under Article XIX, GAMs are of open-ended duration. This characteristic allows GAMs to become tools of protectionism more easily. Economic theory states that GAMs are in fact extremely disadvantageous to consumers, reduce efficient competition, and harm economic welfare as a whole. There is also no guarantee that the protected domestic firms will make the necessary adjustments to restore competitiveness to their products.⁷⁶ Most GAMs protect the European Community market or one of its member states, or the U.S. – these two account for four-fifths of the VER measures listed. The main targets of GAMs are developing countries with a “rapidly changing structure of exports,” coupled with high economic growth.⁷⁷ There is no question that GAMs affect the interests of developing countries and major exporting countries; which is considered the main reason why the GATT mechanism has been viewed as ineffective.

The question of whether Article XIX should apply the principle of MFN was the

⁷⁴ For example, in January 1957, Japan gave American officials details of a five-year programme of “voluntary” export controls. American pressure contributed to this outcome. See Martin Wolf, *supra* note 56, at 277-278.

⁷⁵ David Greenaway & Brian Hindley, *What Britain Pays for Voluntary Export Restraints* (Trade Policy Research Center, Thames Essay No. 43, 1985)

⁷⁶ For related case analysis see Brian Hindley, “EC Imports of VCRs from Japan, A Costly Precedent” 20 J. World Trade L. 168, 179, 182.

⁷⁷ Brian Hindley, “GATT Safeguard and Voluntary Export Restraints: What are the Interests of Developing Countries?” (1987) 1 World Bank Econ. Rev. 689. See also Michel Kostecki, “Export-restraint Arrangements and Trade Liberalization” [1987] World Econ. 428-429.

most debated issue in the Tokyo Round and the Uruguay Round.⁷⁸ Most developing countries have complained through the years that safeguard measures in fact discriminate against them,⁷⁹ and various proposals have emerged during the Uruguay Round (and before) to prohibit selectivity.⁸⁰ Defenders of selectivity argue in response that protective measures under Article XIX should apply primarily to the "guilty" nations -- those that have increased their exports and have caused the injury.⁸¹ The conclusion in the Agreement on Safeguards supports that idea that an Article XIX action must follow the MFN principle, and prohibits taking any GAMs for improving the distorted trade order. However, in order to address the dispute between "selectivity" and "non-discrimination," it also allows one significant exception when using quantitative restrictions: that a moderate quota modulation can be applied in specific circumstances.⁸² As for existing VRAs, the Agreement on Safeguards requires them to be phased out by 1999. The Agreement also allows a more general exception for VRAs that are maintained pursuant to other GATT provisions (e.g. anti-dumping measures), or pursuant to protocols or arrangements made within the framework of GATT (presumably including protocols of accession for new members).⁸³ For example, China

⁷⁸ John H. Jackson and W. J. Davey, *supra* note 35, at 595-606.

⁷⁹ Gary Sampson, *supra* note 57, at 148.

⁸⁰ Uruguay Round Negotiators Begin Talks On Proposed Text for Safeguards Pact, 6 Intl Trade Rptr (BNA) 869 (1989).

⁸¹ Gary Sampson, *supra* note 57. See also GATT, MTN.GNG/NG9/W/15, p.3, 21(1989); GATT, MTN.GNG/NG9/W/23, p.6, 13(1989); GATT, MTN.GNG/NG9/W/24, p.6, 13(1989).

⁸² "Quota modulation" means that a Member can depart from the MFN principle if imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product; or if the reasons for the departure from such principle are justified and the conditions of such departure are equitable to all suppliers of the product concerned. See Article V, para. 2 (b) of Agreement on Safeguards.

⁸³ Article XI, para.1 (c) of Agreement on Safeguards. See also George D. Holliday, *supra* note 26, at 159.

has agreed to a 12-year product-specific safeguard. This arrangement allows the United States to address rapidly increasing Chinese imports in a targeted fashion, if they are disrupting the U.S. market. This provision does not apply to U.S. exports to China.⁸⁴

3. Compensation requirements and retaliation

Another problem related to the MFN principle is the issue of compensation and retaliation allowed for under Article XIX. When an importing country invokes safeguards, Article XIX para. 3(a) permits the affected exporting countries to retaliate by increasing their protection against some other export of the country invoking Article XIX. Alternately, the affected country can claim an equivalent compensatory concession. To avoid retaliation, the party invoking Article XIX usually has to sacrifice the interests of other domestic industries, which may result in more severe impacts on other unrelated industries.⁸⁵ Persuading other domestic industries to sacrifice benefits in order to save a specific industry will be very difficult. Strong political pressures due to extensive compensatory costs are likely. Moreover, exporting countries affected by safeguards are often reluctant to worsen their trade relations with importing countries by demanding compensation or retaliating.⁸⁶ On the other hand, GAMs look simple and do not require compensation. Both importing and exporting countries face less political risks and costs. This is one of the reasons for the infrequency of use of Article XIX and

⁸⁴ The Product-Specific Safeguard will remain in force for 12 years after China accedes to the WTO. For other details see <http://www.chinapntr.gov/industryfactjump.htm>, China Trade Relations Working Group, U.S. -- China WTO Accession Agreement, Industry Fact Sheets: Product-Specific Safeguard (Feb. 15, 2000).

⁸⁵ Robert E. Baldwin, *Trade Policy in a Changing World Economy* (New York: Harvester/Wheatsheaf, 1988) at 227.

⁸⁶ Hufbauer and Rosen, *supra* note 70, at 56.

the prevalence of GAMs.⁸⁷

However, the WTO Agreement on Safeguards continues to include compensation requirements and retaliation provisions. This may be because compensation and retaliation provisions prevent countries from using Article XIX opportunistically or for frivolous reasons.⁸⁸ The retaliation provision seems to serve as a brake on protectionism.⁸⁹ But in order to improve shortcomings in the previous mechanism and encourage parties to apply the safeguard clause, the Safeguards Agreement limits the execution of retaliation.⁹⁰ This limitation provides the importing country with more flexibility and more opportunities to carry out safeguard measures after the date of entry into force of the WTO Agreement.

4. How to assure the real nature of emergency action

Safeguard measures are intended to assist industries with their adjustment, but not to protect them for an indefinite duration. However, although the short-term character of Article XIX is evident from the term “emergency action” in its heading, the Article contains no specific time limit for the quantitative restraints or tariff increases which could be applied.⁹¹ As discussed above, GAMs which have an open-ended duration can

⁸⁷ Augustin Tan, *supra* note 22, at 329.

⁸⁸ Ezra Ginzburg, “An Analysis of Article XIX: The Safeguard Problem after the Uruguay Round” (1992) 71 Neb. L. Rev. 566, at 572.

⁸⁹ Marco C.E.J. Bronckers, “Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism” in *GATT European Community and United States Law* (Hingham, MA, U.S.A.: Kluwer Law and Taxation, 1985) at 89.

⁹⁰ Article VIII, para. 3 of Agreement on Safeguards: “The affected exporting members shall not execute the right of retaliation for the first three years if the safeguard measure is taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the Agreement.”

⁹¹ P. Kleen, “The Safeguard Issue in the Uruguay Round – A Comprehensive Approach” (1989) 23:5 Journal of World Trade 83.

easily become a tool of protectionism. In order to prevent such a shortcoming, a time limit for safeguard actions is necessary. A time limit can also stop members from postponing the inevitable decline of a sunset industry, and encourage them to make industry adjustments within the limited time. The Agreement on Safeguards addresses these issues, instituting a time limit and the principle of progressive liberalization to assure the temporary nature of safeguard actions.⁹²

As for the extent of safeguards, the WTO Agreement stresses that its purpose is to remedy injury and facilitate industry adjustment.⁹³ Although the Agreement does not explicitly require petitioners to provide an adjustment plan, Article V stipulates that safeguard measures should be used to encourage industrial adjustment. This reflects the WTO's objective to prevent the safeguard measures from becoming an excuse to delay the removal of sunset industries.

However, a specific time limit is clearly not enough, which is evidenced by the experience with the Multi-Fibre Arrangement ("MFA").⁹⁴ A regular, annual review and monitoring of safeguard measures by a surveillance committee should be instituted.⁹⁵ The fact that GATT had no specific permanent body for surveillance and monitoring of Article XIX actions partly explains why GATT has lost control over developments in the safeguard area.⁹⁶ Therefore, the WTO Safeguards Agreement addresses this concern

⁹² Article VII of Agreement on Safeguards.

⁹³ Article V, para. 1 of Agreement on Safeguards: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."

⁹⁴ Although the MFA is explicitly temporary in nature, this arrangement has in many countries developed into a more or less permanent trade policy instrument. The requirement for a time limit does not have a real meaning in the MFA. See P. Kleen, *supra* note 91.

⁹⁵ *Id.*

⁹⁶ *Id.*, at 84.

by establishing a Committee on Safeguards. The committee assures that safeguard measures are executed normally under multilateral surveillance systems; it also monitors the recurrence of GAMs.⁹⁷ Transparent investigation procedures, notification, and consultation are also required by the new Agreement.⁹⁸ If a dispute arises under the Agreement on Safeguards, the provisions of Article XXII and XXIII of GATT 1994 and the WTO Dispute Settlement Understanding are applied.⁹⁹ Through such public dispute settlement procedures, international conflicts should be reduced, and also any resolution concerning safeguard disputes should have a more just result.

5. Other important supplements

Past experience shows that developing countries are always the target of developed countries applying Article XIX (even the GAMs).¹⁰⁰ The negative economic impacts on these developing countries are clear, especially the reduction of trade flows.¹⁰¹ The slow progress of many developing countries serves as a reminder that developed countries should focus on long-term world-wide economic development rather than on immediate trade advantages.¹⁰² Developing countries should be allowed appropriate access to foreign trade in order to upgrade their industries. The Agreement on Safeguards considers this concern, granting developing countries a special immunity to foreign safeguards if their share of imports of the product concerned does not exceed

⁹⁷ Article XIII of Agreement on Safeguards.

⁹⁸ Article III & XII of Agreement on Safeguards.

⁹⁹ Article XIV of Agreement on Safeguards.

¹⁰⁰ Jorge F. Perez-Lopez, *supra* note 32, at 524-525.

¹⁰¹ *Id.*

¹⁰² Alting Von Geusau, *Economic Relations After the Kennedy Round* (Leyden: A. W. Sijthoff, 1969) at 3.

a specific amount. Further, compared to developed countries, developing countries can have safeguards in effect for a longer duration when safeguard measures are taken.¹⁰³

Further, to strengthen the function of providing an immediate remedy in critical circumstances, the Agreement on Safeguards permits an importing country to take a provisional safeguard measure, following a preliminary determination that there is clear evidence of injury. But the form and duration of this provisional remedy are strictly limited in order to prevent potential abuse.¹⁰⁴

B. The application of the WTO Agreement on Safeguards and Article XIX.

Under the WTO mechanisms, the Agreement on Safeguards is one of the agreements included in the Multilateral Agreements on Trade in Goods. As Article XIX in GATT is also subject to the GATT 1994 agreement, it is also one of the Multilateral Agreements on Trade in Goods. In the case of conflicts between Article XIX and the Agreement on Safeguards, which agreement supersedes the other? How is the legal interpretation determined?

Article XVI, para. 3 of the WTO Agreement provides: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict." Moreover, the General interpretative note to Annex 1A of WTO states: "In the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the WTO Agreement, the provision of the other agreement shall prevail to

¹⁰³ Article IX of Agreement on Safeguards.

¹⁰⁴ Article VI of Agreement on Safeguards.

the extent of the conflict.” Thus it can be seen, Article XIX is a supplement of the Agreement on Safeguards; on the other hand, when there is conflict, the agreement on Safeguards prevails over Article XIX.

Article I of the Agreement on Safeguards states: “This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.” Through this statement, it may be thought that the Agreement on Safeguards contains only the procedural rules for Article XIX of GATT 1994. However, the Agreement has already changed some substantive conditions of Article XIX. Furthermore, according to the Article XI, para. 1(a)¹⁰⁵, this Agreement has become the only legitimate basis to carry out safeguard measures.

C. Other safeguard clauses in specific areas

1. Agriculture

Because of its special nature, trade in agriculture has historically always been subjected to exceptions under GATT. In order to have trade in agriculture return to the basic norms of GATT under the WTO mechanism, WTO established the Agreement on Agriculture, which allows the industry to liberalize progressively.¹⁰⁶ Nevertheless, the degree of protection tolerated for agricultural products is much higher than for other

¹⁰⁵ Article XI, para. 1 (a) of Agreement on Safeguards: “A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.”

¹⁰⁶ Agreement on Agriculture, opened for signature Apr. 15, 1994, in GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations 39, GATT Sales No. 1994 - 4 (1994).

goods. Once domestic markets are opened, the impact on agriculture products will thus be more serious than on general goods. Otherwise, because the conditions for safeguards are relatively onerous in Article XIX of GATT and the Agreement on Safeguards, it is feared that the agricultural products may not get instant relief in some cases. Thus, it is necessary to establish another safeguard clause to meet the special needs for the liberalization of agriculture products.

In comparison with Article XIX of GATT and the Agreement on Safeguards, the special safeguard provisions under the WTO Agreement on Agriculture are more easily applied. Firstly, the importing country can take safeguard measures if the volume of imports exceeds a trigger level or the price falls below the trigger price.¹⁰⁷ Secondly, the Agreement on Agriculture does not require the member invoking safeguard measures to provide compensation to other affected countries. Nevertheless, the execution of safeguard measures is limited in how tariffs maybe increased, although not in any quantity restriction. Not all agricultural products, but only those which have been converted into an ordinary customs duty, and are designated with the symbol “SSG” in the Member’s concession schedule, can be safeguarded.¹⁰⁸

2. Textiles

The reasons why WTO established special safeguard measures for textiles are the same as for agricultural products. The purpose is to reduce pressures from the process of liberalization on vulnerable textiles and clothing industries following their return to

¹⁰⁷ Article V, para. 1 (a) of Agreement on Agriculture.

¹⁰⁸ Article V of Agreement on Agriculture.

GATT. The transitional safeguard in the Agreement on Textiles and Clothing¹⁰⁹ does not require following the principle of non-discrimination. The transitional safeguard states that “any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis.” Therefore, this transitional safeguard is a type of selective safeguard measure.

3. Services

The General Agreement on Trade in Services (“GATS”)¹¹⁰ does not have a complete regime for emergency safeguard measures. There is only a basic rule in Article X of the GATS that requires that multilateral negotiations on the question of emergency safeguard measures be based on the principle of non-discrimination. Further, the results of such negotiations must enter into effect no later than three years from the date of entry into force of the WTO Agreement. In the period before the results of the negotiations take effect, Article X can be seen as a transitional mechanism substituting for emergency safeguard measures.

Some commentators argue that these kinds of safeguard measures had little meaning, as they did not have any concrete provisions, and only required Members to achieve agreements up until 1997.¹¹¹ However, the WTO negotiators did not achieve

¹⁰⁹ Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A: Multilateral Agreements on Trade in Goods, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (GATT Secretariat ed., 1994) at 85. The transitional safeguard clause is in Article VI of Agreement on Textiles and Clothing.

¹¹⁰ General Agreement on Trade in Services, in the Uruguay Round Final Act, Dec. 15, 1993, Annex 1B, 33 I.L.M. 1130 (1994)

¹¹¹ Bernard Hoekman and Michel Kosteci, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: Oxford University Press, 1995) at 134.

any agreement regarding this question. Perhaps the lack of agreement was because pressures for invoking this kind of special safeguard almost invariably came from developing countries. Most developed countries are the suppliers/exporters of services. Developed countries are not keen on establishing this kind of special safeguard and even wish to exclude it; hence it is not difficult to understand why safeguard measures in services were not created. This problem may also reflect the conflict of interest and disparity of power in the WTO between developing countries and developed countries.

III. Conclusion

As the economy of the world begins to gradually integrate, liberalization requires a restructuring of previous protective trade policies. The adjustment of protective measures is an inevitable change that countries must face as they adapt to the new trade environment after opening their domestic markets. Liberalization, as we know, brings not only economic benefits, but also risks harming domestic industries. Every country pursuing the goal of free trade must recognize the various impacts on its own industries and make proper adjustments to deal with a variety of complex situations. However, how does a country decide on a policy or strategy which will not violate the principle of liberalization, and also choose the kinds of measures which will be the most effective to help its industries survive change?

The safeguard clause is a provisional relief measure, but its purpose is not protectionism. Unlike other import relief systems, the safeguard clause can be used to allow industries to escape from obligations even though there has been no instance of

unfair trade. If we accept the legitimacy of the safeguard clause as a safety valve, it can be seen that the spirit of the safeguard clause has a close relationship with trade liberalization. This safeguard mechanism gives importing countries some leeway to reduce obstruction from domestic industries in the process of liberalization, and also to induce them to agree to trade concessions.

Unfortunately, the meaning of Article XIX of the GATT is obscure, and there is still no definite procedure to execute safeguard measures. As a result, every country has its own safeguard mechanism based on its own internal needs, with resulting confusion about the safeguard standard. In addition, the requirements to follow the rule of MFN or compensation and retaliation also causes difficulties in applying Article XIX. Many grey area measures are used instead of safeguard measures and this results in new trade obstacles.

To improve these deficiencies and consequential distortions in trade, the WTO Agreement on Safeguards came into effect as part of the agreement establishing the WTO. This Agreement broadened the requirements of Article XIX to allow members to apply the safeguard clause more easily than before; and it also prohibited the application of grey area measures. Furthermore, in order to make the spirit of the safeguard clause practicable, the Agreement indicated that safeguard measures are to be used to facilitate industry adjustments.

The effects of the Agreement on Safeguards will depend on whether it succeeds in encouraging countries to use formal GATT-consistent measures more frequently. However, there was only one case concerning safeguard measures in 104 consultations

under the WTO dispute-settlement mechanism occurring from January 1995 to August 1997.¹¹² The frequency of using this mechanism does not seem to have increased because of the improvements instituted by the Agreement on Safeguards. Compared to anti-dumping and countervailing duty laws, the relatively high injury standard for safeguard actions may continue to be a disincentive for their use. It is still easier to prove injury if petitioners can prove dumping or subsidies under these unfair trade remedies.

As for the principle and exception of applying selective measures, perhaps it cannot prevent measures that are by their nature discriminatory. Some commentators predict that other import relief approaches, including anti-dumping and countervailing duties, and the possible "price undertaking", will replace the functions of safeguard measures.¹¹³ Others suggest loosening the principle of non-discrimination to solve this problem.¹¹⁴

However, considering the safety valve, adjustment, and inducement functions of the safeguard clause, the advantages of its use cannot be denied. This research affirms the value of safeguard measures as helpful ways to establish a fairer trade environment. Moreover, based on the spirit of equity, it is not appropriate to fully recognize selective measures. Under the mechanism of GATT/WTO, every Member is in an equal position, without being put in a category based on status, national power or economic resources.

¹¹² See WTO, Overview of Disputes, from <http://www.wto.org/wto/dispute/>, August 1997.

¹¹³ See Ernesto M. Hizon, *supra* note 53, at 137; See also Brian Hindley, "Safeguards, VERs and Anti-dumping Action", in OECD, *The New World Trading System: Readings* (Paris: OECD, 1994) at 102.

¹¹⁴ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 176.

Permitting selective measures would provide a legitimate cover for discrimination. This unfair situation would result in the deterioration of trade liberalization and ultimately contravene the spirit of GATT/WTO.

Chapter 4

The analysis and comparison of safeguard measures in the U.S. and the EU

This chapter examines national legislation from selected countries implementing GATT Article XIX and the WTO Agreement on Safeguards. Since its agreement is international, the WTO created a set of rights and obligations which all members must agree to assume. They usually do so by adopting legislation which implements, within their borders, the internationally agreed upon rules. In many instances, the domestic legislation closely tracks the WTO Agreement, while in others there are significant differences.

Because of the flaws and ambiguities existing in the GATT Article XIX, the Agreement on Safeguards was established in the Uruguay Round. It requires that every WTO member comply with the new safeguard rules after entering the WTO.

The U.S. and the EU have been the most frequent users of safeguard measures in the world in the past few years. These countries introduced significant changes to their domestic legislation, implementing the WTO Safeguards Agreement. This chapter will examine several aspects of this legislation; including, definition of domestic industry and like or directly competitive goods; criteria for serious injury; elimination of grey area measures; type and length of relief; progressive liberalization; provisional relief; link to structural adjustment; notification and consultation; and dispute settlement. The aim of this chapter is to analyse and compare the differences of national safeguard rules in the U.S. and the EU, with the goal of providing some direction to countries whose implementing legislation is not yet complete.

I. The Evolution of Safeguard Measures in the United States and the European Union

A. United States

The establishment of GATT Article XIX was the realization of the desire of the United States¹¹⁵ for a safeguard rule within GATT which would allow states to waive their commitments or infringe upon the agreed rules of conduct in exceptional circumstances. The applied procedures and executions of this kind of safeguard rule in domestic law were first introduced in the United States. However, because of the independent development of U.S. law, there are still some divergences between Article XIX of GATT and the escape clause in U.S. law.

The first time the escape clause appeared in U.S. trade agreements was in a 1942 Reciprocal Trade Agreement with Mexico.¹¹⁶ The provision in the Mexico agreement read much like the escape clause in Article XIX, and indeed the Trade Agreement served as the model for Article XIX.¹¹⁷ By the end of World War II, free trade ideology was at its peak. The Trade Agreements Act of 1945¹¹⁸ was enacted, giving the President broad discretion regarding tariff reduction. Nonetheless, the Trade Agreements Act prompted Congressional protectionist fears and led to a compromise Executive Order in

¹¹⁵ See J. Jackson, *supra* note 31, at 553.

¹¹⁶ J. Jackson, *Legal Problems of International Relations* (1974) at 629.

¹¹⁷ Agreement Respecting Reciprocal Trade, Dec. 23, 1943, U.S. – Mexico, 57 Stat. 833, E.A.S. No. 311.

¹¹⁸ Ch. 269, 59 Stat. 410 (1945) (codified at 19 U.S.C. §§ 1351-1352, 1354 (1982)).

1947 that required an escape clause to be included in all future trade agreements.¹¹⁹ The Tariff Commission (the predecessor of the International Trade Commission) was responsible for investigation of petitions by industries claiming injury.

The U.S. escape clause was first legislated in the Trade Agreements Extension Act of 1951.¹²⁰ During the 1950s, the U.S. Congress repeatedly amended the escape clause and its contents.¹²¹ In 1962, Congress enacted an even more stringent safeguard provision in the Trade Expansion Act ("TEA") of 1962.¹²² With the heavy burden of proof established, it was very hard to obtain relief under the TEA escape clause; from 1962 to 1969 there was no determination of serious injury by the Tariff Commission.¹²³ Frustration over the rigid structure of the TEA, aggravated by the deteriorating economy of the early 1970s, led to what some called the "new protectionism."¹²⁴ It was in the midst of such sentiment that Congress passed the Trade Act of 1974,¹²⁵ with the provisions containing the escape clause procedures in Sections 201 through 204 of the Trade Act.¹²⁶

¹¹⁹ Exec. Order No. 9832, 3 C.F.R. §§ 624-625 (1943-48 comp.). This was replaced with Exec. Order No. 10004, which made the clause a permanent part of U.S. law. Exec. Order No. 10004, 3 C.E.R. §§ 819-821 (1943-48 comp.). See Richard L. O'Meara, "Comment -- United States Trade Laws: Re-examining the Escape Clause" (1985) 26:1 Va. J. Int'l L. 261, 265.

¹²⁰ Trade Agreement Extension Act of 1951, Pub. L. No. 82-50, § 7, 65 Stat. 72, 74 (repealed by the Trade Expansion Act of 1962, Pub. L. No. 87-794, § 257(e)(1), 76 Stat. 882 (1962)) discussed in Comment, *id.* at 266-67.

¹²¹ These amendments were made individually in the Trade Agreements Extension Act of 1953, 1955, and 1958 (codified as amended in scattered sections of 19 U.S.C.). See Leddy & Norwood, "The Escape Clause and Peril Points Under the Trade Agreements Program", in Harry C. Hawkins and John M. Leddy, *Studies in United States Commercial Policy* (Chapel Hill: University of North Carolina Press, 1966) at 146.

¹²² Pub. L. No. 87-794, 76 Stat. 872 (codified as amended at 19 U.S.C. §§ 1801-82 (1982)).

¹²³ Williams Commission Report 62 (1971), in *Legal Problems of International Relations*, *supra* note 116, at 638, 639.

¹²⁴ B. Balassa, "The New Protectionism and the International Economy" (1978) 12 J. World Trade L. 409.

¹²⁵ Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2101-2487 (1982)).

¹²⁶ Codified as amended at 19 U.S.C. §§ 2251-2254 (1982).

From the 1980s onward, the U.S. suffered many serious problems relating to trade deficits. Congress attempted to remedy these problems by reforming the Trade Act, especially Section 201.¹²⁷ Section 201 did not effectively help to promote the competitiveness of injured U.S. industries, nor did it facilitate industrial adjustments. The industries in question preferred to go in quest of other sorts of relief (e.g. anti-dumping duties or countervailing duties).¹²⁸ Therefore, in 1988, Congress revised Section 201 in the Omnibus Trade and Competitiveness Act.¹²⁹ This important revision gave a new status and clarification to the escape clause, and also stressed the function of promoting industrial adjustments.

To meet the changes required following U.S. membership of the WTO after 1995, the U.S. Congress passed the Uruguay Round Agreement Act at the end of 1994.¹³⁰ Some revisions to the escape clause were also included in this new Act to meet the requirements of the WTO Agreement on Safeguards. However, because the escape clause before the revisions largely conformed to the spirit the Final Act of WTO, there are not many obvious differences between the Uruguay Round Agreement Act and the prior legislation.

¹²⁷ Paul C. Rosenthal and Robin H. Gilbert, "The 1988 Amendments to Section 201: It Isn't Just for Import Relief Anymore" (1989) 20 Law & Pol'y in Int'l Bus. 423.

¹²⁸ O'Meara, *supra* note 119, at 273-75.

¹²⁹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 [hereinafter "Trade Act of 1988"].

¹³⁰ Pub. L. No. 103-465, 1995 U.S.C.A.N. (108 Stat.) 4809 (codified at 19 U.S.C. §§ 3511) David W. Leebron, "Implementation of the Uruguay Round Results in the United States", in John H. Jackson and Alan O. Sykes ed., *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997) at 175-177.

B. European Union

In 1957, the Treaty of Rome that created the European Economic Community ("EEC") provided for the elimination of tariffs and the removal of other restrictions on trade among member nations, to be achieved within a twelve-year transition period, as well as for the progressive establishment of a common commercial policy ("CCP").¹³¹ The CCP means that all EEC member nations agree on a common external tariff and co-ordinate Member States' policies regarding commercial relations with other countries.

On July 1, 1968, the Member States established a common external tariff, thus making much progress towards creating the CCP. In December 1968, the EEC issued a list of products, the importation of which into the EEC was liberalized,¹³² and established common rules applicable to imports from certain third countries.¹³³ The above-mentioned "Common Rules for Imports" were the major base upon which the EEC took safeguard measures for numerous years. Because all Member States in the EEC are also the members of GATT, the safeguard measures of the EEC were designed to conform with the spirit of GATT obligations.

During the 1970s through to the 1990s, the common rules for imports underwent several revisions based on practical needs or changed circumstances.¹³⁴ Generally speaking, these revisions reflect three tendencies: (1) the power of the Commission had

¹³¹ The establishment of an external common commercial policy is provided for in Article 3b and 110-116 of the Treaty of Rome.

¹³² Regulation No. 2041/68, 18 O. J. EUR. COMM. (No. L. 303) 1 ff (1968).

¹³³ Regulation No. 2045/68, 18 O. J. EUR. COMM. (No. L. 303) 43 (1968).

¹³⁴ Regulation No. 926/79, 22 O. J. EUR. COMM. (No. L. 131) 15 (1979); Regulation No. 288/82, 25 O. J. EUR. COMM. (No. L. 35) 1 (1982).

gradually increased; (2) conversely, the power of Member States had declined; (3) procedures for the common import rules were made increasingly transparent.¹³⁵

After the EEC completed the integration of its internal market in 1993, the EEC Commission was of the view that the common rules for imports should be revised to meet the demands of a single market. As a result, the emphasis of the revisions regarding safeguard measures in Regulation No. 518/94¹³⁶ is on eliminating the power of each Member State to take safeguard actions, and instead transfers the whole power to the European Commission. Except under special circumstances, the Commission would permit safeguard measures to be taken in limited areas, and these safeguard actions could not undermine the formation of the single market. In 1994, in order to coordinate the conclusion of the Agreements on Safeguards reached in the Uruguay Round, the Council adopted new safeguard rules contained in Regulation No. 3285/94 on common rules of imports.¹³⁷

II. A Comparison between Safeguard Measures in the United States and the EU

Generally, the procedures for safeguard measures in the U.S. and the EU involve the same basic steps: (1) application for an investigation, (2) the investigation, (3) making recommendations, (4) the final decision on safeguard measures. However, there are some important differences between the two systems.

¹³⁵ I. Van Bael & J. F. Bellis, *Anti-dumping and other Trade Protection Laws of EEC* (Bicester, Oxfordshire : CCH Editions, 1990) at 294.

¹³⁶ Regulation No. 518/94 (repealing Regulation No. 288/82), 29 O. J. EUR. COMM. (No. L. 067) 77 (1994).

¹³⁷ Regulation No. 3285/94 (repealing Regulation No. 518/94), 37 O. J. EUR. COMM. (No. L. 349) 53 (1994).

In making an injury determination, the United States International Trade Commission ("USITC") takes into account "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."¹³⁸ There are three elements that comprise this determination: increased imports, serious injury, and substantial cause.

For the EU, safeguard measures (e.g. quotas or tariffs) or surveillance can be authorized by the Commission when increased imports from third countries outside the Community cause or threaten to cause serious injury to Community producers.¹³⁹ Moreover, if there are special considerations such as the public interest, human health, preservation of cultural relics, or protection of industrial and commercial property, Member States can adopt surveillance or safeguard actions without the interference of the Committee.¹⁴⁰

In order to compare the Trade Act of the U.S. to the Regulation 3285/94 of the EU, several features will be analyzed, as follows.

1. The procedure of applying safeguard measures

Under U.S. law, safeguard investigations can be initiated by the private sector or by the government. A petition for safeguard relief can be filed by "an entity, including a trade association, firm, certified or recognized union, or group of workers, which is

¹³⁸ 19 U.S.C. §§ 2252 (b)(1)(A).

¹³⁹ Council Regulation (EC) No. 3285/94, Article 16.

¹⁴⁰ *Id.* Article 24.

representative of an industry.”¹⁴¹ An investigation can also be instituted at the request of the President or the United States Trade Representative, upon a resolution of either the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or by the USITC on its own motion.¹⁴² The USITC is expected to submit its determination within 120 days of the filing of a petition (180 days if the petition alleges that critical circumstances exist).¹⁴³

In cases where injury is found, the USITC is also charged, by law, with recommending to the President the amount of the increase in tariffs or the level of quantitative restraints which is necessary to prevent or remedy the injury. The USITC may also recommend one or more adjustment measures, including trade adjustment assistance, if it believes such measures would effectively remedy the injury.¹⁴⁴

The USITC makes public the report of its investigation and recommendations (excluding confidential information) and publishes a summary in the Federal Register.¹⁴⁵ In the course of its investigation, the USITC is required to hold public hearings and afford interested parties (including firms, unions, importers, consumers, foreign governments) the opportunity to present evidence and to appear at the hearings.¹⁴⁶

Within 60 days of receiving a report from the USITC containing an affirmative finding of serious import injury or the threat thereof, the President must “take all

¹⁴¹ 19 U.S.C. §§ 2252 (a)(1).

¹⁴² 19 U.S.C. §§ 2252 (b)(1)(A).

¹⁴³ The deadline may be extended by the USITC if it determines that the investigation is “extraordinarily complicated. See 19 U.S.C. §§ 2252 (b)(2).

¹⁴⁴ 19 U.S.C. §§ 2252 (e).

¹⁴⁵ 19 U.S.C. §§ 2252 (f)(3).

¹⁴⁶ 19 U.S.C. §§ 2252 (b)(3).

appropriate and feasible action which he [or she] determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”¹⁴⁷ If the President decides that granting relief is in the national economic interest, the President must decide what method and type of import relief will be provided and transmit a report to Congress. If the President decides that there is no appropriate and feasible action to take, this decision must be reported to Congress, together with the reasons for the decision.¹⁴⁸ Congress can override the President’s denial of import relief or disapprove of the type or amount of relief chosen by the President, by having a concurrent resolution passed in both Houses. Pursuant to the resolution, the President would be required to implement the relief recommended by the USITC.¹⁴⁹

In Europe, actions under the EU Regulation 3285/94 can be initiated by a Member State, by the Commission or by the Council. Private parties (e.g., a firm, an industry association, or a group of workers) cannot initiate a safeguard case directly, although they can influence their own government (i.e. a Member State), the Commission, or the Council to do so on their behalf.¹⁵⁰

The EU Regulation 3285/94 lays down the consultation and investigation procedures to be followed prior to implementing safeguard measures. The first step in the process is the establishment of an Advisory Committee formed of representatives of

¹⁴⁷ 19 U.S.C. §§ 2253 (a)(1)(A).

¹⁴⁸ 19 U.S.C. §§ 2253 (b).

¹⁴⁹ 19 U.S.C. §§ 2253 (c)(1).

¹⁵⁰ I. Van Bael & J. F. Bellis, *supra* note 135, at 189.

Member States.¹⁵¹ The Committee reviews the data provided by the petitioner and if, after the consultation, it is apparent that there is sufficient evidence to justify an investigation, the opening of the investigation is announced in the Official Journal of the European Communities. The legislation is silent on how long this review may last. The announcement gives a summary of the information received and indicates how and within what period of time interested parties may submit information and their written views.¹⁵²

The investigation is carried out by the Commission. The Commission may check the validity of the information it has received with importers, traders, agents, producers, trade associations and organizations. It may be assisted in this task by the staff of the Member State on whose territory the investigation is being carried out.¹⁵³

The Commission must make its decision within nine months from the initiation of the investigation, submitting its report to the Advisory Committee.¹⁵⁴ The Commission should also communicate to the Council and Member States about its decision. If a Member State does not agree with the decision, it can refer the decision to the Council for reconsideration. The Council has the right to confirm, amend or revoke the decision.¹⁵⁵

¹⁵¹ *Supra* note 139, Article 4 (1).

¹⁵² *Supra* note 139, Article 6 (1)(a).

¹⁵³ *Supra* note 139, Article 6 (2).

¹⁵⁴ *Supra* note 139, Article 7.

¹⁵⁵ *Supra* note 139, Article 16 (7)(8).

2. The definition of domestic industry and like or directly competitive goods

Before taking safeguard measures, the scope of domestic industry and products should be confirmed in order to evaluate the degree of damage from increased imports. It is only when the injury scope is determined that the subsequent investigation and the execution of safeguard measures can be properly carried out.

For the U.S., the domestic industry injured or threatened must produce an article "like or directly competitive with the imported article."¹⁵⁶ In the legislative history of Section 201, the Senate Finance Committee explained that "like" and "directly competitive" are two distinct concepts.¹⁵⁷ "like" articles are those which are substantially identical in inherent or intrinsic characteristics and "directly competitive" articles are those which are substantially equivalent for commercial purposes to like articles. Further, "like" articles mean that the materials from which they are made, their appearance, quality, texture, etc. are identical; while "directly competitive" articles are those adapted to the same uses and therefore essentially interchangeable.¹⁵⁸

¹⁵⁶ 19 U.S.C. §§ 2251 (a).

¹⁵⁷ S. REP. No. 1298, 93rd Cong., 2d. Sess. 121-122, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7265-7266.

¹⁵⁸ In the Nonrubber Footwear case, the primary question raised in the investigation was whether to distinguish between athletic and nonathletic footwear. The ITC found that most athletic footwear was produced in different establishments from those used for the production of nonathletic footwear. Distinct research and development efforts emphasized performance and comfort, and different technology and employee skills were utilized for the production of athletic shoes. Therefore, the ITC determined that athletic and nonathletic shoes were not "substantially identical in inherent or intrinsic characteristics," since they were made from different materials, through a different process and had a distinctly different appearance. As for the determination of "directly competitive," the ITC held that the legislative history defined "directly competitive" as "substantially equivalent for commercial purposes," that is, products that were adapted to the same uses and were "*essentially interchangeable*." In other words, while two-way substitutability would be "perfect" interchangeability, the statute refers only to "essential" interchangeability. In this case, there were clearly many types and styles of both athletic and nonathletic footwear. Some of this footwear had only a limited range of uses. Yet a substantial portion of both athletic and nonathletic footwear was purchased and used in contexts in which either was suitable. The ITC, therefore, determined that this industry was domestic producers of both nonathletic and athletic footwear. *See* USITC Inv. No. TA-201-55, Pub. No. 1717 (July 1985).

EU laws do not give a definition of like or directly competitive goods. The Quartz Watches case¹⁵⁹ analyzed the product under investigation as well as the parameters of the domestic industry. First, the Commission had to decide which products in the community market were directly competitive with the imported watches under investigation. The Commission easily determined that digital watches compete with each other. The Commission then considered the question of whether domestic analog and imported digital watches were “like” products. It determined that products having the same uses, or which are basically interchangeable, also compete directly. Both kinds of watches have the same uses, are commercially interchangeable, and have essentially the same parts. Therefore, they are like products.

Both the U.S.¹⁶⁰ and EU¹⁶¹ follow similar principles in defining a “domestic industry,” following Article IV (1)(c) of the WTO Agreement on Safeguards. That article states that the producers should be a whole of the “like or directly competitive products” or those whose collective output of the “like or directly competitive products” constitutes a major proportion within a territory. The U.S. Trade Act provides additional guidelines permitting the ITC to use its judgment in light of the guidelines and the relevant economic factors in a given case. Such factors may include whether the domestic producers also import the competed article;¹⁶² whether the domestic producers manufacture other articles that are not “like or directly competitive;”¹⁶³ and

¹⁵⁹ See Commission Regulation (EEC) No. 1087/84, 27 O.J. EUR. COMM. (No. L 106) 31 (1984) (introducing protective measures in respect of certain electronic piezo-electric quartz watches with digital display).

¹⁶⁰ 19 U.S.C. §§ 2252 (c)(6)(A).

¹⁶¹ *Supra* note 139, Article 5 (3)(c).

¹⁶² 19 U.S.C. §§ 2252 (c)(4)(A).

¹⁶³ 19 U.S.C. §§ 2252 (c)(4)(B).

geographic factors.¹⁶⁴ However, EU Regulation 3285/94 does not provide similar guidelines for the Commission to determine a “domestic industry”.¹⁶⁵

3. The criteria for determining serious injury

Basically, the rules in the U.S. and EU both meet the requirements for determining serious injury of Article XIX of GATT and the Agreement on Safeguards of the WTO. These criteria are: (1) the absolute or relative increase in imports; (2) serious injury or threat of serious injury to the domestic industry; (3) the causal link between (1) and (2).

In the United States, the USITC conducts an investigation to determine whether an article is being imported into the U.S. in such increased quantities as to be a substantial cause of serious injury or the threat thereof to the domestic industry.¹⁶⁶ This injury standard differs from that contained in GATT Article XIX in several ways. First,

¹⁶⁴ 19 U.S.C. §§ 2252 (c)(4)(C): “The Commission may treat a regional segment of the national industry as the domestic industry if one or more domestic producers which produce a like or directly competitive article in a major geographic area of the United States and whose production facilities in such area for such article constitute a substantial portion of the domestic industry in the United States and primarily serve the market in such area, and where the imports are concentrated in such area.” In the Fresh Cut Roses case, the ITC found that although the growers in the eastern two-thirds of the United States may have technically met the above statutory conditions, approximately one-half of consumption in that region is supplied by domestic growers outside the geographical area. The impact of imports, therefore, was not isolated to growers in just the eastern region, since imports also competed with roses grown in the western one-third of the United States. The ITC determined, therefore, that the appropriate domestic industry consisted of all the facilities in the United States devoted to the production of fresh cut roses. See USITC Inv. No. TA-201-42, Pub. No. 1059 (Apr. 1980).

¹⁶⁵ In the Quartz Watches case, the Commission sought to define the domestic industry, which consisted of all community manufacturers of the like or directly competing product. Within the Community, France, West Germany, and the United Kingdom had producers of the like product -- electronic quartz display watches. The producers in the United Kingdom only made parts and sub-assemblies and were not considered further by the Commission. The industries in West Germany and France were very different from each other. The West German industry was heavily concentrated in clock-making production, while the French industry focused on watches. Because the producers in these two countries were so different, the Commission decided to study each country's producers separately. *Supra* note 159, at 33.

¹⁶⁶ 19 U.S.C. §§ 2252 (b)(1)(A).

the U.S. legislation does not require that the increase in imports be unforeseen and tied to a trade concession. Second, Article XIX requires the offending imports to be both increasing in quantity and subject to "certain conditions" (e.g. abnormally low prices) in order to be injurious, while the U.S. statute simply requires the product be imported in "increased quantities." Third, the U.S. statute requires that increased imports should constitute "a substantial cause" of the injury.

Section 202 (c)(1) of the Trade Act¹⁶⁷ sets out rules regarding some of the factors which the USITC should take into account in determining whether there is a serious injury or a threat of serious injury (shown in Table 1). "Substantial cause" is defined as a cause which is "important and not less than any other cause."¹⁶⁸ Prior to the enactment of the Trade Act of 1974, the test for causation was more rigorous. It involved a determination of whether the increased imports were a "major cause" of injury. "Major" was understood to mean greater than all other factors combined.¹⁶⁹ The statute has widened the standard to allow the domestic industry access the safeguard measures more easily.¹⁷⁰

In determining "substantial cause," the USITC must also take into account the condition of the domestic industry over the course of the relevant business cycle, as well as factors other than imports that may be the cause of serious injury. However, the

¹⁶⁷ 19 U.S.C. §§ 2252 (c)(1).

¹⁶⁸ 19 U.S.C. §§ 2252 (b)(1)(B).

¹⁶⁹ Section 301 (b)(1) of the Trade Expansion Act of 1962, 19 U.S.C. §§ 1901 (b)(1)(1970)(repealed 1975); Note, "An Examination of ITC Determinations on Imports: The Basis for Substantial Injury" (1980/1) 6 Int'l Trade L. J. 242. See also Note, "Escape Clause Causation After the Auto Case: 1.8 Million Japanese Imports As Less Than a Substantial Cause of Injury" (1982) 16 Geo. Wash. J. Int'l & Econ. 299.

¹⁷⁰ See Christopher W. Derrick, *supra* note 49, at 354.

USITC cannot aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury or threat of serious injury, and then array that single cause against the impact that "increased imports" may have had.¹⁷¹

In the European Union, Article 10 of Regulation No. 3285/94 lists several important factors in measuring the seriousness of injury (shown in Table 2). Usually the Commission examines the period of three to five years immediately prior to the investigation as the representative years. Once the Commission determines the existence of one of the factors, it can take safeguard measures immediately.¹⁷² Article 5 defines "serious injury" as a significant overall impairment in the position of

¹⁷¹ 19 U.S.C. §§ 2252 (c)(2). For examples, in the Canned Mushroom case, the ITC held that the diversion of raw product to the fresh market was also an important cause of injury to the canning industry. There had been an extraordinary growth in demand for fresh mushrooms as national income had grown and tastes changed. However, the statistics showed that consumption of canned mushrooms had also increased from 193 million pounds in 1974/75 to 273 million pounds in 1978/79. Therefore, the ITC could not determine that the shift in consumer demand for fresh mushrooms was the substantial cause of serious injury to mushroom canners. Rather, their poor performance was primarily due to import competition. See USITC Inv. No. TA-201-43, Pub. No. 1089 (Aug. 1980). In the Potassium Permanganate case, the ITC found that the loss of the domestic industry's major customer, Chemagro, to be a more important cause of injury than increased imports. The loss of Chemagro in 1981 resulted in a significant loss of demand for domestically produced potassium permanganate. Approximately 50 percent of the domestic industry's capacity devoted to the production for Chemagro was idled, and employment of production workers fell, together with the number of hours worked by the remaining employees. Therefore, the ITC made a negative determination because the condition that the increase in imports and the industry's serious injury were not causally linked. See USITC Inv. No. TA-201-54, Pub. No. 1682 (Apr. 1985).

¹⁷² In the Quartz Watch case, the Commission utilized trend analysis to monitor changes in the volume of imports, consumption, and prices over a period of four years (1979-1983). Imports of quartz digital watches into the Community increased from 36.7 million units in 1980 to 45.1 million units in 1982. Between 1980 and 1982, the number of imports into the EEC increased at an annual rate of 12.2%. The Commission estimated that domestic consumption of the product in the EEC stabilized at between 63 and 65 million watches annually, which meant that the market share of imports increased from 64.3% to 83.3% between 1980 and 1982. The Commission found evidence of significant undercutting of prices between watches. The price differences ranged from 12.1% to 77.4%. Further, for estimating the impacts on community producers, the Commission also analyzed the domestic industry, looking at sales, market shares, firms, work force, and financial data. These analyses led the Commission to the conclusion that the domestic industry had suffered substantial injury. *Supra* note 159, at 33-35.

Community producers; "threat of serious injury" means serious injury that is clearly imminent.¹⁷³

On the issue of causality, the serious injury for Community producers must result from greatly increased imports and/or on similar terms.¹⁷⁴ While Article XIX requires the offending imports to be both increasing in quantity and subject to "certain conditions" (abnormally low price) in order to be injurious, the Regulation establishes that imports would meet the requirements if they either increased, were imported under such conditions as to cause injury, or both.¹⁷⁵

¹⁷³ *Supra* note 139, Article 5 (3)(a), (b).

¹⁷⁴ *Supra* note 139, Article 16 (1). In the Quartz Watch case, the Commission examined any causal links between imports and the injury to the domestic industry. It determined that a stable market combined with increasing import penetration and significantly lower import prices proved that imports were responsible for the substantial injury suffered by the domestic industry. The Commission found no other cause that could explain the injury to the domestic industry. *Supra* note 159, at 36-37.

¹⁷⁵ See Jorge F. Perez-Lopez, *supra* note 32, at 556.

Table 2. The factors of determining serious injury

	EU	United States
Serious Injury	<p><i>Volume of imports</i> --a significant increase, either in absolute terms or relative to production or consumption in the Community.</p> <p><i>Prices of imports</i> -- The price of imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community.</p> <p><i>Impact on Community producers</i> – production, capacity utilization, stocks, sales, market share, prices, profits, return on capital employed, cash flow, employment.¹⁷⁶</p>	<p><i>Volume of imports</i> -- either actual or relative to domestic production and a decline in the proportion of the domestic market supplied by domestic.</p> <p><i>Significant idling</i> --the significant idling of productive facilities in the domestic industry.</p> <p><i>Profits</i> -- the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit.</p> <p><i>Unemployment</i> – significant unemployment or underemployment within the domestic industry.¹⁷⁷</p>
Threat of serious injury	<p><i>Clearly foreseeable injury</i> -- whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:</p> <p><i>Rate of increase</i> -- The rate of increase of the exports to the Community.</p> <p><i>Export capacity</i> -- Export capacity in the country of origin or export, as it stands or is likely to be in the foreseeable future, and the likelihood that that capacity will be used to export to the Community.¹⁷⁸</p>	<p><i>Market share</i> -- a decline in sales or market share.</p> <p><i>Impact on U.S. producers</i> -- a higher and growing inventory and a downward trend in production, profits, wages, productivity, or employment in the domestic industry.</p> <p><i>Capital</i> -- the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research development.</p> <p><i>Diversion of sales</i> -- the extent to which the United States market is the focal point of the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets.¹⁷⁹</p>

¹⁷⁶ As to the degree of price undercutting, it should be determined case by case. *Supra* note 139, Article 10 (1).

¹⁷⁷ 19 U.S.C. §§ 2252 (c)(1)(A).

¹⁷⁸ *Supra* note 139, Article 10 (2).

¹⁷⁹ 19 U.S.C. §§ 2252 (c)(1)(B).

4. MFN and the prohibition of grey area measures

Grey area measures (GAMs) were often used rather than safeguard actions, due to difficulties with Article XIX, such as its ambiguity, and procedural inadequacies, the MFN dispute, and the requirements of compensation and retaliation. Taking grey area measures may not only reduce costs and the risk of political pressure, but also bypass the scrutiny of GATT. The main characteristic of such GAMs (e.g. VERs, OMAs) is that they are generally bilateral and not very transparent. The U.S. and the EU have historically been the most frequent users of GAMs in safeguard cases.

Since disputes concerning MFN and GAMs reached agreement in the Uruguay Round, the U.S. and EU have changed their legislation to meet the new WTO Safeguards Agreement.¹⁸⁰

The U.S. Trade Act, Section 126(a) stipulates that “any duty, or other import restriction or duty-free treatment” proclaimed under the Act can be applied to products from all foreign countries, whether imported directly or indirectly.¹⁸¹ In practice, the U.S. has implemented safeguard relief on a non-discriminatory, or MFN, basis.¹⁸² Thus, U.S. law directs that imports from all sources should be considered in determining whether there has been import injury caused in safeguard cases. Similarly, relief actions in the form of tariff increases or quantitative restrictions have been aimed at all sources

¹⁸⁰ On the MFN issue, safeguard measures have to be applied to a product being imported irrespective of its source. Furthermore, any VER, OMA or any other similar measure on the export or the import side cannot be sought, taken or maintained. However, a quota modulation can be used if the imports from certain countries increase in disproportionate percentage in a representative period. Alternately, if quota modulation can be justified as reasonable and fair to all exporting countries, the importing country can use this modulation to harmonize the principle of MFN. See Article II, XI and V of Agreement on Safeguards.

¹⁸¹ 19 U.S.C. §§ 2136 (a).

¹⁸² Jorge F. Perez-Lopez, *supra* note 32, at 548.

of imports. Furthermore, to meet the standard of the Agreement on Safeguards, the U.S. revised its Trade Act to eliminate the negotiation and application of OMAs in 1994 amendments.¹⁸³ Section 203 (a)(3)(E)¹⁸⁴ has been adapted to permit the U.S. President to negotiate, conclude, and carry out agreements (e.g. import quotas) with foreign countries, limiting exports from foreign countries and imports into the United States. Such agreements must conform to the relevant provisions of GATT 1994 and the WTO Agreement on Safeguards.¹⁸⁵

Similarly, the EU also improved its safeguard rules to meet the MFN standard and eliminate the application of GAMs, thus dealing with the ambiguity of the former Regulation 288/82.¹⁸⁶ The Preamble of Regulation 3285/94 indicates that safeguard measures should “follow the Agreement on Safeguards ... and Article XIX,” and that the “Agreement requires the elimination of safeguard measures which escape those rules, such as voluntary export restraints, orderly marketing arrangements and any other similar import or export arrangements.”¹⁸⁷ Thus, EU law directs the Commission to invoke safeguard measures based on a non-discriminatory, or MFN, basis, and prohibits grey area measures. However, if imports originating from one or more supplier countries have increased disproportionately, relative to the total increase in imports of the product, the Community can depart from the MFN requirement and take discriminatory quota measures admitted under the Agreement on Safeguards.¹⁸⁸

¹⁸³ Pub. L. 103-465, Title III, section 302(a)(1), Dec. 8, 1994, 108 Stat. 4933-4937, struck “orderly marketing” preceding “agreements”.

¹⁸⁴ 19 U.S.C. §§ 2253 (a)(3)(E).

¹⁸⁵ Footnote 3 of Agreement on Safeguards.

¹⁸⁶ Regulation No. 288/82, 25 O. J. EUR. COMM. (No. L. 35) 1 (1982).

¹⁸⁷ *Supra* note 139, Preamble.

¹⁸⁸ Agreement on Safeguards, Article V, para. 2 (a).

5. The type of relief

Every safeguard measure must be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.¹⁸⁹ GATT 1994 Article XIX and the WTO Agreement on Safeguards do not limit the types of safeguard measures except for grey area measures.¹⁹⁰

Prior to the 1988 amendments, the USITC had the power to recommend an increase in, or imposition of, any duty or import restriction on the article investigated “which is necessary to prevent or remedy” the serious injury found. Alternately, trade adjustment assistance can also be recommended if the USITC thinks it is sufficient to remedy the injury.¹⁹¹ While the USITC may have reviewed adjustment plans and commitments that were submitted by petitioners, the law provides no authority to factor those plans and commitments into the remedy recommendations.

The 1988 Trade Act authorizes the USITC to recommend not just import relief measures and adjustment assistance, but also two new remedies. These include (a) international negotiations to address the underlying cause of the increase in imports of the article or otherwise alleviate the injury, and (b) any other action authorized by law that is likely to facilitate adjustment to import competition.¹⁹² Actions which can be taken by the U.S. President are quite similar to those recommended by the USITC (shown in Table 3). The types of relief are expanded for both the President and the

¹⁸⁹ Agreement on Safeguards, Article V, para. 1.

¹⁹⁰ *Supra* note 185.

¹⁹¹ 19 U.S.C. §§ 2251 (d)(1)(A) (1982 & Supp. IV 1986)

¹⁹² 19 U.S.C. §§ 2252 (e)(4).

USITC after the 1988 Trade Act. Not only is the power of recommendation of the USITC broader, but so is the decision-making authority of the President. These increased remedial mechanisms give petitioners more opportunities to obtain relief and to improve their competitiveness. Further, the U.S. has revised its laws to eliminate OMA, VER and any other similar import or export arrangements which are prohibited by the Agreement on Safeguards.

In spite of the many options on safeguard measures, there are still statutory limits on the maximum level of relief that can be claimed. Section 203 (e)(3) stipulates that when increasing or imposing duties, a rate that is "more than 50 percent ad valorem above the rate (if any) existing at the time the action is taken may not be imposed."¹⁹³ When making a quantitative restriction, the level of restraint is not to be "less than the quantity or value of such article imported into the U.S. during the most recent three years that is representative of imports of such article."¹⁹⁴ If an agreement implemented under Section 203 (a)(3)(E)¹⁹⁵ is not effective, the President may modify the type of relief to another form (e.g. duty increase, quotas, or quantitative restraints).¹⁹⁶

The EU has only two ways to deal with safeguard cases under Regulation 3285/94. One is a surveillance measure and the others are safeguard measures (for example, quotas or limitation of import documents shown in Table 3). If the Commission determines that continued entry of a product into the EU presents a

¹⁹³ 19 U.S.C. §§ 2253 (e)(3).

¹⁹⁴ 19 U.S.C. §§ 2253 (e)(4).

¹⁹⁵ "...negotiate, conclude, and carry out agreements with foreign countries limiting the export from foreign countries and the import into the United States of such article;" 19 U.S.C. §§ 2253 (a)(3)(E).

¹⁹⁶ 19 U.S.C. §§ 2253 (f)(2).

substantial threat of serious injury to EU producers, it can order that the product be placed under surveillance.¹⁹⁷ The major reason why the EU frequently takes surveillance measures is that such measures can help the Commission collect related information more carefully and defuse many trade tensions at an early stage.¹⁹⁸ Besides, through such actions, foreign exporters can be made aware of the attention that is paid by the EU to the products concerned. Usually, the Commission has the power of deciding whether or not to take surveillance measures.¹⁹⁹ Surveillance can be imposed for a period of up to twelve months, and cannot be renewed unless there are special circumstances.²⁰⁰

When deciding to take safeguard measures, the Commission can use the safeguard measures laid down in Article 16 and 17 of Regulation 3285/94. The most frequent safeguard measures applied by the Commission have been quantitative restraints (i.e. quotas and VERs). However, in the current law Regulation 3285/94, VERs and any other similar import or export arrangements have been eliminated as forms of import relief. When establishing a quota, the Commission is expected to consider traditional trade flows, the volume of goods exported in normal terms and conditions before the quota was in effect, and the need to avoid jeopardizing the goal pursued in establishing the quota.²⁰¹ Some scholars have suggested that there are also other permissible forms of relief not listed in the regulation. One reason for this view is

¹⁹⁷ *Supra* note 139, Article 11 (1).

¹⁹⁸ In 1987, over 300 products were under surveillance. See, e.g., List of Products Subject to Surveillance, 30 O.J. EUR. COMM. (No. C 37) at 46 (1987).

¹⁹⁹ *Supra* note 139, Article 11 (2).

²⁰⁰ *Supra* note 139, Article 11 (3).

²⁰¹ *Supra* note 139, Article 16 (3)(a).

that since Article XIX of GATT has allowed the use of tariff increases, that remedy can then be regarded as falling within the requirements of the regulation.²⁰² Further, the language of the regulation may be broad enough to cover any form of protective measures.²⁰³

Table 3. Types of import relief in U.S. and EU

	European Union	United States
Types of Import Relief	<ul style="list-style-type: none"> • Quota. • Surveillance. • Limiting the period of validity of import documents. • Altering the import rules for the product in question. 	<ul style="list-style-type: none"> • Increase duty. • Tariff-rate quota. • Quantitative restriction. • Adjustment measures (e.g. trade adjustment assistance). • Agreements with foreign countries limiting export and import. • Auction of import licences quantities. • International negotiations to address the underlying cause of the increased imports. • Congress legislature to facilitate domestic industries positive adjustments. • Any other action which may be taken under the authority the law and considered appropriate and feasible. • Any combination of the actions listed above.

6. The duration of safeguard measures and progressive liberalization

On the subject of the duration of safeguard measures, both the U.S.²⁰⁴ and the EU²⁰⁵ have identical rules to the Agreement on Safeguards. The safeguard period should not exceed four years, which includes the duration of any provisional measures.

²⁰² E. McGovern, *supra* note 48, at 309.

²⁰³ I. Van Bael & J. F. Bellis, *supra* note 135, at 181.

²⁰⁴ 19 U.S.C. §§ 2253 (e)(1)

If the safeguard action continues to be necessary to prevent or remedy serious injury and there is evidence that the domestic industry is making positive adjustments to import competition, the initial safeguard measure may be extended. The total period of application of a safeguard measure and associated provisional measures, with extensions, cannot exceed eight years. To facilitate industry adjustments, the liberalization of relief is to take effect if the safeguard action has been applied over one year. The EU surveillance measures, however, cease to be valid at the end of the second six-month period following the six months in which the measures were originally introduced.²⁰⁶

7. Provisional safeguard measures

Provisional safeguard measures are set out in the GATT Article XIX (2) and Article VI of the Agreement on Safeguards. Both the U.S. and the EU have followed these rules to deal with critical circumstances where delay might cause damage which would be difficult to repair.

In the 1988 amendments, the U.S. added two conditions to deal with provisional safeguards. One is for perishable agriculture products and citrus products. A domestic industry in this sector may apply to the Trade Representative (USTR) to monitor the imports of a product, if there is a reasonable indication that increased imports constitute a threat or a substantial cause of serious injury.²⁰⁷ The USITC is responsible for

²⁰⁵ *Supra* note 139, Article 20.

²⁰⁶ *Supra* note 139, Article 11.

²⁰⁷ 19 U.S.C. §§ 2252 (d)(1)(A).

initiating and monitoring the investigation.²⁰⁸ After 90 days of monitoring, the petitioner can request provisional relief if the situation has not improved.²⁰⁹ The other measure is for critical circumstances and applies more broadly to any industry. The industry concerned may request provisional relief in circumstances where a delay in taking safeguards would cause damage that would be difficult to repair.²¹⁰ On the relief itself, the U.S. allows three types of provisional relief: tariffs, quantitative restraints, or any combination of the two.²¹¹ A tariff increase is the most utilized option in provisional relief cases.

Unlike the U.S., the EU does not divide their procedures of provisional relief for perishable products and other products in critical circumstances. The EU has one provisional relief rule to deal with all products in critical circumstances. The EU provisional safeguard measures are applied in critical circumstances where delay would cause damage which is difficult to repair, or where a preliminary determination provides clear evidence that increased imports have caused or are threatening to cause serious injury.²¹² The procedures of taking provisional relief are very similar to Article VI of the Agreement on Safeguards.

8. Link to structural adjustment

U.S. laws emphasize the link between safeguard measures and industry

²⁰⁸ 19 U.S.C. §§ 2252 (d)(1)(B).

²⁰⁹ 19 U.S.C. §§ 2252 (d)(1)(C).

²¹⁰ 19 U.S.C. §§ 2252 (d)(2).

²¹¹ 19 U.S.C. §§ 2252 (d)(5)(C).

²¹² *Supra* note 139, Article 8.

adjustment more than those of the EU. The most important revision to Section 201 in the Trade Act of 1988 emphasizes the promotion of industrial adjustment. Although the original Section 201 also encouraged the industry to make adjustments, it did not emphasize this purpose as clearly.

In passing the Trade Act of 1988, the U.S. Congress strongly encouraged petitioners to submit adjustment plans when making their safeguard request.²¹³ The 1988 Act concluded that a petitioner “might” add a plan to facilitate positive adjustment to import competition at any time within 120 days after the date of filing the petition for safeguards.²¹⁴ Before submitting the adjustment plan, the petitioner could consult with the Trade Representative and the employees of any Federal agency that are considered appropriate by the Trade Representative, to evaluate the adequacy of the plan’s proposals.²¹⁵ The 1988 Trade Act did not require that the petitioners submit an adjustment plan; submission of the plan was optional. However, in reality, submissions of plans and commitments were, and continue to be, essential to the success of petitions.²¹⁶ After all, the plans are considered by the USITC in making its recommendations for potential remedies to the President; and then in turn by the President in deciding what relief, if any, to impose.²¹⁷

In contrast with the former Trade Act, the purpose of escape clause relief, to promote adjustments to import competition by U.S. producers, is clearly set out in the

²¹³ See Paul C. Rosenthal and Robin H. Gilbert, *supra* note 127, at 409-410.

²¹⁴ 19 U.S.C. §§ 2252 (a)(4).

²¹⁵ 19 U.S.C. §§ 2252 (a)(5)(A).

²¹⁶ See Paul C. Rosenthal and Robin H. Gilbert, *supra* note 127, at 424,425.

²¹⁷ Suchman, “Adjustment to Import Competition: Section 201”, in David E. Birenbaum, *The 1988 Trade Law: What It Affects and What It Means* (Clifton, N.J.: Prentice Hall Law & Business, 1988) at 249.

1988 Act. Section 201 (a) states that following an injury finding by the USITC, the U.S. President should take all appropriate actions to “facilitate efforts by the domestic industry to make a positive adjustment to import competition.” The purpose of “positive adjustment” to import competition is to strengthen the domestic industry to compete successfully with imports after the safeguard actions are terminated; or to help the domestic industry and dislocated workers experience an orderly transfer of resources, or an orderly transition to other productive pursuits.²¹⁸ The statute clarifies that an industry can be considered as having made a positive adjustment to import competition even if the industry does not have the same size and composition as it had at the time the escape clause investigation was initiated.²¹⁹

In order to improve import competitiveness, assist the affected domestic industry, and transfer resources or labour forces to other productive pursuits, the U.S. promulgated regulations on Trade Adjustment Assistance (TAA).²²⁰ The TAA program attempts to remedy harm caused by fairly priced imports, but not to address harm caused by unfair trade practices on the part of foreign competitors. Moreover, the trade adjustment assistance program is not meant to provide assistance to all displaced workers in the industries facing foreign competition.²²¹ There must be a causal nexus

²¹⁸ 19 U.S.C. §§ 2251 (b)(1).

²¹⁹ 19 U.S.C. §§ 2251 (b)(2).

²²⁰ Trade adjustment assistance may be secured in two ways. Under the escape clause, the President may determine that instead of, or in addition to, temporary trade restrictions, adjustment assistance will facilitate an injured domestic industry's positive adjustment. Secondly, workers may petition the Secretary of Labor directly, and firms may petition to the Secretary of Commerce directly, for adjustment assistance, without an escape clause affirmative-injury determination. See 19 U.S.C. §§ 2253 (a); 19 U.S.C. §§ 2271 (a); 19 U.S.C. §§ 2252 (a)(1).

²²¹ See Former Workers of CSX Oil & Gas v. United States, 720 F. Supp. 1002, 1006-7 (Ct Int'l Trade 1989). Information submitted by CSX showed that production and sales of crude oil and liquid natural gas increased. Thus, imports of products like or directly competitive with crude oil and liquid natural gas

between the harm suffered by the domestic injury and increased imports.²²² Competent authorities should carefully identify those industries that are worth adjusting, or else the TAA program may become useless.²²³

Unlike the U.S., the EU Regulation 3285/94 does not include an explicit provision requiring the industry to submit a structural adjustment plan. One can only find the connection between the safeguard measures and structural adjustment from Article 20 describing the degree and limitation of safeguard measures: "The duration of safeguard measures must be limited to the period of time necessary to prevent or remedy serious injury and to facilitate adjustment."²²⁴ Such a safeguard period may be extended if "there is evidence that Community producers are adjusting."²²⁵ Further, Regulation 3285/94 does not have articles like the provisions of TAA in the U.S. to assist the affected industry and its employees.

did not importantly cause the worker separation. While CSX's dry natural gas sales and production decreased slightly in quantity, so too did the United States' imports. Thus, it was reasonable to conclude that there were no increased imports that significantly contributed to plaintiffs' separation. This conclusion was bolstered by substantial evidence that the cause of the worker's layoffs was a corporate-wide cost reduction program. The plaintiffs did not get the trade adjustment assistance.

²²² Retail Clerks Int'l Union v. Donovan, 10 Ct Int'l Trade 308, 311 (1986). See also, Estate of Finkle v. Donovan, 9 Ct Int'l Trade 374, 382, 614 F. Supp. 1245, 1251 (1985) causal nexus exists when there is a "direct and substantial relationship between increased imports and a decline in sales and production."

²²³ For example, the apparel and textile industry benefited from protective quotas and other forms of assistance between 1957 and 1985. Despite apparent troubles in this industry, it has continued to attract new resources. As of the end of 1982, one third of all clothing and textile producers in the United States had entered the industry in the previous six years. See Mary Anne Joseph, "Trade Adjustment Assistance: an analysis" (1990) 6 Conn. J. Int'l L. 269-270; R. Lawrence & R. Litan, *Saving Free Trade* (Washington, D.C.: Brookings Institution, 1986) at 30. One commentator claims that the trade adjustment assistance program contains a "perverse incentive in the promise of getting . . . aid if you are hurt by imports: firms and workers may be implicitly encouraged to gamble on import-vulnerable industries if they know that relief will be given should things work out badly." See P. Lindert, *International Economics* (Homewood, Ill.: Irwin, 1986) at 187.

²²⁴ *Supra* note 139, Article 20 (1).

²²⁵ *Supra* note 139, Article 20 (2).

9. Notification and consultation

The U.S. Trade Act and the EU Regulation 3285/94 do not contain any special provisions regarding notification to GATT/WTO or procedures for consultation with other trading partners. However, in practice, the U.S. government notifies the GATT Council [under Article XIX (2)] of the initiation of escape clause investigations and of all other significant milestones in the process. The same information has also been transmitted to other trade partners through diplomatic channels. Also, although there are no formal escape clause consultation procedures in the Trade Act, trading partners may request consultation to offer their views regarding any aspect of a case.

Similarly, there is no procedure in the EU whereby exporting nations may be notified of the proceedings or consulted regarding any alternative approaches to remedy an import injury. However, in practice, the Commission affords all interested parties the opportunity of making their views known, both in writing and orally.²²⁶

III. Dispute Settlement in Safeguard Cases

In a safeguard case, can the petitioner or other interested parties challenge the investigation process, its results, or the final decision on safeguard measures through administrative or judicial action?

In the U.S., the task of reviewing the USITC reports and making recommendations to the President as to which action should be taken has been delegated to the interagency trade organization established by Section 242 of the Trade

²²⁶ See I. Van Bael & J. F. Bellis, *supra* note 135, at 189.

Expansion Act of 1962.²²⁷ This organization is chaired by the United States Trade Representative (USTR) and has representation from other Cabinet agencies.²²⁸ Interested parties are permitted to file briefs with the USTR in escape clause cases. Also, the U.S. Congress is entitled to review Presidential import relief decisions.²²⁹ In instances where the President opts for a form of import relief different from that recommended by the USITC (including a decision not to provide any import relief), the U.S. Congress could, within 90 days after receiving the report, override the President's decision upon the adoption by both Houses of a concurrent resolution disapproving of the President's action. In such cases, the USITC-recommended relief is implemented.²³⁰

Generally speaking, the U.S. escape clause gives the President a substantial amount of power when making safeguard decisions. The U.S. courts rarely interfere in the international affairs in which the President has a great degree of discretion. The Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his or her delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with relevant procedural requirements. The President's findings of fact or motivations are not subject to review.²³¹ As for the USITC, its obligations are to

²²⁷ Jackson, Louis, & Matsushita, "Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules" (1982) 81 Mich. L. Rev. 351.

²²⁸ *Id.*

²²⁹ 19 U.S.C. §§ 2253 (b).

²³⁰ 19 U.S.C. §§ 2253 (c).

²³¹ "We must also bear in mind that the subject matter is intimately involved with foreign affairs, an area in which congressional authorizations of presidential power should be given a broad construction and not hemmed in or 'cabined, cribbed, confined' by anxious judicial blinders." See Florsheim Shoe Company, Div. of Interco, Inc., v. United States, 744 F. 2d 795 (Fed. Cir. 1984). United States v. George S. Bush & Co., 310 U.S. 371, 379-80, 60 S.Ct. 944, 946, 84 L.Ed.2d 1259 (1940); United States Cane Sugar Refiners' association v. Block, 683 F.2d 399, 404 (CCPA 1982); Aimcee Wholesale Corp. v. United

conduct the investigation and to assist the President in making a decision. The USITC also has great discretion to consider various factors, including all economic factors it deems relevant. However, if the USITC does not provide an explanation of the basis of its determination, interested parties can bring a claim to court.²³² As one court has stated, judicial review of the USITC findings is limited to determining “whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law.”²³³ The courts will sustain the determinations of the USITC if its findings and conclusions are rationally connected and are supported by substantial evidence.²³⁴

As for the EU, there is no procedure in the Regulation 3285/94 whereby interested parties may challenge the investigation process, its results, or the decision of the Commission. Regulation 3285/94 merely states that a Member State may use administrative relief to override the decision of the Commission. Any decision taken by the Commission shall be communicated to the Council and to the Member States. A Member State may, within one month of the communication of the decision by the Commission, refer the decision to the Council for confirmation, amendment, or revocation.²³⁵ If within three months from the referral of the matter to the Council, the

States, 468 F. 2d. 202, 206 (CCPA 1972).

²³² The opinion of COWEN, Senior Circuit Judge: “Although the ITC's findings of fact are not subject to the same substantial evidence standard that prevails in judicial review of most administrative action, the agency is required by section 201(d) to report its determination to the President, accompanied by ‘the basis therefor.’ Before the ITC can be deemed to have complied with this statute, it is necessary that its Report ‘fairly apprise the President, interested parties, and the public of the reasoning underlying its recommendation.” See Maple Leaf Fish Co. v. United States, 762 F. 2d 90 (Fed. Cir. 1985).

²³³ City Lumber Co. v. United States, 457 F. 2d 991, 994 (C.C.P.A. 1972).

²³⁴ 529 F. Supp. at 682-83.

²³⁵ *Supra* note 139, Article 16 (7).

latter has not given its decision, the measure taken by the Commission is deemed revoked.²³⁶ Only Member States can express their objections to the decision of the Commission. No private party (e.g., an exporter or importer concerned) is entitled to bring a challenge.

If the safeguard measure is in operation, a Member State may request a consultation with the Advisory Committee to examine the safeguard measures. As a result of the consultation, if the Commission considers that the safeguard measures should be revoked or amended, the Commission must amend or revoke the safeguard measure itself, or propose that the Council do so.²³⁷ Similarly, private parties have no right to require the Commission or the Council to revoke or amend safeguard measures.²³⁸

In theory, European courts are able to review decisions made by the Commission and the Council. It has been pointed out that interested parties might bring a claim before the European Court of Justice.²³⁹ In reality, such a possibility is extremely unlikely. Only under limited conditions, such as if the Commission does not abide by the rules of procedure, or makes serious or obvious mistakes when determining the facts, do European courts have the right to interfere and perhaps proclaim that the proposed safeguard measure is invalid.²⁴⁰

²³⁶ *Supra* note 139, Article 16 (8).

²³⁷ *Supra* note 139, Article 21.

²³⁸ I. Van Bael & J. F. Bellis, *supra* note 135, at 327.

²³⁹ Lussenburg, "New EEC Safeguard Measures: Regulation 288/82" (1984) 16 Case W. Res. J. Int'l L. 351.

²⁴⁰ *Id.*, at 327-328.

IV. Conclusion

After establishing the WTO Agreement on Safeguards to overcome the deficiencies of Article XIX of GATT, many uncertainties regarding the application of that article have been resolved. As a result, every WTO Member should revise its national laws to comply with the spirit of the Agreement. Currently, laws and practices in the United States and the European Union implementing escape clause import relief generally conform to the requirements outlined in GATT, Article XIX and the WTO Agreement on Safeguards.

Both the U.S. and EU conduct thorough investigations to explore the economic merits of petitions for escape clause relief. This process affords interested parties an opportunity to present their views. Unlike the U.S., the EU does not permit a private party to be a petitioner, but he or she must make claims to their own governments. After receiving a claim from a Member State, the EU Commission will assemble an Advisory Committee that will include representatives from every EU Member State.

Under U.S. legislation, imports must present "a substantial cause of serious injury" (a lower standard than the one required to be called "a major cause"). A "substantial cause" has been defined in the U.S. legislation as a cause which is no less important than any other cause. The injury standard in the EU legislation has replaced the term "substantial injury" with the term "serious injury." Specific factors to be considered in determining whether there has been a serious injury have also been listed in both systems. Both the U.S. and the EU appear to ignore two Article XIX

requirements: that the increase in imports be unforeseen, and result from GATT obligations.

Grey area measures are no longer permitted as a form of import relief in the U.S. and the EU. Every safeguard measure has to be applied on the basis of MFN. The only types of relief authorized by the EU are surveillance and quota measures. U.S. law authorizes safeguard relief in other forms (e.g. tariff increases, imposition of quotas, tariff-rate quotas, and adjustment assistance). U.S. law especially emphasizes the function of adjustment in the escape clause, authorizing the President to take adjustment measures (e.g., trade adjustment assistance). The U.S. seems to make the function of the escape clause more positive and consequently more practical.

Both the EU and the U.S. have rules about provisional import relief in critical circumstances. In the EU, provisional relief is not limited to perishable products, although in practice its application seems to be directed at such products. Under U.S. law, provisional relief is divided into two kinds: for perishable products and other products in critical circumstances.

With regard to whether any determination made about a safeguard case can be challenged, the U.S. Congress is entitled to review Presidential import relief decisions, while EU Regulation 3285/94 only permits EU Member States to use administrative remedies to override decisions of the Commission. Also, if a safeguard measure is in operation, a Member State may request a consultation with the Advisory Committee to examine whether the safeguard measure ought to be revoked or amended. As for going through judicial channels to resolve any disputes in import relief cases, there is no

specific rule in EU regulations. However, if there is an obvious procedural mistake or another serious error (e.g. no explanation of the reasons for the decision), at least in theory, interested parties may bring such claims before the European Court of Justice. In the U.S., decisions regarding safeguard measures made by the USITC are reviewable by the courts.

Chapter 5

The impacts on Taiwan's local industries and import relief after joining the WTO

Becoming a member of the WTO will bring massive pressures for structural adjustments to Taiwanese local industries. Especially in recent years, because of labour shortages, soaring salaries and severe competition from other newly developing countries, Taiwanese local industries have faced the challenge of adjustment. Taiwan's entry into the WTO now impels local industries to speed up this process of structural adjustment. In order to make domestic industries achieve an appropriate balance between the opening of markets and general production and marketing, and to avoid the possibility of serious injury to domestic producers from large quantities of foreign imports, Taiwan's government has established its own import relief system. That system is patterned after the regulations of the WTO, the U.S. and EU with the aim of supporting Taiwanese domestic industry while pursuing liberalized trade policies.

In order to discuss the impact on Taiwan's local industries and the need for import relief after joining the WTO, this chapter will examine the background of Taiwan's economy and trade; the future impact on Taiwanese industry after Taiwan's WTO entry; and the current import relief system – Rules for Handling Import Relief Cases ("RHIRC") and other relevant regulations. Finally, this chapter will also compare differences in import relief rules amongst the WTO, U.S., EU and Taiwan, in an effort to make suggestions and observations about Taiwan's import relief system.

I. Background and history of trade liberalization in Taiwan

A. The history of trade liberalization in Taiwan (1950 to the present)

Taiwan is an island economy. Despite scarce natural resources and a very high population density, Taiwan has sustained a surprisingly high rate of economic growth since World War II.²⁴¹ Foreign trade has played a very important role in this economic success. Over the past 50 years, the focus of government trade policies has moved from control to liberalization, with the pace of change having been adjusted several times in order to accommodate different needs at various stages of the country's economic development. The broad policy phases that were part of this process, are outlined below.

1. Import substitution policies of the 1950s

Most of Taiwan's industrial and agricultural equipment was destroyed during World War II. The need to provide for the million mainlanders, who had followed the Kuomintang government to Taiwan, placed an additional and severe strain on the country's limited resources.²⁴² The main thrust of economic development in the 1950s was thus to re-establish agricultural and industrial production in order to achieve

²⁴¹ From 1952 to 1998, the economy grew at an average rate is 8.5% per annum. In the same period, the average per capita gross national product (GNP) increased dramatically, from about US\$ 196 to US\$ 12,333. Taiwan has become the fourteenth largest trading country in the world and has the third highest foreign exchange reserves. See The Third Bureau of Directorate-General of Budget, Accounting and Statistics (DGBAS) of the Executive Yuan, *Statistical Yearbook of the Republic of China* (Taiwan, ROC: November 1999) at 18.

²⁴² Danny Kin-Kong Lam, *Guerrilla Capitalism: Export Oriented Firms and the Economic Miracle in Taiwan* (March 1989) at 181.

economic independence and to create enhanced employment opportunities.²⁴³

The government began a program of agricultural reform, as well as assistance to industries that produced import substitutes.²⁴⁴ By creating trade barriers, such as high tariffs and import and investment restrictions, the government protected local industry against competition from imports, and fostered the development of light, labour-intensive and consumer goods industries.²⁴⁵ To conserve foreign exchange, the government established a multiple-rate system of exchange controls whereby a higher rate was applied to all imports, other than necessities of life and important construction materials.²⁴⁶

Effectively combining this import substitution policy with the use of relief goods and materials from the United States, Taiwan soon established its own small-scale operations in industries such as textiles, plastics, cement, electrical appliances, and food processing.²⁴⁷ Over time, these industries came to form the basis for development of the domestic economy, and transformed themselves into the main export industries. However, during the 1950s, the volume of both imports and exports was quite small and the country's trade deficit continued. (See Table 5.) It was domestic agriculture that, indisputably, provided the main source of raw materials, funds and markets for these industries (e.g. textiles etc.).²⁴⁸

²⁴³ Xiao Wan-Zhang, "Trade Liberalization in Taiwan: Retrospect and Prospect (Taiwan Di Mao Yi Zi You Hua: Hui Gu Han Zhan Wang)" (Oct. 1992) 78 *Industry of Free China* 2.

²⁴⁴ *Id.*

²⁴⁵ The Ministry of Economic Affairs, *Liberalized Measures and Effects in Taiwan (Zi You Hua Cuo Shi Ji Ji Dui Taiwan Di Ying Xiang)* (Taiwan, ROC: The Ministry of Economic Affairs, 1989) at 3.

²⁴⁶ Nai Ping, "Financial Policy and Economic Development in Taiwan (Taiwan Di Jin Rong Zheng Ce Han Jing Ji Fa Zhan)" (1994) 34 *Pacific Economic Review* 32.

²⁴⁷ See Xiao Wan-Zhang, *supra* note 243, at 2.

²⁴⁸ The Ministry of Economic Affairs, *supra* note 245, at 4.

2. Export-oriented policies of the 1960s

In the late 1950s, Taiwan's import substitution industries found their domestic markets saturated, and the high rate of exchange had a negative impact on exports.²⁴⁹ In order to continue its industrial development and earn foreign exchange, Taiwan's government began to change the focus of its trade policies from passive import control to positive export expansion, and implemented a series of regulations that encouraged investment and exports.²⁵⁰ Increasing export demand fuelled production. In addition to light industries, several technology-intensive industries became well-established and contributed to the country's industrial diversification.²⁵¹ Taiwan's main exports were no longer agricultural products but those of the labour-intensive industries.

Because exports were growing faster than imports, the growth of the trade deficit slowed. The government then relaxed its trade policies to encourage foreign investment and technological cooperation. For example, it reduced tariffs, loosened import restrictions and reverted to a single rate of exchange.²⁵² New capital and technology raised productivity levels and strengthened the competitive position of import-substitution industries, enabling them to make the transition to export industry status.

²⁴⁹ Government Information Office (GIO), *Taiwan's Story: Economy* (Taiwan, ROC: GIO, 1997). See <http://www.gio.gov.tw/info/ecobook/ecobody2.htm>.

²⁵⁰ For example "Rules for Technological Cooperation" and "Rules for Encouraging Investments" were promulgated in 1962 and 1965, respectively. In addition, many bonded stores and factories, and export processing zones were established in the same period. This gave the industries in Taiwan a comparative advantage in relation to other countries. See Xiao Wan-Zhang, *supra* note 243, at 3.

²⁵¹ The brunt of export promotion was carried out by small- to medium-sized firms that were not state owned or dominated. These Taiwanese firms are known among foreign buyers for their willingness to change, adapt and meet their customer's requirements even if it involves costly, small runs of special orders. See Danny Kin-Kong Lam, *supra* note 242.

²⁵² Nai Ping, *supra* note 246, at 35.

Along with the continuing prosperity of the world's economy, Taiwan's trade exports grew rapidly.²⁵³ Since the country had become a centre for adding value to imports and then re-exporting them, imports also increased. The decade of the 1960s was a period of high economic growth for Taiwan; however, the trade deficit persisted (shown in Table 5).

3. Second import substitution period — the 1970s

After the 1960s, in which it had achieved rapid industrial development and economic growth, the country lacked basic infrastructure and agricultural and industrial raw materials and therefore undertook major construction projects of all kinds. By developing a heavy chemicals industry, the government laid the foundation for further economic development, this time in the area of producer goods.²⁵⁴

Except for 1974 and 1975,²⁵⁵ there was a trade surplus throughout the decade, and there were only two years when imports and exports did not grow. The lack of growth in those years might be explained, in part, by the two oil crises that resulted in worldwide economic recession; fierce competition in international markets; and the revival of the trade protectionism.²⁵⁶ However, underlying these issues, Taiwan's infrastructure was still inadequate and its trade system was not very sound.

²⁵³ GIO, *supra* note 249.

²⁵⁴ Starting in 1970, ROC' President Jiang Jing-Guo implemented a project called "Ten Major Construction Works." This included the establishment of a new international airport, international ports, a freeway, an oil refinery, and other heavy chemical industries—all to support the country's economic growth. This is a clear demonstration of the extent to which government dominates investment activity. Xie Zheng-Yi, *The Evolution of Taiwan's Economic Miracle (Taiwan Jing Ji Qi Ji Di Fan Zhan)* (1995) at 22-23.

²⁵⁵ See Xiao Wan-Zhang, *supra* note 243, at 3. See also GIO, *supra* note 249.

²⁵⁶ GIO, *id.*

In order to promote trade and industry, the government abandoned policies that supported production rather than sales, and thus fostered confidence in a trade-based economy. Initial measures were taken to liberalize trade and to coordinate policy with respect to the developing industries, in order to avoid a trade surplus that might have caused conflict with the country's trading partners.²⁵⁷ Furthermore, the government also adopted a flexible exchange rate system to make exchange rates responsive to the market, and in 1979, it established a foreign exchange market.²⁵⁸ These measures contributed greatly toward the liberalization of trade in Taiwan.

4. The 1980s

Early in the decade, Taiwan's trade surplus continued to grow rapidly and the country thus accumulated large foreign exchange reserves (shown in Table 5). This great success in trade has had the practical benefit of raising Taiwan's international standing, but it also resulted in international political pressures.²⁵⁹ At the same time, Taiwan's large foreign exchange reserves increased the value of its dollar and contributed to domestic inflationary pressures.²⁶⁰ This combination of circumstances not only increased export prices, but weakened the competitive position of Taiwan's

²⁵⁷ These measures included revising the Customs Law governing tariff adjustments; a series of annual tariff reductions; and giving preferential tariffs to friendly countries based on the principle of reciprocal treatment. See Xiao Wan-Zhang, *supra* note 243.

²⁵⁸ Nai Ping, *supra* note 246, at 38.

²⁵⁹ In the climate of protectionism that had revived because of trade imbalances among nations, the US government pressured Taiwan, with its huge trade surplus, to open up its domestic market. Other countries (e.g. Europe countries) that had trade deficits with Taiwan brought similar pressure to bear, either during trade negotiations, or by increasing trade restrictions on Taiwan's products. See Tsai Hong-Min, "US-ROC Economic and Trade Relationship under International Protectionism (Guo Ji Bao Hu Zhu Yi Xia Di Zhong Mei Jing Mao Guan Xi)" (1993) 29 Taiwan Economy and Finance Monthly 65,66.

²⁶⁰ Nai Ping, *supra* note 246, at 40.

export industries, and threatened the stability of its financial market and commodity prices.²⁶¹

It is against this background that Taiwan's government formally promulgated the economic policies of "Liberalization, Internationalization, and Regularization."²⁶² The "liberalization" aspect involved Taiwan opening up its domestic market by removing any unnecessary import restrictions. This measure was taken on the government's own initiative in order to lessen trade conflicts and assist its local industries.²⁶³ To enhance Taiwan's relations with its trading partners and raise its economic standing in the world, the government carried out a program of trade expansion, and actively participated in various international economic and trade activities.²⁶⁴ This was the "internationalization" component of the policy. The main purpose of "regularization" was to facilitate "liberalization" and "internationalization". This aspect of the policy included legislation to establish a fair trade environment. For example, the Foreign Trade Act of Taiwan²⁶⁵ was first established in this decade and provided a legal basis for every foreseeable trade measure. The trade law covers several important issues,

²⁶¹ GIO, *supra* note 249.

²⁶² The Ministry of Economic Affairs, *supra* note 245, at 8.

²⁶³ The major measures of trade liberalization included reducing tariffs and other non-tariff restraints, widening the limitation of trade barriers to include communist countries or areas, and loosening investment restraints. See Xie Zheng-Yi, *supra* note 254, at 23-24.

²⁶⁴ Taiwan (ROC) participates in various international economic and trade activities to widen the channels of negotiation with its trading partners. In 1984 and 1986, respectively, Taiwan became a member of the Pacific Basin Economic Commission (PBEC) and the Pacific Economic Cooperation Committee (PECC). Afterwards, Taiwan formally participated in the Asia Pacific Economic Commission (APEC) of which it became a member in November 1991. Since 1989, Taiwan has participated in a series of informal professional discussions held by the Organization for Economic Cooperation and Development (OECD). These memberships give Taiwan more opportunities to participate in international economic forums and expand its international experiences. See Board of Foreign Trade of the Ministry of Economic Affairs, Taiwan, ROC.

See http://www.moeaboft.gov.tw/global_org/global_index.htm.

²⁶⁵ Foreign Trade Act, see *supra* note 1.

such as clearly endorsing the policy of free trade,²⁶⁶ confirming of the principle of free imports and exports,²⁶⁷ and establishing of an import relief system.²⁶⁸

Table 4. Taiwan: Economic Indices

	GNP*	Economic Growth Rate (%)	Per Capita GNP**	Foreign Exchange Deposits*
1950	12	----	145	----
1960	18	6.88	152	----
1970	66	12.90	443	----
1980	482	6.16	2669	72.35
1984	591	10.60	3167	156.64
1985	621	4.95	3297	225.56
1986	754	11.64	3993	463.10
1987	1016	12.74	5298	767.48
1988	1231	7.84	6379	738.97
1989	1491	8.23	7626	732.24
1990	1602	5.39	8111	724.41
1991	1794	7.55	8982	824.05
1992	2122	7.49	10506	823.06
1993	2243	7.01	10956	835.73
1994	2442	7.11	11781	924.54
1995	2649	6.42	12653	903.10
1996	2792	6.10	13225	880.40
1997	2902	6.68	13559	835.00
1998	2762	4.57	12333	903.40

Source: *Economic and Social Statistics of Taiwan*, The Third Bureau of Directorate-General of Budget, Accounting and Statistics (DGBAS), Executive Yuan, Taipei. (November 1999)

Note:

* In billions of US Dollars

** In US Dollars

²⁶⁶ The Foreign Trade Act was enacted for the purpose of expanding foreign trade and maintaining a sound trade order, so as to enhance the economic benefits to the country in the spirit of liberalization and internationalization and on the principles of fairness and reciprocity. See Article 1 of Foreign Trade Act.

²⁶⁷ However, trade control may be imposed by reason of the requirements of international treaties, trade agreements, national defense, social security, culture, hygiene, and environmental protection, or policy. See Article 11 of Foreign Trade Act.

²⁶⁸ Article 18 of the Foreign Trade Act set out the escape clause. Article 19 of the Foreign Trade Act stipulates antidumping and countervailing duties.

Table 5. Taiwan: Trade Statistics

	Import				Export			
	CA(%)	AIM(%)	CG(%)	Total*	AP(%)	PAP(%)	IP(%)	Total*
1950	14.2	65.9	19.9	1.9	22.1	69.8	8.1	1.2
1960	26.4	63.5	10.1	3.2	14.8	44.3	40.9	2.0
1970	32.0	62.9	5.1	18.4	7.9	11.2	80.9	20.6
1980	16.2	76.9	6.9	212.0	2.6	4.6	92.8	226.1
1984	13.6	78.6	7.8	219.6	1.7	4.3	94.0	304.6
1985	14.1	76.9	9.0	201.0	1.6	4.5	93.9	307.3
1986	15.0	75.6	9.4	241.8	1.6	4.9	93.5	398.6
1987	16.0	74.1	9.9	349.8	1.3	4.8	93.9	536.8
1988	14.9	73.7	11.4	496.7	1.4	4.1	94.5	606.7
1989	16.4	72.1	11.5	522.7	0.7	3.9	95.4	663.0
1990	17.5	70.4	12.0	547.2	0.6	3.9	95.5	672.1
1991	16.7	72.4	10.9	628.6	0.7	4.0	95.3	761.8
1992	17.9	69.3	12.8	720.1	0.6	3.7	95.7	814.7
1993	16.8	70.2	12.8	770.6	0.6	3.5	95.9	850.9
1994	15.9	70.7	13.4	853.5	0.5	3.6	95.9	930.5
1995	16.3	72.0	11.7	1035.5	0.4	3.4	96.2	1116.6
1996	17.9	69.0	13.1	1023.7	0.4	3.1	96.5	1159.4
1997	19.0	67.4	13.6	1144.2	0.3	1.8	97.9	1220.8
1998	23.2	63.8	13.0	1046.7	0.3	1.5	98.2	1105.8

Source: *Economic and Social Statistics of Taiwan*, The Third Bureau of Directorate-General of Budget, Accounting and Statistics (DGBAS), Executive Yuan, Taipei. (November 1999)

Note:

CA = Capital Appliances

AIM = Agricultural and Industrial Materials

CG = Customer Goods

AP = Agricultural Products

PAP = Processed Agricultural Products

IP = Industrial Products

* = In millions of U.S. dollars

B. Why Taiwan should join WTO

Since the main avenue for Taiwan's economic growth has been the development of foreign trade, trade volumes have been increasing rapidly in recent years. However, because Taiwan is not a member of the WTO, it does not have the right to participate, with most of the rest of the world, in the legislative process for enacting international regulations governing the international economy and international trade. When it is the victim of trade discrimination on the part of other countries, Taiwan does not have access to the established international channels for seeking a fair solution.²⁶⁹ Taiwan is thus susceptible to unilateral threats and trade sanctions.

If Taiwan were to become a WTO member, the disadvantages, mentioned above, would be greatly reduced. The main advantages of joining an international trade organization would be as follows. Firstly, it would help Taiwan to more precisely predict future trends in the international economy and international trade. Taiwan would also have direct access to comprehensive trade and economic information about other nations which is provided by the WTO to its members.²⁷⁰ There would be a positive impact on all of Taiwan's trade and investment activities as a result. Secondly, it would help Taiwan to maintain its current enhanced ranking in the international trade system. Taiwan would gain "Most Favored Nation" ("MFN") treatment and protection

²⁶⁹ For example, under section 301 of the US Trade Act, Taiwan is usually listed as the retaliatory country. Y. Kurt Chang, "Special 301 and Taiwan: a case study of protecting United States intellectual property in foreign countries" (1995) 15 *Nw. J. Int'l L. & Bus.* 214.

²⁷⁰ James V. Feinerman, "Taiwan and the GATT" [1992] *Colum. Bus. L. Rev.* 39, 54. Currently, such information is compiled officially in Taiwan by the Board of Foreign Trade (BOFT). As Feinerman said, "The GATT's information, much of it willingly provided by GATT member nations, is probably both a good deal more complete and possibly more accurate than information gathered by any single nation's efforts. In addition, the processing of such information by the GATT Secretariat and its dissemination among the Contracting Parties is quite swift and cost-efficient."

from trade discrimination, and would also have fair and reasonable access to the domestic markets of other member countries.²⁷¹ Thirdly, Taiwan would be able to take advantage of WTO mechanisms for dispute settlement and avoid unreasonable trade restraints or other unfair treatment.²⁷² Fourthly, through the promise of fair competition, WTO membership might stimulate industries in Taiwan to adjust their structure to meet the challenges of change and competition. Fifthly, Taiwan would be provided with more opportunities to join other economic and trade organizations and participate in activities sponsored by the WTO, and to obtain information from these sources.²⁷³ The above-mentioned advantages could help Taiwan to expand its economic activity and trade. And on yet another front, Taiwan could build relations with its major trading partners, thus circumventing the diplomatic limitations presently imposed in political relations with China.

However, although research undertaken by Taiwan's Ministry of Economic Affairs shows that opening up the country's domestic market might impose serious hardship on some local industries, these economic costs would be far outweighed by the macroeconomic benefits, to both producers and consumers, of this increased level

²⁷¹ For example, the EU has always given preferential tariff treatment to Hong Kong, Korea, and Singapore, but not to Taiwan because Taiwan is not a member of GATT. In other words, Taiwan is treated differently and suffers trade discrimination. So far, the EU has not established any negotiation channels with Taiwan. Once Taiwan successfully joins the WTO, it can be expected that the EU will establish an unofficial office in Taiwan in order to strengthen economic and trade relationships between the two sides. See Lin I-Nan, "WTO and Its Impacts on Taiwan's Trade (WTO Han Ji Dui Taiwan Mao Yi Di Ying Xiang)" (May 1996) 8 *Journal of Trade Relief* 217.

²⁷² See ROC To Play Positive Role in World Trade: Soong, Central News Agency, June 16, 1990 (Speech to the "World Forum" organized by the American Enterprise Institute in Vail, Colorado, June 15, 1990).

²⁷³ Chang Chang-Pang, "The Impacts on Taiwan's Economic Development After Taiwan enters the WTO (Taiwan Jia Ru WTO Dui Taiwan Jing Ji Di Ying Xiang)" (1998) 370 *Economy Today* 2.

of trade.²⁷⁴ These positive economic results would probably also lead to social benefits for Taiwan's people.

On the other hand, there would also be benefits accruing to existing WTO Members as a result of Taiwan's WTO accession. The vast international free market which has existed for the past fifty years has made the economic miracle of Taiwan possible.²⁷⁵ Taiwan certainly plays a key role in the world economy and in world trade. As a member of the WTO, Taiwan would be required to submit detailed trade and economic information. Member nations would gain from greater transparency in relation to Taiwan's trade practices. Besides, membership in the WTO will lead to further liberalization of Taiwan's economy and assist other Members in reducing their trade imbalances with Taiwan.²⁷⁶ The broad extension of WTO principles, to the intangible interests represented by intellectual property and trade in services, would also reach Taiwan as soon as it joins the WTO. Reduction of agricultural tariffs, elimination of quotas on foreign financial and insurance companies and stricter enforcement of intellectual property protections would benefit all of Taiwan's trading partners; and the WTO mechanism also provides the most powerful and expeditious

²⁷⁴ Compared to the time before entering the WTO, in the ten years after Taiwan's entry, the gross domestic product (GDP) is estimate by Taiwan's government to be increased be U.S.\$ 33 billion (about 9.7%); consumption by U.S.\$ 23.7 billion (about 12.5%); investments by U.S.\$ 3.9 billion (about 4.1%); export by U.S.\$ 25.9 billion (about 16.7%); import by U.S.\$ 26.3 billion (about 17.3%). About 37,600 new jobs are estimated to be created. See The Ministry of Economic Affairs, Executive Yuan, Taipei, Taiwan (ROC) "The Meaning, Process and Prospects for Taiwan's Entry to the WTO (Taiwan Jia Ru WTO Di Yi Yi, Guo Cheng Han Zhan Wang)" (May 1998) 3 Monograph of International Trade Commission 6.

²⁷⁵ Taiwan now has the fourteenth highest international trade activity in the world and the third highest foreign exchange reserves. The country's economic growth, which has been consistently high, is the seventh highest in the world. See Chang Chang-Pang, *supra* note 273.

²⁷⁶ Susanna Chan, "Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round " (1994) 2 Ind. J. Global Legal Stud. 275, at 291.

means for them to bring pressure on Taiwan with respect to all of these issues.²⁷⁷ When all these factors are taken into consideration, it seems obvious that Taiwan's major trading partners will benefit greatly from Taiwan's participation in the WTO.

C. The process of Taiwan joining the WTO

Taiwan submitted its application for membership and a Memorandum on its Foreign Trade Regime to the GATT on January 1, 1990.²⁷⁸ Due to its political and international legal problems associated with its relationship to China, Taiwan must use the name "The Customs Territory of Taiwan, Penghu, Kinmen and Matsu," (abbreviated as "Chinese Taipei") to negotiate entering into this international organization.²⁷⁹ After the GATT transformed into the WTO in 1995, Taiwan also changed the direction of its application process with the WTO.

Until now, 26 countries have requested bilateral negotiations with Taiwan regarding economic and trade matters that will arise once Taiwan joins the WTO. Taiwan has completed all of these bilateral negotiations and signed agreements with 25 of the 26 countries.²⁸⁰ Only Hong Kong has not signed an agreement with Taiwan.²⁸¹

²⁷⁷ Lin I-Nan, *supra* note 271, at 219-222; see also Susanna Chan, *id.*, at 293.

²⁷⁸ Taiwan Applies for GATT Membership, Files Formal Application in Geneva, Daily Rep. for Executives, Jan. 4, 1990, at A-4; Taiwan, ASIA 1991 Y.B., (Far E.Econ.Rev. Press) at 223.

²⁷⁹ Although GATT belongs to the United Nations, the qualification for entering GATT is merely that one specific area have its own independent right of tariff. The focus of GATT does not involve matters of sovereignty. However, based on the results of negotiations between European countries, United States and China regarding the question of Taiwan's entry, China principally agreed to Taiwan's entry, as long as Taiwan enters the WTO later than China. Some European countries and the United States also announced that they would approve of China's requirements by following the United Nation's resolution No. 2758 of October 25, 1971. Therefore, Taiwan has to wait to enter the WTO until China solves all of its entry problems with other trade partners. See Lin I-Nan, *supra* note 271, at 215.

²⁸⁰ These countries include Mexico, Chile, Korea, Australia, Hong Kong, Japan, Norway, United States, Switzerland, EU, Thailand, Canada, New Zealand, Malaysia, Philippines, Argentina, Singapore, Poland, Hungary. Ministry of Economic Affairs, Taiwan, ROC, "The progress of Bilateral Negotiations" (1999).

As for the WTO working group considering Taiwan's WTO application, there have been ten official and three unofficial meetings called to examine the working group reports and protocol.²⁸² After Taiwan completes these negotiations, the working group reports and protocol will be transferred to a WTO Committee, and then Taiwan will be permitted to become a fully-fledged WTO member. As such, Taiwan's application is in the final steps of its consideration. Taiwan also concurrently makes efforts to secure the support of other WTO member countries.

II. The impacts and challenges to Taiwan's local industries after its joining the WTO

A. Impacts and potential challenges to local industries after Taiwan's entry

Joining the WTO would allow Taiwan to share the vast economic benefits that are generated from trade liberalization in every WTO member country. However, because Taiwan has applied to enter the WTO in a "developed country" capacity, this would force Taiwan to undertake the obligations of a developed country such as bearing more trade commitments.²⁸³ Such obligations would affect the structure of the domestic market in the short term. The reduction of tariff and non-tariff barriers will make citizens consume and use more imported goods and hence affect some domestic industries that have higher production costs, possibly resulting in some structural

See http://www.moeaboft.gov.tw/global_org/wto/wto_index.htm.

²⁸¹ Ministry of Economic Affairs, Taiwan, ROC, "The Present Schedule of Taiwan's Entry WTO" (March 2000). See http://www.moeaboft.gov.tw/global_org/wto/wto_index.htm.

²⁸² *Id.*

²⁸³ Tsai Hong-Min, "The Impacts on Cross Strait Relationships After Entering the WTO (Jia Ru WTO Dui Hai Xia Liang An Guan Xi Di Ying Xiang)" (Fall 1997) 3 Theory and Policy 151.

problems and unemployment.

The impacts and challenges to Taiwan's industries will be discussed in terms of the different industries themselves;

(1) Agricultural produce – A confined territory, along with a dense population, impose territorial limitations on Taiwan's agriculture. Hence, domestic products are usually weaker than foreign products in competitiveness. In the past, Taiwan's government has given a high degree of protection to agriculture (such as price support, subsidies and other tariff or non-tariff protections).²⁸⁴ In the future, once Taiwan reduces or eliminates its tariff and non-tariff restraints on foreign agricultural products, some local agricultural areas will have to reduce their output, and may lose their productive value due to an increase in imports. Such situations will also have a major impact on farmers' livelihoods. Due to higher historical levels of protection to agriculture, the impact on agriculture will likely be more serious than on any other industry in Taiwan.²⁸⁵ Three kinds of agricultural products will be greatly affected: (a) those that were prohibited or strictly controlled from import in the past (such as rice, chicken and pork); (b) those which are more expensive than foreign goods (such as peanuts, red beans and brown sugar); (c) those that have higher production costs than goods from other places, such as tropical fruit.²⁸⁶

(2) Industrial products – Industrial areas in Taiwan seem to have a better

²⁸⁴ Xu Shi-Xun, "Impacts of Trade Liberalization on Agricultural Trade Across the Strait (Mao Yi Zi You Hua Dui Hai Xia Liang An Nong Ye Mao Yi Di Ying Xiang)" (1996) 60 *Agricultural Economy* 135.

²⁸⁵ Chiu Mao-Ying, "Report of the Council of Agricultural Committee (Nong Wei Hui Bao Gao)" (March 22 1997) 86 *Gazette of the Legislative Yuan* 201-266.

²⁸⁶ Jiang Bing-Kun, *Impacts on Taiwan's Industries after Joining the WTO (Jia Ru WTO Dur Taiwan Chan Ye Di Ying Xiang)* (Taiwan, ROC: Council of Economic Development of the Executive Yuan, 1998) at 6.

capability to adapt to the impacts of opening their domestic markets to foreign competition than do agricultural areas. The reason is that currently more than 80 per cent of industrial products in Taiwan have tariffs of roughly ten per cent.²⁸⁷ In other words, reducing tariffs in the future will not have a very serious impact on domestic industrial products. However, some products with high tax rates will still feel the pressure of reduced tariffs, such as vehicles, electronics, iron, steel.²⁸⁸ According to an economic evaluation by Taiwan's government, the transportation vehicle industry will sustain the most serious impact after opening the domestic vehicle market (details shown in Table 6).²⁸⁹ However, despite the serious impact to finished industrial products, the import of raw materials and semi-finished products will reduce production costs for Taiwan's industries, and thus stimulate them to raise their competitive capabilities overall.²⁹⁰

(3) Services -- Opening the domestic service market to foreigners may result in strong competitive pressures to domestic service industries. However, if competition grows, the overall technological standard and quality of the local service industry and the welfare of customers will be increased. In addition, if internationally acclaimed firms establish branches in Taiwan, Taiwan can also extend its international business and potentially provide more opportunities for production and employment.²⁹¹ Because Taiwan has actively carried out international and liberalized policies since the 1980s,

²⁸⁷ See Tsai Hong-Min, *supra* note 283, at 152.

²⁸⁸ Board of Foreign Trade, the Ministry of Economic Affairs, Taiwan, ROC, "The Impacts on Taiwanese Industries after entering the WTO", see http://www.moeaboft.gov.tw/global_org/wto/wto_index.htm.

²⁸⁹ Ou Jia-Rui, "WTO and Taiwan's Vehicle Industry (WTO Han Taiwan Di Qi Che Gong Ye)" (1998) 33 *Journal of Policy* 15-16.

²⁹⁰ See Jiang Bing-Kun, *supra* note 286, at 7.

²⁹¹ *Id.*

the market for the service industry has already been quite open and progressive for several decades.²⁹² As a result, except for a few industries, the import of services will not cause significant impacts on Taiwanese service industries. The few exceptions are foreign legal services, travel agencies, financial and insurance services and telecommunication services.²⁹³ The last two industries will sustain the biggest changes after the opening of the domestic service market (refer to Table 6).

²⁹² See Tsai Hong-Min, *supra* note 283, at 152.

²⁹³ Board of Foreign Trade, *supra* note 288.

Table 6. Taiwan's concessions for entering the WTO

	Before Entry	After Entry
Agriculture	Items of controlled import: chicken, liquor, milk, pears, giblets and haslets.	These items will be opened gradually by the way of tariff quotas.
	There is a limitation of the origin on apples. Different areas have different quota based on the results of negotiations.	The import of apples will be wholly opened.
	The amount of rice is controlled to import.	The import will be increased 4% based on the amount of consumption. The degree of opening should be reached to 8% level after 5 years.
Industry	The average nominal tariff is about 6.52%.	After the tariff, is reduced based on the value of trade all over the world, the average tariff should be 3.81%.
	Ratio for self-manufactured content: Vehicles – 50%; Motorcycles – 90%.	These limitations will be eliminated.
	The limitation on origin for imported motorcycles.	The limitation will be eliminated.
	Only vehicles from Europe, United States and Canada can be imported. The import of vehicles from other countries is based on the results of negotiations.	These items will be opened gradually by the way of tariff quotas.
Services	Foreign lawyers cannot practice in Taiwan.	Foreign lawyers can practice in the field of their own laws and international laws in Taiwan.
	Foreigners cannot invest in the travel industry.	Foreigners can invest and establish their branches in Taiwan.
	There are limitations in the telecommunications industry.	The telecommunications market will be opened.
	There are limitations in the financial services.	Limitations on commercial credit insurance to foreign banks will be reduced.
Government Purchase	No existing regulations.	Taiwan should follow the WTO Agreements on Government Purchase.
Tobacco & Wine	Public sale system	Fruit wine, beer, strong liquor will be open to manufacture and the tariffs will be reduced.

Source: Bureau of International Trade, Taipei, Taiwan, ROC

B. The necessity of an import relief system for Taiwan's local industries

The above discussion shows that following Taiwan's membership of the WTO, there will be a growing number of local industries that will face the pressure of structural adjustment, due to the threat of lower-priced imported goods and the increase in imports. The industries affected will not be limited to those producing labour-intensive goods and basic or intermediate raw materials, but will also extend to industries making finished products.²⁹⁴ Such matters should be emphasized by Taiwan in discussion about entering the WTO.

Of course, it cannot be ignored that because the economy of Taiwan is export-oriented, processing industries would welcome low-price foreign intermediate raw materials to some degree. From the perspective of importers, low-price products would also stimulate consumer demand. Learning to deal with economic loss within the domestic industry after trade liberalization merits careful consideration, while facing the inevitable economic conflict between the domestic industry and consumers.

The future pressure of import competition and industry adjustment can be easily predicted. In order to let domestic industry achieve proper harmony between opening markets, production and marketing, as well as to avoid serious injury resulting from large amounts of foreign imports, it will be necessary to improve the current import relief system in Taiwan. In the past, in order to facilitate Taiwan's entry into the international trade organization, any adjustment in regulations generally followed the style of opening markets, reducing trade barriers or eliminating protective measures.²⁹⁵

²⁹⁴ See Tsai Hong-Min, *supra* note 283, at 152.

²⁹⁵ See Xiao Wan-Zhang, *supra* note 243, at 1-4.

However, many Taiwanese industries were not satisfied with such measures.²⁹⁶

As for the import relief system, Taiwanese industries usually believed that executive procedures for anti-dumping and countervailing laws were too slow and politicized and as a result would not necessarily provide immediate relief.²⁹⁷ Especially after Taiwan enters the WTO, increased imports will bring instant and severe competition. If Taiwan cannot establish a sound structure for an import safeguard system, domestic industries will continue to be skeptical about the protective efficiency of the import relief structure, thereby, perhaps, withdrawing their support of the government's liberalization policies.

An export-oriented policy made Taiwan form a tight and dependent relationship with its trading partners, especially the U.S. and EU. In addition, Taiwan has a vulnerable political status in the world. Therefore, if Taiwan uses import relief laws to impose anti-dumping duties, increase tariffs, or set up quotas, other foreign countries may easily question those measures whether they meet the standards of GATT/WTO or not.²⁹⁸ This is especially the case for safeguard measures affecting large amounts of imports.²⁹⁹ In the future, such measures are generally expected to meet the consultation requirements and other conditions of the GATT Article XIX and the WTO Safeguards

²⁹⁶ Tsai Hong-Min, "The Necessity for Taiwan to Establish a Special Institute of Import Relief (Taiwan Jian Li Jin Kou Jiu Ji Zhuan Ze Ji Gou Zhi Bi Yao Xing)" (1993) 25 Taipei Bank Monthly Journal 69.

²⁹⁷ A survey conducted by the Industry Association in 1992 shows only ten per cent of domestic industries agree that an import relief system will be useful for them to deal with economic injury. *Id.*

²⁹⁸ Huang Zhi-Hui, "Trade Liberalization and Import Relief System in Taiwan (Mao Yi Zi You Hua Han Taiwan Jin Kou Jiu Ji Zhi Du)" (Nov. 1994) 17 Taiwan Economic Research Monthly 25.

²⁹⁹ For example, in 1988 US-ROC agriculture trade negotiation, Taiwan tried to use a safeguard measure like the GATT Article XIX action to protect the domestic fruit industry. But the United States representative argued that the causality did not meet the requirement of Article XIX. See Tsai Hong-Min, *supra* note 296.

Agreement.

In other words, after it joins the WTO, it is essential for Taiwan to improve its current import relief system and procedures to help its domestic industries gain confidence in a new competitive environment. Further, a transparent import relief system would be more helpful for domestic industries to obtain assistances. By using regulations that meet WTO standards, subject to investigation by a special institution, it would be easier to avoid unnecessary disputes with foreign countries when initiating import relief cases.

C. Special economic issues between Taiwan and China after both become WTO members

Taiwan and China separated in 1949. Taiwan's government prohibited its citizens from virtually all contact with persons under the effective jurisdiction of China. Despite this prohibition, Taiwan business enterprises have, in the past decades, increasingly explored Mainland trade and investment opportunities presented by the opening up of the Mainland economy in the post-Mao period.³⁰⁰ Both sides of the Taiwan Strait understood the importance of rebuilding communications and have, therefore, readily expanded economic and cultural exchanges. However, because political issues remain a significant factor for Taiwan and China, the two sides have formed a unique economic and trade relationship that is different from relations with each others trading partners.

For Taiwan, the structure of communication with China is based on the

³⁰⁰ Ada Koon Hang Tse, "The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland" (1992) 6 J. Chinese L. 137, at 139.

"Guidelines for National Unification."³⁰¹ The timetable of this program is divided into three phases: a short-term phase of exchanges and reciprocity, a mid-term phase of mutual trust and cooperation, and a long-term phase of consultations and reunification. The middle-term phase includes the establishment of direct postal, commercial, and transportation links ("Three Links") across the Taiwan Strait, as well as an exchange of visits by ranking officials from both sides. The prerequisite for Taiwan to enter the middle-term phase is that "the two sides of the Strait should end the state of hostility and, under the principle of one China, solve all disputes through peaceful means, and furthermore respect--not reject--each other in the international community."³⁰² However, China has not given up its military threats against Taiwan in order to implement its "one country, two systems" proposal. For its national safety, Taiwan has not yet planned to have negotiations on direct trade with China.³⁰³ Therefore, communications between Taiwan and China currently remain in the short-term phase.

Currently, the system for Taiwan to manage imports from China is based on the 1993 "Statute Governing Relations between People of the Areas of Taiwan and Mainland China."³⁰⁴ To avoid a violation of the "Guidelines for National Unification",

³⁰¹ "Guidelines for National Unification." was adopted by the National Unification Council at its third meeting in February, 1991, and by the Executive Yuan Council (Cabinet) at its 2223rd meeting in March, 1991. Legal text *see* Mainland Affairs Council, Mainland Policy Documents: General Policy, <http://www.mac.gov.tw/english/MacPolicy/gnueng.htm>. See also Tsai Hong-Min, *supra* note 283.

³⁰² Article IV, paragraph 1(4) of Guidelines for National Unification. See Mainland Affairs Council, *id.*

³⁰³ Lin I-Nan, *supra* note 271, at 218.

³⁰⁴ Taiwan, Statute Governing Relations Between People of the Areas of Taiwan and Mainland China (Diqu yu Dalu Diqu Renmin Guanxi Tiaoli) was designed to serve as the primary source of legal authority to direct any civil exchanges across the Taiwan Strait and to resolve any conflicts that might result from such interaction. Article 8 of Statute Governing Relations Between People of the Areas of Taiwan and Mainland China stipulates that the items admitted to import from China should meet the following conditions: (1) cause no danger to the national safety; (2) cause no harm to related industries. If there is any changing circumstance that causes the former conditions to be impossible to meet, products listed in the former paragraph should be stopped from being imported by the authority. See Tsai

the Taiwanese government only permits Chinese products to be indirectly imported. The route of indirect import begins from China to Hong Kong, then transfers from Hong Kong to Taiwan.³⁰⁵ However, owing to the low cost of raw materials and labour, as well as the possibility of government subsidies, Chinese imports are usually cheaper than Taiwanese products. Taiwan's domestic industries also sustain strong demand for imports of Chinese products, especially raw materials.³⁰⁶

Trade flow statistics show the frequency of trade between Taiwan and China in the past few years (see Table 7). Further, in a survey conducted in 1996, more than 40% of Taiwanese industries claimed to have suffered serious threats from low-priced products imported from China. Of those industries, 79% were threatened by the products that were prohibited from being imported indirectly and 21% were threatened by products that were permitted to be imported indirectly.³⁰⁷ This survey shows that Chinese products have gradually replaced some production in Taiwan. Taiwan's domestic industries are thus facing more and more competition from Chinese imports.

Hong-Min, *supra* note 283, at 143; see also Ada, *supra* note 300, at 140.

³⁰⁵ Zongda Yan, "Cross-Strait Commercial Relations and Our Mainland Commercial Policy (Liang'an Jingmao Guanxi yu Woguo de Dalu jingmao zhence)" (Summer 1990) *China Strategic Studies Journal* (Zhonghua Zhanlue Xuekan) 44.

³⁰⁶ Mitchell A. Silk, "Silent Partners" (Sept.- Oct. 1990) 17 *China Bus. Rev.* 35.

³⁰⁷ Chen May-Lan, "Reviews to the low-price products imported from China (Da Lu Di Jia Jin Kou Huo Pin Zhi Yan Jiu)" (May 1996) 5 *Industry Magazine* 103-107.

Table 7. Trade Flow Statistics Between Taiwan and China

(In Millions of U.S. Dollars)

	General Trade		Taiwan's Output		China's Input		Surplus & Deficit	
	Amount	Rate	Amount	Rate	Amount	Rate	Amount	Rate
1993	13,743.3	8.5%	12,727.8	14.9%	1,015.5	1.3%	11,712.3	30.9%
1994	16,511.7	9.3%	14,653.0	15.7%	1,858.7	2.2%	12,794.3	9.2%
1995	20,989.6	9.8%	17,898.2	16%	3,091.4	3%	14,806.8	15.7%
1996	22,208.1	10.2%	19,148.3	16.5%	3,059.8	3%	16,088.5	8.7%
1997	24,450.4	10.3%	20,535.0	16.8%	3,915.4	3.4%	16,619.6	3.3%

Source: *Economic and Social Statistics of Taiwan*, the Third Bureau of Directorate-General of Budget, Accounting and Statistics (DGBAS), Executive Yuan, Taipei. (November 1999)

Recently, with positive attempts for membership in the WTO, Taiwan and China not only compete regarding their speed of entry into the Agreement but also face possible problems regarding their relationship with each other after entry. Once Taiwan and China enter the WTO, the current short-term phase of the "Guidelines for National Unification" will not meet WTO standards for liberalization. Taiwan will have to change its principle of indirect import from China, as well as its import restraints in relation to China.

The Chinese government has declared that it does not wish Taiwan to use the non-application clause of GATT/WTO³⁰⁸ in dealing with China. China has also indicated that it will not use economic sanctions to force Taiwan to open its direct postal

³⁰⁸ Article 35 of GATT: "This Agreement, or alternatively article II of this Agreement, shall not apply as between any contracting party and any other contracting party if: a) the two contracting parties have not entered into tariff negotiation with each other, and (b) either of the contracting parties, at the same time either becomes a contracting party, does not consent to such application." Article 13 of WTO Agreement: "This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."

communication, navigation and trade with China.³⁰⁹

If Taiwan applies the non-application clause, the current special relationship with China can be retained. However, because China has presented its views, should Taiwan apply the non-application clause, China may endeavour to persuade other countries to reject Taiwan's entry. Therefore, Taiwan's government may wish to avoid applying the non-application clause.³¹⁰

Owing to political factors, it is still not clear whether the non-application clause will be utilized or how the special relationship between Taiwan and China will develop after both become WTO members. But if Taiwan decides to follow the principles of WTO with China, the relief of injury or the threat of injury to domestic industries due to imports from China may depend on the Foreign Trade Act, the Rules for Handling Import Relief Cases, the Customs Law and the Implementing Regulation on the Imposition of Countervailing and Antidumping Duties.³¹¹ Some revisions and additions regarding the role of China in Taiwan's economy will need to be developed.

³⁰⁹ On March 9, 1998, China authority held an associated press meeting to express their views concerning Taiwan's entry into the WTO. There are three points: (1) Taiwan should follow the "one China" policy and enter the WTO under a name of an independent tariff area. In other words, Taiwan can only join the WTO in a situation where China has entered earlier than Taiwan and should use a name of "China Taipei" (2) China does not wish for Taiwan to apply Article 13 of WTO (Non-application clause) to it (3) China will not use economic sanctions to force Taiwan to open its "three links" – direct postal, commercial, and transportation links across the Taiwan Strait. See Tsai Hong-Min, "The Impacts on Trade and Industries After Taiwan and China Enter the WTO (Taiwan Han Da Lu Jia Ru WTO Dui Mao Yi Ji Gong Ye Di Ying Xiang)" (1999) 4 Economy Outlook 244.

³¹⁰ In 1993, Taiwan's Ministry of Economic Affairs had declared that it would apply the non-application clause to China after entering the WTO. However, in the 1996 WTO Ministry Meeting, Taiwan's representative no longer expressed the intention of applying the non-application clause. Taiwan's Executive Yuan indicated that carrying out the "three links" with China under the multilateral economic and trade structures does not contravene the present schedule of the "Guidelines for National Unification". Chen Song-Zhang, "Should Taiwan use the non-application clause to China after joining into the WTO (Taiwan Shi Fou Dui Da Lu Shi Yong Pai Chu Tiao Kuan)?" (1998) 21:6 Taiwan Economic Research Monthly 58.

³¹¹ Lin I-Nan, *supra* note 271, at 219.

III. The import relief system of Taiwan

A. *An analysis of the import relief system of Taiwan – the Foreign Trade Act, the Rules for Handling Import Relief Cases and the Rules for Relieving Import Injury of Agricultural Products*

1. Origins

Prior to 1980, Taiwan usually imposed high tariff and non-tariff trade barriers to allow the expansion of immature domestic industries. Despite such a high level of protection, these inefficient domestic industries remained unable to compete with imported goods.³¹² After 1980, the foreign trade of Taiwan became liberalized and more systematic. Taiwan acted quickly to open its markets. At the same time, Taiwan also embraced the principle that goods can be freely imported and exported.³¹³

However, in the past years, because Taiwan wishes to enter GATT/WTO, it is necessary to open its domestic market and eliminate trade barriers in a way that meets the requirements of GATT/WTO. Trade authorities will no longer be able to use high tariffs or administrative interferences to prevent or relieve industries from injuries resulting from increased imports. Therefore, an import relief system was created with this background. The Legislative Yuan of Taiwan promulgated the first Foreign Trade Act in 1993 in order to regulate related trade issues.

³¹² Lin Qi-Yuan, "WTO Safeguard Agreement and Taiwan's Practice (WTO Fang Wei Xie Ding Han Taiwan Di Shi Shi)" (1998) 28 Taipei Bank Monthly Journal 2-17.

³¹³ *Id.*

On the subject of import safeguards, Article 18 of Taiwan's Foreign Trade Act is the legal basis for establishing the import safeguard system.³¹⁴ On June 1, 1994, the Ministry of Economic Affairs, the Ministry of Finance and the Council of the Agriculture of Executive Yuan together promulgated the Rules for Handling Import Relief Cases, based on that article. The rules clearly regulate the permissible safeguard measures, such as tariff adjustments or quotas, when an import relief case is recognized. Further, the International Trade Commission of the Ministry of Economic Affairs was officially established in the same year and became responsible for dealing with import relief cases.

Two reasons contributed to the subsequent revision of the Rules for Handling Import Relief Cases in 1998. First, Article 18 of the Foreign Trade Act was revised in 1997. One of the main points of this revision was that the term "rapid or sharp increase in the import volume" was changed to "the increase in the import volume."³¹⁵ In addition, the 1994 Rules for Handling Import Relief Cases in fact included some illegal provisions that contravened the spirit of GATT/WTO (such as permission for taking grey area measures).³¹⁶ Therefore, in order to coordinate the revision of Article 18 of

³¹⁴ It stipulates that "in case of the rapid or sharp increase in the import volume of a commodity causing or threatening to cause serious injury to the domestic industry which produces like or directly competitive products, the authority in charge of the said industry, the said industry, its associations, or related organizations may apply to the competent authority for investigation of the injury and for import relief." "Regulations governing the process of applications for import relief shall be drafted by the MOEA in conjunction with government agencies concerned and submitted to the Executive Yuan for approval and subsequent promulgation."

³¹⁵ There is also another revised and enlarged provision in Article 18: "Regulations governing the process of applications for import relief on textiles and clothing products which are specifically designated and published by the competent authority pursuant to the WTO Agreement on Textiles and Clothing shall be separately stipulated by the MOEA and submitted to the Executive Yuan for approval and subsequent promulgation." However, these revised provisions will be applied only when Taiwan enters the WTO.

³¹⁶ Tsai Hong-Min, "The Uruguay Round and Import Relief System (Wu La Gui Hui He Han Jin Kou Jiu Ji Zhi Du)" (1994) 14 Socioeconomic Law and Institution Review 374; Hsiao, Simon F. S, "An

the Foreign Trade Act and to make Taiwan's import relief system meet international standards,³¹⁷ the International Trade Commission made further revisions to the Rules for Handling Import Relief Cases in 1998.³¹⁸

The 1998 RHIRC includes many important revisions as compared with the 1994 RHIRC, such as:

- Eliminating some unnecessary limitations to domestic industries applying for relief. The term "the import of the product concerned increases *rapidly or sharply* [emphasis added]" has been revised to "the import of the product concerned increases." The linkage between the volume of increased import and serious injury was revised, and definitions of serious injury and the threat of serious injury were added (revised in Article 2 of RHIRC).
- To comply with Article 4 of the Agreement on Safeguards, the factors relating to an injured industry that should be considered when making a decision about serious injury were revised. Further, when considering causality in a relief case, the Commission is required to exclude the factor of non-imports (revised in Article 3 of RHIRC).
- To meet the requirement of prohibiting grey area measures in GATT/WTO, the provision that permits taking an orderly marketing agreement (OMA) with foreign

Introduction to the Agreement on Safeguards and the Safeguard Clauses in WTO Agreements--The Impact on and Response of Taiwan (WTO Fang Wei Xie Ding Ji Fang Wei Tiao Kuan Di Jie Shao -- Lun Dui Taiwan Di Ying Xing Ji Yin Ying)" (1997) 3 Chung Yuan Financial & Economic Law Review 140.

³¹⁷ Based on Article XVI, paragraph 4 of the WTO Agreement, all member countries should make their domestic laws coordinate with the international provisions of the WTO.

³¹⁸ Rules for Handling Import Relief Cases was revised in December 30, 1998. One provision was added and ten provisions were supplemented. See International Trade Commission of the Ministry of Economic Affairs, *Related Import Relief Regulations*, *supra* note 1, at 14.

countries was eliminated. While setting a quota, the government may make an implementation agreement with exporting countries. Only one border safeguard measure can be taken in each case. To be practical, other within-border measures are to be taken by the Ministry of Economic Affairs in conjunction with other government agencies concerned (revised in Article 4 of RHIRC).

- To prevent the petitioner from losing an opportunity to submit a petition because of the insufficiency of the adjustment plan, a provision was added that allows the adjustment plan to be submitted within 90 days after the date of applying (revised in Article 8 of RHIRC).
- The period of deciding whether or not to proceed with an investigation was shortened, as was the period of time needed to make a decision as to whether the industry concerned is injured, in order to impel the regulatory agency to provide timely relief (revised in Articles 9, 18 and 19 of RHIRC).
- In order to save administrative resources, legal consequences costs are applied to the petitioners if they withdraw the petition before or after the investigation of serious injury (added in Article 16-1 in RHIRC).
- To be consistent with Article 7.5 of the Agreement on Safeguards, no safeguard measure can be applied for again for a period of time equal to the duration of the previous measure. The period of non-application must also be at least two years. And, a safeguard measure with a duration of 180 days or less may be applied for again, if it relates to the import of a specific product in a given condition (revised in Article 27 of RHIRC).

In addition, according to the special characteristics of agricultural products, the Council of Agriculture promulgated Rules for Relieving Import Injury of Agricultural Products,³¹⁹ based on Article 40 of the Rules of Developing Agriculture on May 20, 1989. These rules outlined requirements for dealing with domestic agricultural producers that might suffer injuries or might face the threat of being injured due to increases in import volumes.³²⁰ Relief measures in the special safeguard rules should also be adjusted to follow the principle of meeting the requirements of the GATT/WTO agreements.

2. Analysis of the Rules for Handling Import Relief Cases

The following sections will discuss the application of conditions and procedures stipulated in the Rules for Handling Import Relief Cases.³²¹

(a) Standing of parties to file a petition

Based on Article 6, there are three parties, including natural and legal persons, that have standing to initiate an import relief case:

1) Representative of the injured industry – The current RHIRC does not explicitly define who is qualified to be a “representative of the injured industry”. But in Article 6

³¹⁹ Rules for Relieving Import Injury of Agricultural Products was revised on Feb. 27, 1995. See ITC, *Related Import Relief Regulations*, *id.*, at 96.

³²⁰ Liu Fu-Shan, *The Introduction of Rules for Relieving Import Injury of Agricultural Products (Nong Chan Pin Shou Jin Kuo Sun Hai Jiu Zuh Ban Fa Di Jie Shao)* (Taiwan, ROC: Council of Agriculture of the Executive Yuan, 1998) at 68-70.

³²¹ The RHIRC here means the one promulgated in Dec. 1998. The one promulgated in 1994 in this paper is noted as “the 1994 RHIRC”.

of the 1994 RHIRC, “representative of the industry” has been defined as the domestic producers of like products or directly competitive products whose collective output of the products constitutes *a major proportion* of the total domestic production of those products.³²² Instead, the current RHIRC only defines the term “domestic industry” in determining injury or threat thereof.³²³ Sometimes, the petitioner (representative of the injured industry) who initiates the investigation may not be as large as the total injured domestic industries, when determining the injured entity in the investigation procedure.³²⁴ The current RHIRC seems to better clarify who is qualified as a “representative” to initiate a petition. Nevertheless, in order to let the petition be initiated successfully, the precedent explanation of “representative of the industry” in the 1994 RHIRC is still reasonable. Referring to the legislative interpretation of the 1994 RHIRC, the qualification of “representative of the industry” should be determined by the International Trade Commission of MOEA (hereafter referred to as “the Commission”) based on the characteristics of different industries, on a case by case basis.³²⁵ Even a single producer whose total output constitutes the major part of

³²² The 1994 RHIRC does not give guidelines on the criterion of “major proportion”. Referring to the U.S anti-dumping law concerning “the major proportion”: “the Department of Commerce must affirmatively determine that the petition is supported by producers or workers representing both (a) a minimum of 25% of total domestic production of the domestic like product, and (b) at least 50% of the production of those companies that take a position either in support of or in opposition to the petition.” This interpretation is consistent with the result of the Uruguay Round. See Michael D. Esch & Daniel E. Waltz, “The Impact of the Uruguay Round Amendments on U.S. Antidumping Law” (1995) 5 Fed. Circuit B.J. 397.

³²³ The definition of “the representative of domestic industry” in Article 6 of the 1994 RHIRC has been removed in the current RHIRC. Article 5 of the current RHIRC uses the same description (“the domestic producers of like products or directly competitive products whose collective output of the products constitutes a major proportion”) to define the “domestic industry” in determining injury or threat thereof.

³²⁴ For example, both A and B own 50% of market share in the juice industry. A can be the representative of domestic industry to file a petition. But in the subsequent investigation, the scope of the juice industry investigated will contain A and B in order to find the facts and causes of the injury.

³²⁵ See ITC, *Rules for Handling Import Relief Cases: legislative purpose and introduction*, *supra* note 6, at 10.

domestic production can be the representative of the domestic industry.³²⁶

2) The association representing the injured industry or the relevant bodies – An association can submit a petition through legal channels or become authorized by the members of the association to do the same. However, the RHIRC does not define “relevant bodies,” nor does it state who can decide on the qualifications of the “relevant bodies.” Perhaps the “relevant bodies” should have a relationship with import affairs or with the importing industries; for example, an association of downstream products. At the broadest level, the “relevant body” might be an entity related to public interests, such as a consumer protection group. It is unclear whether such an entity must have the qualifications of a legal person.

If “relevant bodies” can include a general public-interest entity, and the petitioner is not the injured party, the litigation of an import relief case will have the nature of a public interest case. However, Taiwan’s administrative law system requires that public interest litigation be specifically provided for in the applicable legislation (in order to manage the administrative burden on public agencies).³²⁷ The text in the RHIRC does not specifically mention the possibility of public interest litigation. Thus it seems more appropriate for the standing of a “relevant body” to be decided from the viewpoint of whether the bodies’ own rights and interests have been injured. A more precise definition of the term “relevant bodies” should be made. Further, the qualification of

³²⁶ *Id.*

³²⁷ Article 9 of the Law of Administrative Litigation states: “In order to maintain public interests, even though the matters have no relations with one’s own rights and interests, people can initiate administrative litigation regarding the illegal behaviours of administrative authorities. But the litigation should be limited to those that have been provided in legislation.”

“relevant bodies” should be limited to legal persons for similar reasons, to prevent vexatious litigation.

3) The relevant authority – If a domestic industry meets the conditions in Article 18 of the Foreign Trade Act,³²⁸ and an application for relief is not submitted by private entities, the relevant authority can initiate its own investigation of an import relief case with the Ministry of Economic Affairs (“MOEA”) based on its authority of office.³²⁹ For example, the Council of Agriculture of Executive Yuan can initiate a petition if it finds out that the domestic apple industry is seriously injured. In accordance with the words in Article 6, the term “relevant authority” does not seem to include the MOEA.³³⁰ The right of the MOEA to initiate an investigation seems to be passive in nature.

Other countries allow commissions or committees to initiate investigations. The U.S. escape clause provides that the USITC can make an investigation on its own motion.³³¹ As for the EU, after consultations regarding a possibility of surveillance or safeguard measures and if there is sufficient evidence to justify the initiation of an investigation, the EU Commission can also commence an investigation acting in cooperation with the Member States.³³² In order to address the need for import relief as early as possible, granting the initiative to the MOEA is necessary and useful. The

³²⁸ *Supra* note 3.

³²⁹ Huang Zhi-Hui, “The Strategy to Win An Import Relief (Jin Kou Jiu Ji Ying Di Ce Lve)” (1995) 26:5 Taipei Bank Monthly Journal 25.

³³⁰ Article 6 of the RHIRC: “With respect to an import relief case, the Ministry of Economic Affairs may, upon the petition of the relevant authority, the representative of the injured industry, the association representing the injured industry or the relevant bodies, hand over the case to the International Trade Commission of the Ministry of Economic Affairs to proceed with the investigation.”

³³¹ 19 U.S.C. §§2252 (b)(1)(A).

³³² *Supra* note 139, Article 6.

RHIRC should strengthen the ability of the MOEA to deal with the risk of import injury.

(b) Investigation

After receiving a petition and reviewing the qualification of the petitioner, the Commission begins the work of investigation. The following two sections will discuss the substantial and procedural requirements of the investigation process.

(1) Substantial Requirements

Three Prerequisites

The three conditions for qualifying for import relief are the same as Article 2 of the WTO Safeguard Agreement.³³³ In comparing the current RHIRC and the 1994 RHIRC, there are two differences in the prerequisites, which may show the different attitudes of Taiwan's government to trade remedies in different phases. First, with regard to the increase in imports relative to the amount of goods on the domestic market, in the 1994 RHIRC, the Commission can consider "domestic production" or "consumption" to be the basis for comparison to the imports. This condition was more lenient than the requirement of the WTO Safeguards Agreement, because it furnished more choices in order to demonstrate a relative increase, and thus the domestic industry could get relief more easily.³³⁴ However, in order to meet the norms of the WTO, the

³³³ First, the import of the product concerned increases greatly within a specific period or increases greatly relative to the domestic production. Second, the domestic industry producing the like products or directly competitive products suffer serious injury or the threat of serious injury. Third, the increased imports cause serious injury or threat of serious injury to the domestic industry. See Article 2, paragraph 2 of the RHIRC.

³³⁴ Article 2 of the Agreement on Safeguards only considers "domestic production" as the basis for comparison to imports. Discussion see Huang Zhi-Hui, "The Evolution and Development of Import

current RHIRC has eliminated “consumption” as a basis.

Second, with regard to causation, the 1994 RHIRC required increased imports be a “major cause” of the serious injury to the domestic industry.³³⁵ The current RHIRC only states that “the serious injury or the threat of serious injury must result from increased imports.”³³⁶ “Major cause” has not been emphasized in legal texts. In the legislative history of the U.S. escape clause, “major cause” has been modified to read “substantial cause”, resulting from different political pressures around trade protection. “Major cause” involves a more serious degree of causation than “substantial cause.”³³⁷ Thus it can be seen that the 1994 RHIRC had a more onerous causal requirement than the current RHIRC, resulting in a lower burden of proof on the domestic industry. The current RHIRC will help domestic industry obtain relief more easily after the opening of domestic markets.

The scope of goods and industry and the criteria for injury

In order to facilitate the investigation process, the RHIRC defines “like and directly competitive goods,” “domestic industry” and the criteria of “serious injury” within its text.³³⁸ Scholars argue that the meaning of “like product” in the safeguard

Relief System”, *supra* note 10.

³³⁵ See ITC, *Rules for Handling Import Relief Cases: legislative purpose and introduction*, *supra* note 6, at 5.

³³⁶ Article 2 of the RHIRC.

³³⁷ For example, under the 1962 Trade Extension Act, import relief was difficult to obtain because that Act required that the increase in imports be the “major factor” (defined as a cause greater than all other causes combined). In order to increase protection to domestic industry, the 1974 Trade Act reduced the requirement to a “substantial cause” of the injury (defined as “important and not less than any other cause”). See Richard L. O’Meara, *supra* note 119, at 270.

³³⁸ Huang Zhi-Hui, “Present Import Relief System (Jin Kou Jiu Ji Zhi Du Di Xian Kuang)” (1999) 35 Taiwan Economy and Finance Monthly 49.

clause on the one hand and in the anti-dumping and countervailing law, on the other, should be distinguished.³³⁹ Determining like products in antidumping law should focus on their “physical” nature. But in a safeguard case, in addition to their “physical” nature, the competitive relationship of goods and commercial substitution opportunities are also emphasized.³⁴⁰ In practice, the characteristics of products, their constituent parts, the harmonized commodities system (“HS”), and the nature of substitution are some indices that has been suggested by the Commission when determining like or directly competitive products.³⁴¹ For example, if the category number of imported apples in the HS is No. 10042, then the Commission can determine that all products within the scope of No. 10042 are like or directly competitive to the imported apples.³⁴²

The scope of the imported goods concerned will directly affect the decision on the scope of the injured industry.³⁴³ The RHIRC defines “domestic industry” as domestic producers of like products or directly competitive products, whose collective output of the products (as determined by the Commission) constitutes a major proportion of the total domestic production of those products.³⁴⁴ However, the scope of the domestic industry is not determined solely based on the product itself. Like the U.S., the factors

³³⁹ In antidumping and countervailing law, the term “like product” means a product which is identical to, or is composed of the same materials and is of the same characteristics and with the features as the imported product. That which is composed of the same materials, however different in appearance or packaging, is considered a like product. Hsu Wei-Nong, “Import Relief System and Industrial Competitiveness (Jin Kou Jiu Ji Zhi Du Ji Gong Ye Jing Zheng Li)” (1998) 29 Taipei Bank Monthly Journal 99.

³⁴⁰ *Id.*

³⁴¹ The International Trade Commission of the Ministry of Economic Affairs, *Import Relief System: Frequently Asked Questions (Jin Kou Jiu Ji Zhi Du: Da Ke Wen)* (Taiwan, ROC: The Ministry of Economic Affairs, November 1997) at 9.

³⁴² Huang Zhi-Hui, “The Strategy to Win an Import Relief”, *supra* note 329, at 27.

³⁴³ *Id.*

³⁴⁴ Article 5, paragraph 1 of the RHIRC.

determining the scope of the domestic industry also include geographical distribution, the import business and even the producer itself.³⁴⁵ The area of Taiwan's territory is much smaller than that of the United States. It seems impossible that one or more domestic producers would produce a like or directly competitive article in a major geographic area of Taiwan, and also primarily serve the market in that area. Geographical distribution is not a suitable factor for Taiwan to utilize in defining the scope of its domestic industry.

However, the other two factors (import business and producer) are helpful, as the total domestic production can be calculated more precisely in those instances. Further, the actual injury to the domestic industry can be determined more easily. Otherwise, if the total production of a domestic industry is exported abroad,³⁴⁶ its production might be included in the total domestic production. Such a result would be unrealistic.

In determining whether there has been a serious injury or threat thereof, the current RHIRC makes several important revisions. First, the current RHIRC eliminates some unnecessary indicia in determining injury (e.g. inventory, price and investment return)³⁴⁷ and clarifies the definitions of serious injury and the threat thereof.³⁴⁸ Second,

³⁴⁵ 19 U.S.C. §§ 2252 (c)(4): "In determining the domestic industry producing an article like or directly competitive with an imported article, the Commission: (A) To the extent information is available, shall, in the case of a domestic producer which also imports, treat as part of such domestic industry only its domestic production; (B) may, in the case of a domestic producer which produces more than one article, treat as part of such domestic industry only that portion or subdivision of the producer which produces the like or directly competitive article; and (C) may, in the case of one or more domestic producers which produce a like or directly competitive article in a major geographic area of the United States and whose production facilities in such area for such article constitute a substantial portion of the domestic industry in the United States and primarily serve the market in such area, and where the imports are concentrated in such area, treat as such domestic industry only that segment of the production located in such area."

³⁴⁶ For example a processing industry.

³⁴⁷ In the current RHIRC, determining a serious injury should consider: (1) Market share; (2) Sales; (3) Production; (4) Productive capability; (5) Capacity utilization rate; (6) Profits and losses; (7) The employment situation; (8) Other related factors. As for the threat of serious injury, in addition to the eight

increased imports are no longer required to be a major cause. Compared to the 1994 RHIRC, the current RHIRC widens the standard of determination and clarifies the definition of injury to help the domestic industry obtain relief more easily and facilitate the investigation process.³⁴⁹

(2) Procedural Requirements

Like U.S. and EU laws, the RHIRC meets the spirit of transparent procedures required by the Agreement on Safeguards. The Commission must assign committees to conduct on-site investigations and interviews, and to hold public hearings.³⁵⁰ Article 12 allows the retention of confidential information,³⁵¹ but the Commission may be required to provide a summary that can be made public.

As mentioned above, the current RHIRC reduces the causation requirement and thus the burden of proof on the domestic industry seems to be lower. Nevertheless, in order to obtain an affirmative determination, the crucial factor for the domestic industry is to provide enough related information to prove that the injury resulted from the increase of imports.³⁵² Further, the domestic industry must also prove that the injury to

factors, the production and export capacity of the major exporting countries should also be evaluated. These indicia are similar to those stipulated in Article 4 of the WTO Safeguard Agreement. However, in the 1994 RHIRC, the factors of inventory, price and investment return should also be considered in the determination of injury. See Huang Zhi-Hui, "Present Import Relief System", *supra* note 338.

³⁴⁸ The term "serious injury" should be understood to mean an *obvious overall impairment* in the position of a domestic industry; the term "threat of serious injury" should be understood to mean that although there is no fact of serious injury having occurred, without the execution of relief measures the said industry is firmly expected to suffer serious injury in a short time. See Article 2 of the RHIRC.

³⁴⁹ Huang Zhi-Hui, "Present Import Relief System", *supra* note 338, at 50.

³⁵⁰ Article 11 of the RHIRC.

³⁵¹ Article 12 of the RHIRC: "The Commission shall permit public inspection of the information provided by the petition of the interested parties, except where a request with justifiable reasons has been made for keeping the information confidential."

³⁵² Once it is found that the provided information and evidence is not sufficient, the petition will be

the industry did not result from factors other than increased imports, and the influence of factors related to the increased imports is not less than factors other than imports.³⁵³ The consequences of failure can be severe; if the Commission makes a negative determination, another petition based on the same facts cannot be filed for another year.³⁵⁴ As a result, the burden of proof on the domestic industry remains substantial.

For Taiwanese industries that lack any experience in seeking safeguard relief, it may be difficult to collect complete and useful evidence. Many Taiwanese industries are medium and small enterprises. Their internal management may not be very systematic, and record-keeping may not be entirely complete.³⁵⁵ However, whether applying for import relief or resisting foreign arguments, it is necessary to provide complete information, such as sales, profits or market share. The validity and continuity of information are essential in order for industries to prove injury successfully.

Having completed the investigation of an import relief case,³⁵⁶ the Commission must convene a Commissioners Meeting to decide whether the concerned industry has been injured or threatened,³⁵⁷ and to submit their suggestions to the MOEA about whether or not to execute a safeguard measure. The MOEA makes the final decision as

dismissed if the petitioner, upon being notified to do so, fails to submit any additional information within a specified time limit or submits an incomplete supplement. The Commission may directly examine the case based on the information available, and the result may not be advantageous to the industry. See Article 9 of the RHIRC. Also, International Trade Commission, *Import Relief System and Its Practice (Jin Kou Jiu Ji Zhi Du Ji Shi Shi)* (Taiwan, ROC: International Trade Commission, 1998) at 5.

³⁵³ *Id.*

³⁵⁴ Article 27 of the RHIRC.

³⁵⁵ Hsu Wei-Nong, *supra* note 339, at 104.

³⁵⁶ The investigation should be undertaken within 120 days from the date following the day on which it receives the import relief petition. The time limit may be extended by another 60 days if necessary. See Article 18 of RHIRC.

³⁵⁷ Article 17 of the RHIRC.

to whether or not a safeguard measure will be employed.

(c) The execution of safeguard measures

(1) Decision on the safeguard measures

The MOEA is expected to take into account the effect which each import relief case will have on national economic interests, consumers' rights, or interests of relevant industries.³⁵⁸ And, *if necessary*, the RHIRC stipulates that the MOEA *may* give affected countries an opportunity for consultation before it takes a safeguard action.³⁵⁹ However, this requirement in the WTO Safeguard Agreement has the nature of an obligation. If this obligation is not fulfilled, Taiwan will likely suffer an equivalent retaliatory action from affected countries. Therefore, it would be more appropriate to say "the MOEA 'must' notify and consult with the interested countries before making the decision to implement a safeguard measure" to avoid the possibility of trade retaliation. The terms "may" and "if necessary" should be changed to the mandatory term "must."

There are three kinds of safeguard measures that the MOEA can adopt:³⁶⁰ (1) adjusting tariffs; (2) setting import quotas; and (3) providing adjustment measures or assistance such as guarantees, assistance for technological research and development, guidance in changing the line of business, and professional training.³⁶¹

³⁵⁸ The degree of implementation should be limited in scope to redressing or preventing the injury caused to the industry by the import. See Article 23 of the RHIRC.

³⁵⁹ Article 22 of the RHIRC.

³⁶⁰ In the 1994 RHIRC, the MOEA was also permitted to make marketing agreements with the exporting countries, for example OMAs. However, Article XI of the WTO Safeguard Agreement has clearly declared a prohibition on taking grey area measures. In order to meet the norms of WTO, Taiwan decided to revise its related rules and eliminate the adoption of export marketing agreements. Huang Zhi-Hui, "Present Import Relief System", *supra* note 338, at 49.

³⁶¹ Article 22 of the RHIRC.

The first two remedies (tariffs and quotas) are border measures and their character is a kin to trade barriers. Tariffs or quotas will affect the interests of foreign exporting countries. Therefore, in principle, the MOEA can only take one kind of border import relief measure in each case, in order not to form excessive trade barriers.³⁶² In other words, tariffs and import quotas cannot simultaneously be used to assist an injured party.³⁶³

The third remedy is used to help industries improve their structure and management, reduce their costs or make innovations to improve their competitiveness. Taking such assistance measures will not result in hostility on the part of exporting countries, as its nature is not protective or restrictive. Further, in an import relief case, it is possible to carry out several kinds of measures at the same time. In theory, there seems to be no difficulty in simultaneously applying one border measure (tariff or quotas) as well as assistance measures in a relief case, since neither measure conflicts with the other.³⁶⁴

A complete import relief system not only provides border measures to give domestic industries temporary relief; but it is also beneficial to have a plan that helps domestic industries adjust their structure and competitiveness to deal with the pressure of foreign competitions. In the U.S., the 1988 revision to the Omnibus Trade and Competitiveness Act recognized the value of structural adjustment, by requiring

³⁶² ITC, "Import Relief System: Frequently Asked Questions", *supra* note 341, at 9.

³⁶³ Article 4, paragraph 2 of the RHIRC.

³⁶⁴ Chung Hua Institute for Economic Research, *The Research on Import Relief Measures (Jin Kuo Jiu Ji Cuo Shi Zhi Yan Jiu)* (Taiwan, ROC: Chung Hua Institute for Economic Research, 1997) at 67.

petitioners to conduct structural adjustments.³⁶⁵ With this revision, Section 201 (the U.S. escape clause) transferred its focus from applying trade remedies to requiring petitioners to submit plans of positive adjustments.³⁶⁶ The purpose behind the change was to allow domestic industries to be able to compete successfully with importers after safeguard measures have ended, or to transfer their resources and affected labour to other production uses.

To strengthen the efficiency of the Escape Clause, the U.S. established a corresponding measure (Trade Adjustment Assistance, TAA) to help injured industries and affected labour to make economic adjustments.³⁶⁷ The character of the TAA is that it specializes in relieving industries and workers affected by “increased imports.”³⁶⁸ The TAA not only gives injured industries financial assurance and subsidies for technology research, but also provides subsidies for unemployed workers, as well as career training and opportunities to change employment. U.S. industries and workers can apply for assistance even outside of the petition mechanism of Section 201.

For Taiwan, although the RHIRC has stipulated that the MOEA can give adjustment measures or assistance for relief,³⁶⁹ it does not provide any further implementation details.³⁷⁰ The experience of the U.S. in establishing the TAA may provide a useful example for Taiwan. There should be a complete set of trade adjustment assistance, which can systematically help the injured industries facing the

³⁶⁵ See S. Rep. No. 71, 100th Cong., 1st Sess. 48-52 (1987).

³⁶⁶ See Paul C. Rosenthal and Robin H. Gilbert, *supra* note 127, at 409-410.

³⁶⁷ See 19 U.S.C. §§ 2253 (a); 19 U.S.C. §§ 2271 (a); 19 U.S.C. §§ 2252 (a)(1).

³⁶⁸ See Mary Anne Joseph, *supra* note 223, at 251.

³⁶⁹ Article 4, paragraph 1 (3) of the RHIRC.

³⁷⁰ Lin Qi-Yuan, *supra* note 312. See also Hsu Wei-Nong, *supra* note 339, at 105.

impacts of trade liberalization and recover their competitiveness. Although U.S. experience with the TAA has not been perfect, and has even been described as, for the most part, unsuccessful,³⁷¹ commentators argue that adjustment assistance remains a viable means of relief if it is flexibly structured and responsibly administered.³⁷² If Taiwan plans to establish a program like TAA, many factors need to be carefully considered; for example, ensuring that budgets are balanced and that there are enough administrative resources.

Moreover, since the final and most important purpose of import relief is to help industries recover from injury caused by imports, if trade adjustment assistance can achieve this goal, political risks will be reduced since fewer border measures are taken. In this way, the process of trade liberalization is not impeded, and a mechanism to minimize transition costs is in place. Taiwan has relatively little political and diplomatic influence in the world, particularly due to political issues with China. Political vulnerability may affect the willingness of Taiwan's government to take trade sanctions unless they are absolutely necessary. By comparison, trade adjustment assistance appears a more positive and harmless way for Taiwan's government to deal with import relief. Therefore, there is an urgent need to develop more related assistance policies to

³⁷¹ Most of the funds spent on adjustment benefits appear to have been paid to workers who eventually returned to their previous jobs. These payments were often awarded after the workers were back at work. Few adjustment assistance dollars were spent on retraining workers or helping manufacturers upgrade their plants or equipment. See Mary Anne Joseph, *supra* note 223, at 284.

³⁷² The challenge the program presented was largely administrative. *Id.* at 285. Scholars argue that one of the most effective ways to improve the TAA program is to monitor and track the effectiveness of the program. Then strengths and weaknesses can be identified and the TAA program can be improved on an ongoing basis. Also, monitoring will facilitate cost-benefit analyses to guarantee that tax dollars are being effectively utilized. See Whitney John Smith, "Trade Adjustment Assistance: An Underdeveloped Alternation to Import Restriction" (1993) 56 Alb. L. Rev. 977.

prepare for the future challenges after Taiwan entering the WTO.³⁷³

As for the duration of safeguard measures, the RHIRC follows Article 7 of the WTO Safeguards Agreement and provides that any safeguard measure cannot exceed four years.³⁷⁴ Compared to the 1994 RHIRC, the current RHIRC also adds some limitations and modifications concerning re-application of safeguard measures.³⁷⁵ The aim is to prevent the possibility of long-term trade restraints and to impel Taiwanese industries to conduct positive adjustment as soon as possible.

(2) Duration and review

The requirement that a safeguard measure lasting more than one year must be liberalized progressively is another mechanism of the WTO Safeguards Agreement to prevent long-term trade barriers from forming.³⁷⁶ Both the U.S. and the EU have the same kind of provision.³⁷⁷ However, in the corresponding RHIRC of Taiwan, the text does not require that the government progressively liberalize a measure lasting longer than one year. Instead, the RHIRC only states that the Commission should make an annual report reviewing the results and effects of the relief measures adopted. Once the cause for implementing such measures has been extinguished, or there is any change in

³⁷³ Nowadays, Taiwan only establishes one Agriculture Fund based on the Rules for Relieving Import Injury of Agricultural Products to help agricultural industry by subsidizing losses. There is no similar fund established to relieve other industries. Liu Fu-Shan, *supra* note 320, at 72.

³⁷⁴ If there is a need to extend the period of implementation, the extension cannot exceed four years and the number of extensions should be limited to one only. See Article 25 of the RHIRC.

³⁷⁵ No safeguard measure should be applied again for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years. A safeguard measure with a duration of 180 days or less can be the subject of another application in special conditions. See Article 27 of the RHIRC.

³⁷⁶ Article 7, paragraph 4 of Agreement on Safeguards.

³⁷⁷ 19 U.S.C. §§ 2253 (e)(1); Article 20 of EU Regulation 3285/94.

circumstances, the MOEA is expected to cease or modify the measure.³⁷⁸ The annual review system can probably achieve the goal of progressive liberalization. However, in order to prevent disputes or misgivings amongst trading partners affected by safeguard measures, it seems preferable to include a more definite provision assuring progressive liberalization.

(d) Special provision – exclusively for perishable agricultural products

Compared to the laws of the WTO, the U.S., and the EU, the RHIRC of Taiwan does not have any special provision dealing with import relief in critical circumstances. There is only one similar provision dealing with import relief cases for perishable agricultural products.³⁷⁹ The period of investigation in the case of a perishable agricultural product is shortened from that of a general relief case, in order to accommodate the short life of perishable products.³⁸⁰ The RHIRC does not limit the kind of safeguard measures that may be taken to relieve perishable agricultural products. However, the WTO Agreement on Safeguards requires that tariffs be the first measure taken to relieve injury in critical circumstances.³⁸¹

The RHIRC gives special consideration to industries involving perishable agricultural products. However, for other Taiwanese industries that will be similarly

³⁷⁸ If the cause for implementing import relief measures ceases to exist or if there is a change of circumstances after the implementation of the measures, the petitioner, the interested parties or the Commission may apply to cease or modify the safeguard measure. See Article 24, 26 of the RHIRC.

³⁷⁹ With respect to an import relief case concerning perishable agricultural products where serious injury would be difficult to remedy if relief measures are not promptly adopted, the Commission should make a decision as to whether the industry has been injured within 90 days from the date following the date on which the Ministry of Economic Affairs received the said case. See Article 19 of the RHIRC.

³⁸⁰ The period of investigation is shortened to 90 days. See Article 19 of the RHIRC.

³⁸¹ Article 6 of Agreement on Safeguards.

exposed to the severe competition after Taiwan's entry in the WTO, there is no corresponding strategy to help the industry face the impact of sharply increased imports in critical circumstances.³⁸² Those Taiwanese industries may experience greater urgency from import competition, and will have no expedited opportunity to relieve an emergency situation. It is, therefore, appropriate to include provisional safeguard measures into the RHIRC to deal with such an eventuality. In addition, preliminary investigation procedures should also be supplemented.

3. Rules for Relieving Import Injury of Agricultural Products

As a result of the elimination of trade barriers and the reduction of tariffs, agriculture in Taiwan might sustain a severe and negative impact in the future.³⁸³ Until now, the population engaging in agriculture in Taiwan has been large. In addition, national safety and the nature of agricultural products explain the establishment of another special safeguard clause, other than the RHIRC.³⁸⁴ The Council of Agriculture of Executive Yuan promulgated the Rules for Relieving Import Injury of Agricultural Products (RRIAP) in 1989 and revised it in 1995 and 1998.³⁸⁵ The biggest difference between the RRIAP and the RHIRC is that the RRIAP does not require that the injury or the threat of injury be "serious." In other words, the degree of injury in RRIAP does

³⁸² The WTO permits that a Member to take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The form of safeguards should be tariffs and its duration may not exceed 200 days. See Article 6 of Agreement on Safeguards.

³⁸³ Hwang Tsrng-Chyi & Wu Ming-Ming, "Taiwan's Agricultural Policy Adjustments for Trade Liberalization (Mao Yi Zi You Hua Han Taiwan Nong Ye Zheng Ce Di Tiao Zheng)" (1998) 64 Journal of Agricultural Economics 155.

³⁸⁴ Liu Fu-Shan, *supra* note 320, at 68-70.

³⁸⁵ See ITC, *Related Import Relief Regulations*, *supra* note 318, at 96.

not have to be high, allowing farmers to obtain relief more easily.³⁸⁶ If agricultural products meet the higher standard of the RHIRC, suffering serious injury or the threat thereof, such a case should be transferred to the Ministry of Economic Affairs and would become a RHIRC case.³⁸⁷

B. The effect of practice

Taiwan established its own rules for handling import relief cases in 1994. Because of the strict prerequisites of serious injury or the threat thereof, it is relatively difficult for an industry to apply for relief. As Taiwan is not a member of the WTO, it is not easy to apply such a clause to affect other trade partners. As a result, Taiwan has not yet had any cases of import relief.³⁸⁸

As noted above, import relief for agricultural products based on the RRIAP has a lower standard of proof: if the agricultural products suffer injury or the threat of injury, the domestic industry can apply for relief without the requirement of serious injury or threat thereof.³⁸⁹ In addition, these measures meet the principles of GATT/WTO. Therefore, it is easier to establish an import relief case, and the relief measures are not easily objected to by other interested countries. Since the RRIAP have been promulgated, there have already been five applications. The agricultural industries seeking relief were producers of apples, tea and lamb meat. Except in the case of lamb meat, the cases met the conditions for relief. The Council of Agriculture decided to

³⁸⁶ Article 4, paragraph 1 of the RRIAP.

³⁸⁷ Article 5, paragraph 2 of the RRIAP.

³⁸⁸ Lin Qi-Yuan, *supra* note 312.

³⁸⁹ *Supra* note 386.

provide assistance (details shown in table 8).

Table 8. Import Relief Cases of the RRIAP

Petitioner	Products	Application Date	Decision Date	Ratify relief Date	Relief Measure
Li Shai Farm	Apples	6/8/1993		3/9/1994	Transfer technology
Pi Tong Community	Lambs	3/1/1996		5/6/1996	The application did not meet the conditions for relief
Shi Tzu provisional government	Tea	4/2/1996	6/28/1996	1/25/1997	Transfer technology, increase assets, shipping and interest subsidies
Mio Li provisional government	Tea	8/9/1996	10/24/1996	1/25/1997	Same as above
To Hua provisional government	Tea	8/26/1996	10/24/1996	1/25/1997	Same as above

Source: The Council of Agriculture of the Executive Yuan.

IV. Comparing the divergence of safeguard measures between Taiwan and other countries

With a few differences, Taiwan's safeguard clauses basically follow the spirit of the WTO Agreement on Safeguards. As Taiwan referred to the legislation of the U.S. and the EU when establishing and revising its Rules for Handling Import Relief Cases,³⁹⁰ comparison to the laws of the U.S. and the EU will aid in understanding the

³⁹⁰ ITC, *Rules for Handling Import Relief Cases: legislative purpose and introduction*, *supra* note 325, at 1,2.

legislative background and perhaps enhance the legitimacy of the Taiwanese measures.

Many aspects of Taiwan's safeguard measures conform to those of the U.S., EU and WTO: conditions of applications, definitions of serious injury and like or directly competitive goods, duration of safeguard measures, prohibition of GAMs, and protection of confidential materials. Briefly examining the differences, the RHIRC of Taiwan: 1) applies to any product including agriculture and textile goods; 2) does not have a provision regarding provisional safeguard measures; 3) does not have any other cooperative measures regarding trade adjustment, such as the TAA in the U.S.; 4) does not have related provisions regarding quota allocations; 5) does not have a clear provision of progressive liberalization for the safeguard measures which exceed one year; 6) does not have a provision stipulating the principle of compensation; 7) does not have a provision of special treatment for developing countries. These differences are listed and compared in Table 9.

Table 9. Comparisons of the safeguard clauses

	WTO	Taiwan	U.S.	EU
Applied products	This Agreement does not apply to related safeguard measures taken based on the provisions other than this agreement, e.g. MFA and agriculture agreement. (Article 11.1)	Any product can apply to the Rules for Handling Relief Cases.	All products except for textiles. Section 202(h) has been revised.	All products except for textiles and those products listed under Regulation No. 519/94.
Provisional safeguard measures	A preliminary determination is needed before taking a provisional safeguard measure. The duration of the provisional measure shall not exceed 200 days and the form of measure should be tariff increases. (Article 6)	RHRC does not have the provision regarding provisional safeguard measures. But the emergency safeguard for the perishable agriculture products can be taken and should be decided on within 90 days. Such measures are not limited in the form of tariffs.	Two kinds of conditions for taking provisional safeguard: (1) for perishable agriculture products or citrus products; (2) if there is a critical circumstance. (Section 202 d.1 & d.2)	The same as WTO. Provisional safeguard measures should take the form of an increase in the existing level of customs duty and the duration should not exceed 200 days. (Article 8)
Type of safeguard measures	The aim and extent of applying safeguard measures is only to prevent or remedy serious injury and to facilitate adjustment. A quantitative restriction shall not reduce the quantity of imports below the average level of the last three representative years.	Adjusting the tariffs. Import quotas. Financing guarantee, assistance for technological research and development, guidance for changing the line of business, professional training or other adjustment measures or assistance.	Duty; Tariff-rate quota; Quantitative restriction; Trade adjustment assistance; Agreement with foreign countries; Auction of import licenses quantities; International negotiations; Congress legislative; Any other appropriate and feasible actions;	Quota. Surveillance. Limit the period of validity of import documents. Alter the import rules for the product in question.

	(Article 5.1)		Any combination of actions listed above.	
Quotas allocation	The allocation should be based on the proportions of import during a previous representative period. Such a principle of allocation can be departed if certain Members have imported in disproportionate percentages. (Article 5.2)	Without related provisions.	Any quantitative restriction shall permit the importation of a quantity or value of the article which is not less than the average quantity or value of such article in the most recent three years, unless the importation of a different quantity or value is clearly justified in order to prevent or remedy the serious injury. (Section 201 e.4)	Any quota measure should be maintained: the traditional trade flows; the volume of goods exported under contracts concluded on normal terms; the need to avoid jeopardizing the aim of the quota; without being lower than the average level of imports over the last three representative years unless necessary to prevent or remedy serious injury. (Article 16.3)
Progressive liberalization	Any measure over one year should be progressively liberalized. Any measure over three years should be made a mid-term examination and progressively liberalized. (Article 7.4)	Without clear provisions regarding progressive liberalization to the safeguard measure that will exceed more than one year.	An action that has an effective period of more than one year shall be phased down at regular intervals during the period in which the action is in effect. (Section 203 e.5)	If the duration of the measure exceeds one year, the measure must be progressively liberalized at regular intervals during the period of application, including the period of extension. (Article 20.4)
Re-application of safeguard measures	The period of non-application is at least two years. A safeguard measure with a duration of 180 days or less may be applied again if: (a) at least one year has elapsed and (b) has not been applied more than	The same as WTO. The Commission shall not, within one year after making a non-injury decision or within two years after the expiration of relief measures on the same products, accept another petition based	The same as WTO. (Section 203 e.7)	The same as WTO. (Article 22)

	twice in the five-year period. (Article 7.5, 7.6)	on the same facts. (Article 27)		
Consultation and compensation	A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with the Members concerned and shall give any adequate means of trade compensation due to the adverse effects. (Article 8 & 12)	The Ministry of Economic Affairs may, if necessary, notify and consult with the interested countries before making the decision of applying safeguard measures. (Article 22) There is no provision about compensation.	Without such provision describing compensation.	Without such provision describing compensation.
Special treatment to developing country	Safeguard measures shall not be applied to a developing country if its share of import is below 3%, provided that developing countries with fewer than 3% import share collectively account for fewer than 9% of total imports. The maximum duration of a measure for a developing country is 10 years. (Article 9)	Without a special provision for developing countries.	Without a special provision for developing countries.	No safeguard measure may be applied to a product originating in a developing country if its share of Community imports does not exceed 3%, provided that developing country with less than 3% import share collectively account for fewer than 9% of total Community imports of the product concerned. (Article 19)
Links with antidumping & countervailing	Without such provision.	During the process of investigation of the injury, if there is any situation of subsidization or dumping involved, the ITC shall promptly notify the Ministry of Finance	Without such provision.	Without such provision.

		and the petitioner. (Article 28)		
Others	Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures that do not meet the regulations of WTO. (Article 11.3)	Without such provision.	Without such provision.	Without such provision.

Source: compiled by the author.

V. Suggestions to improve the current import relief system of Taiwan

The import relief system in Taiwan has met the essential requirements for developed countries as set out in GATT/WTO. As domestic markets in Taiwan become increasingly open, cases requiring relief will undoubtedly arise with greater frequency than in the past. In order to allow weak industries to obtain immediate and short-term relief, adjust their internal structures, promote their efficiency or conduct transformations under conditions of fair competition with foreign products, and in order to generally reduce the impact on society of the transfer to the open market system, there are additional areas where improvements might be made.

1. The limited number of cases

Although the RHIRC already has a five-year history, Taiwan's industries and

government agencies still do not possess enough experience in handling import relief cases. When conducting negotiations for entering the WTO with other major countries, Taiwan was required to have agricultural and industrial products included in its lists of openings. These industries, which were highly protected in the past, will face the most severe impact in relation to other industries as a result of Taiwan's joining the WTO. It can be predicted that the need for these industries to apply for temporary safeguards will increase, and there will also be a greater need for a more expeditious process. In order to help industries make well-informed decisions about whether or not to apply for relief, and to assist petitioners to submit a complete application in order to avoid rejection without consideration, a detailed publication would be helpful. The publication should include all legal conditions and terms such as "normal price", "major proportion", the amount of money to be requested in a subsidy, etc. The method of calculation or examples from past cases should be provided as well. A database of import relief-related information would also help industries follow precedents when applying for an import relief case.

2. Meeting the requirement of compensation

Article XIX of GATT requires that the Member country that applies a safeguard measure provide compensation to other affected Member countries. In practice, this requirement became one of the reasons why Member countries were unwilling to take safeguard action under Article 19 of GATT. After the problem was recognized, the Agreement on Safeguards altered the requirement of compensation. If the safeguard

measure has been taken as a result of an absolute increase in imports, and such a measure conforms to the provisions of WTO, the affected exporting countries cannot take any retaliatory measures if the compensation agreement has not reached a conclusion.³⁹¹ The importing country has more flexibility and space to take safeguard measures.

Taiwan's current safeguard policies do not include this compensation provision. Since the WTO has once again proclaimed this principle and revised it, it seems preferable to include such a compensation principle in the RHIRC, or at least to comply with the spirit of the principle of compensation in the Agreement on Safeguards. Including such a provision would prevent disobedience to multilateral regulations and the consequent risk of causing Taiwan to suffer retaliation from affected trade partners. The issue of compensation might involve authorities from many different public agencies and interests of many different domestic industries; hence coordination becomes an important issue.

3. Special treatment for developing countries and non-market economic bodies

Since the majority of countries have come to agree that it is better to develop the world economy through cooperation, the WTO usually allows some preferential and special considerations for developing countries. The Agreement on Safeguards is no exception. A developing country with no more than three per cent market share of imports of a particular product is protected from safeguard action by the destination country, as long as developing countries collectively have no more than nine per cent

³⁹¹ Article 8, paragraph 3 of Agreement on Safeguards.

market share.³⁹² Other special treatment also includes the duration of safeguard measures and re-implementation of safeguard measures.³⁹³ All of these provisions not only help developing countries reduce the barriers resulting from other countries' safeguard measures, but also give them more flexibility and longer periods when they can apply safeguards to their weak industries.

As for Taiwan, since it is required to enter the WTO with the status of a developed country, establishing such special provisions for developing countries will be necessary. On the other hand, Taiwan's successful entry into the WTO continues to require support from more countries. Without special treatment for all developing countries, Taiwan may find it difficult to gain complete support and approval for its entry from other developing countries. Therefore, the RHIRC of Taiwan is better off supplementing its contents with regard to the special treatment of safeguards for developing country Members.

Such a supplementary provision would also be useful in bilateral trade matters with China since China will enter the WTO with the status of a developing country. If Taiwan decides not to apply the non-application clause of WTO to China in the future, should products imported from China cause serious injury or threat to Taiwanese domestic industries, the current RHIRC will be the import relief mechanism to deal with the problem.

China is a communist society with a non-market type of economy. Products from such non-market economy bodies usually have the characteristic of low prices. To

³⁹² Article 9, paragraph 1 of Agreement on Safeguards.

³⁹³ Article 9, paragraph 2 of Agreement on Safeguards.

address rapidly increasing Chinese imports, both the U.S. and the EU have insisted that China put in place special safeguard clauses before China finishes its economic reformation.³⁹⁴ The U.S. and EU have established regulations for dealing with market disturbance resulting from products imported from non-market economy countries.³⁹⁵ Therefore, another choice for Taiwan to solve the relief problem concerning products from China might be to establish a special regulation for non-market economy countries. Further, based on the special political factors involving China and Taiwan, perhaps Taiwan can argue that its national security entitles it to apply the exception clause in Article XXI of the GATT once China joins the WTO.³⁹⁶ Such an option may assist Taiwan solve its trade problems with China through WTO channels, without recourse to political solutions.

4. Dispute settlement in an import relief case

For Taiwan, the establishment of RHIRC is the first step to strengthening its import relief system. In both theory and practice, Taiwan still remains in the initial stages of the process, and there may be disputes regarding the practices of the RHIRC. One of the important issues is how dispute settlements will be channeled in an import relief case. Generally speaking, the RHIRC belongs to the field of administrative law. If any dispute is raised in an import relief case, such a dispute should be settled through administrative review channels. The following sections discuss some possible issues in

³⁹⁴ For example Protocol Concerning the Participation of the People's Republic of China in the General Agreement on Tariffs and Trade (1989). See Tsai Hong-Min, *supra* note 283.

³⁹⁵ U.S.' Section 406 of Trade Act and EU' Regulation No. 519/94.

³⁹⁶ See Article XXI of GATT. See also Tsai Hong-Min, *supra* note 309, at 244-245.

the dispute settlement of import relief cases.

1) The standing of petitioners in appeal / litigation – According to the RHIRC, the petitioners for import relief include four kinds of parties: the relevant authority, the representative of the injured industry, the association representing the injured industry or the relevant bodies. The intention is to permit collective, as opposed to individual, petitioners. With the exception of the “relevant authority”, the petition submitted by any of the remaining three parties is different from a petition by individuals. According to the RHIRC, “the representative of the injured industry,” can be domestic producers of like products or directly competitive products, whose collective output of the products constitutes a major proportion of the total domestic production of those products. In other words, the representative of the injured industry should be thought of as a collective of major domestic industries, unless the domestic production of this individual injured itself has constituted the major proportion of the industry. The whole of the industries and their operators are the object of relief from the RHIRC. The import relief system is a type of administrative strategy that tends to protect the occupation rather than the individual. Therefore, the relief system established by the RHIRC does not give individuals the right to petition. Since the petitioner has the general characteristic of a collective, any future appeal and litigation on the import relief case would belong to the collective. In Taiwan’s administrative litigation system, such compulsory collective litigation is not usual.

As for the “relevant authority,” this should be interpreted as an authority other than the Ministry of Economic Affairs; for example the Council of Agriculture of the

Executive Yuan. However, is it possible for the government agency that is the petitioner of an import relief case to have standing in administrative appeals and litigation?

In the old Law of Administrative Appeal of Taiwan,³⁹⁷ only people can be qualified to make an administrative appeal. Therefore, the government authority is not allowed a right of appeal when it is the petitioner of an import relief case. However, such situation may affect the benefits of the domestic industry that is actually the one affected by foreign imports.

This shortcoming has been improved in the new Law of Administrative Appeal of 1998. The new law indicates that the parties who can make administrative appeals include people, other autonomous bodies and other public persons.³⁹⁸ Relevant authorities should meet the qualifications of “public persons”. Therefore, it should be possible for a “relevant authority” to initiate administrative relief in an import relief case.

2) The process of determination – Based on Article 20 of the RHIRC, the Commission can only recommend a finding about whether their industry has been injured and whether any safeguard measure should be taken, and submit reports to the Ministry of Economic Affairs. However, since the Commission is the agency that conducts the investigation and holds the public hearing, the Commission must have greater knowledge about the matter than the Ministry of Economic Affairs. Therefore,

³⁹⁷ Taiwan's Law of Administrative Appeal (Su Yuan Fa) was promulgated in 1930 and revised in 1998. So the old Law of Administrative Appeal here means the one before 1998.

³⁹⁸ Article 1 of Law of Administrative Appeal of Taiwan stipulates that people, other autonomous bodies and public persons can make administrative appeals if these parties think the administrative action concerned is illegal or improper.

the Ministry of Economic Affairs will generally respect and follow the recommendations of the Commission. However, if the Commission submits a recommendation that relief measures should not be adopted and the MOEA finds its recommendation non-acceptable, the MOEA must promptly order the Commission to hold a public hearing within thirty days on the import relief measures to be adopted, and thereafter submit its recommendation to the MOEA.³⁹⁹

Further, after receiving the decision of the Commission, the Ministry of Economic Affairs must notify the petitioner of its decision in writing, and publish the decision in a gazette. As the Ministry of Economic Affairs is the agency that issues the administrative decree, the petitioner in an import relief case should submit any appeal regarding a determination of injury to the Executive Yuan.⁴⁰⁰ The Executive Yuan should then examine whether the investigating procedures of the Commission were complete and thorough or whether the determination was too perfunctory.

3) The process of taking safeguard measures – If the relief measures taken by the Ministry of Economic Affairs affect the rights and interests of the petitioning industry, the petitioner should have the right to claim relief. The channel for settling such a dispute will be administrative or civil procedures based on the type of relief measures taken by the Ministry of Economic Affairs. Different types of measures will result in different public or private relations between the Ministry of Economic Affairs and the petitioner. Generally speaking, if the Ministry of Economic Affairs sets import quotas or imposes a special tax on certain importers based on the RHIRC, such action will be

³⁹⁹ Article 20, paragraph 3 of the RHIRC.

⁴⁰⁰ Article 4, paragraph 9 of Law of Administrative Appeal of Taiwan .

considered administrative disciplinary action. The importers, if dissatisfied with the administrative action of the MOEA, may file an appeal to the Executive Yuan and enter into administrative litigation according to law.⁴⁰¹

However, sometimes the Ministry of Economic Affairs may use adjustment measures as a remedy; for example, by providing a financial guarantee, through assistance with technological research and development, through guidance on changing the line of business, through professional training, or through other adjustment measures or assistance. In general, the government usually issues administrative directions to help with the implementation of such assistance measures. These administrative directions should be restrained by administrative principles. However, does it constitute an administrative disciplinary action if the Ministry of Economic Affairs determines whether to give the applicants the assistance needed?

In the U.S., if an application for Trade Adjustment Assistance ("TAA") that has made by an industry or a worker is rejected, the applicant can claim in the U.S. court of International Trade for relief.⁴⁰² Furnishing an administrative review or appeal process will help ensure that import relief measures are public, transparent and lawful. After all, the creation of an import relief system illustrates the concern of the government for the injured industry. And throughout the procedure, there are strict regulations used to decide on the degree of injury and to draw up the remedy measures; the whole relief case will become the focus of interest by the industry and the country as a whole. In proceeding with import relief, if there are no strict procedures, and the system cannot

⁴⁰¹ *Id.*

⁴⁰² 19 U.S.C Part 2.

provide any review channel for those rejected, the establishment of the import relief system will not provide enough assistance and relief.

The government agency usually uses the method of administrative disciplinary action to provide relief for the injured industry. However, it is possible for the government to use contracts to furnish import relief. Taiwan's laws do not prohibit the government from signing contracts with private parties that are legally effective. For example, the Ministry of Economic Affairs may sign an assistance contract with an injured industry in order to improve the technology of production or provide financial assurances for those industries needing funds. Such assistance measures help form a civil-legal relationship between the government and the industry. Therefore, it is possible for an industry, through a civil proceeding, to seek settlements if there is any dispute regarding such assistance measures.

Although there are two different procedures a petitioner for import relief can use to seek to resolve any dispute, the relief measure that has the nature of a public law relationship imposes greater restraints on the administrative agency. In a civil-legal relationship, the administrative agency has more room to reject an application filed by an industry. But since such an import relief case may become a focus of social or political concerns, there seem to be fewer actual advantages for the government if the assistance measure is established on the basis of civil law. It seems preferable to deal with all import relief cases in the context of public law. There, the petitioners have access to the channels for administrative appeals and litigation to pursue dispute settlements regarding the government's trade assistance behaviours.

5. The importance of prior surveillance

In 1997, many Asian countries, especially those in southeastern Asia, suffered the impact of financial setbacks, currency devaluation and economic recession.⁴⁰³ Fortunately, Taiwan escaped from the impact of these developments and maintained momentum of its economic development. Commentators argue that this success was probably because Taiwan does not have a large dependence on the foreign capital needed for its economic development. Taiwanese industries can easily collect funds from the local capital market and use them to improve their financial conditions and strengthen their ability to deal with such emergencies. Taiwanese government and industries were able to maintain flexibility and adjust their economic directions, which is another important reason why Taiwan avoided the financial crisis of 1997.⁴⁰⁴

However, imports from those countries which experienced currency devaluation are now more competitive than Taiwan's local products in domestic markets. Low-price imports may gradually result in serious injury or threat thereof to local Taiwan producers. This example also shows the importance of prior surveillance or economic observation of the possibility of injury resulting from increased imports. Prior economic monitoring can provide information to industries about market developments and can help to detect whether imports have any abnormal trends, for example a sharp increase in amounts. In particular, unlike antidumping laws, which take a long time to

⁴⁰³ Wang Jian-Quan, "The Impact of Asian Financial Risk to Taiwan's Economy (Ya Zhou Jin Rong Wei Ji Dui Taiwan Jing Ji Di Ying Xiang)" (March 1998) 31 Journal of Policy 1.

⁴⁰⁴ *Id.*, at 6.

activate, a safeguard system focuses on whether the injured industry can obtain timely relief and adjustment opportunities. The earlier the possibility of injury can be predicted, the sooner the industry can take an emergency strategy. The extent of injury may thus be reduced by advance preparation. Evidence can also be collected more easily for industries to prove the causality of injury and imports.

Regulation 3285/94 of the EU establishes a system of prior and retrospective surveillance to collect information on import trends. Such surveillance may sometimes cause foreign exporters to watch their exports more closely, which may be beneficial. In Taiwan, prior surveillance will probably help local industries to be aware of the possibility of injury as early as possible. The collection of relevant information can be more convenient and complete. Currently, Taiwanese industries lack experience in requesting import relief. Prior vigilance is not enough for local industries to start their defense strategy in a timely manner. Therefore, prior surveillance and economic observation are in fact necessary for Taiwanese industries to prevent more injuries in advance or help them collect useful evidence to mount a successful petition. Taiwan's International Trade Commission may need more authority to set up prior economic monitoring or to initiate investigations to help local industries facing the impacts of increased imports.

6. Trade adjustment assistance

Trade adjustment assistance is quite different from border measures like tariffs and quotas. The government needs to prepare vast budgets to give loans to injured

industries, or benefits (assistance payments or career training) to displaced workers. To assist displaced workers, U.S. government provides not only unemployment insurance but also TAA program subsidies. However, in U.S. experience, most workers receiving benefits have not been retrained. Most of those who have received training have not been placed in jobs utilizing their newly acquired skills.⁴⁰⁵ Similarly, many U.S. firms that received loans for the purchase of new facilities or equipment or for the upgrading of existing facilities have not recovered to the point where they can repay their loans.⁴⁰⁶ In the end, the aim of adjustment was not achieved and the assistance resulted in great financial burden to the U.S. government.

Therefore, keeping U.S. experiences in mind, Taiwan needs to pay more attention to the balance between national finances and industrial adjustments when giving financial assistance to affected industries and workers. Careful evaluation will be necessary to avoid future financial burdens. In particular, trade adjustment assistance and the unemployment relief system (or unemployment insurance) should be simultaneously considered when Taiwan draws up government subsidies for displaced workers.⁴⁰⁷ How to make the two programs work in coordination but without

⁴⁰⁵ R. Lawrance & R. Litan, *supra* note 223, at 58.

⁴⁰⁶ Approximately half of all loan recipients under the TAA program between 1976 and 1981 were in default by the end of 1981. By March 1983, 58 percent of all outstanding TAA loans were in default or liquidation, or required special servicing. Significantly, between 1972 and 1983, only five loans, totalling \$3.1 million, had been fully paid back. *Id.* at 61, n.49 [citing Oversight of Trade Adjustment Assistance Programs and Authorization of Appropriations for U.S. Trade Representative, International Trade Commission, and Customs Service: "Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance", 98th Cong., 1st Sess. 231 (1983) (Statement of Lyle Ryter)].

⁴⁰⁷ Until now, Taiwan has not established a system of unemployment insurance but unemployment assistance. The unemployment assistance only provides other job opportunities without any financial subsidies. However, this unemployment assistance achieve little. Taiwan's Executive Yuan has planned to establish a system of unemployment insurance in the future for helping displaced workers. See Chung Hua Institute for Economic Research, *supra* note 364, at 141-144.

overlapping will be a challenge for Taiwan's government to deal with.

In addition, it seems preferable to design different adjustment assistance mechanisms for agriculture and industry because of their different natures. For a long time, Taiwan's government has given domestic agriculture producers greater protection than other industries. The only subsidy fund established was to relieve the injury of the agriculture industry.⁴⁰⁸ Further, the design of RRIAP allows agriculture producers to obtain relief more easily. However, there is no similar relief fund established for manufacturing industries. In the future, once Taiwan's market is opened, industries may also need relief subsidies to facilitate their adjustment. The government should not treat agriculture with partiality but try to establish a more comprehensive relief system in order to cope with future challenges.

⁴⁰⁸ This subsidy fund has exceeded U.S.\$ 65 million. Liu Fu-Shan, *supra* note 320, at 77.

Chapter 6 Conclusion

Liberalized market access is now the basis of developing trade relationships for every country in the world. In order to avoid unforeseen impacts of imports on domestic industries, import relief systems are established in most countries. An examination of the long-term prospects of anti-dumping and countervailing laws, and the import relief system (safeguard clause), reveals that they supplement but do not substitute for one other. Since the former two systems are aimed at unfair trade behavior and the safeguard clause affects fair trade behavior, there should be a distinct division between them. However, in practice, because it is not very easy to distinguish between unfair and fair trade behavior and because the conditions for applying the safeguard clause are more onerous than for antidumping laws, safeguard cases have been increasingly few in number in the international community since the 1980s. Instead, most countries prefer to apply anti-dumping and countervailing laws or other grey area measures to protect their own industries. Many disputes about the meaning of Article XIX of GATT 1994 have also made the safeguard clause unpopular. The prevalence of grey area measures impedes the dream of free trade and may indirectly affect the speed of industrial adjustments. Within an industry, such a situation will generate inefficiencies and other economic problems, and might provide excessive protection.

The real motive in applying safeguard measures is to provide local industries with temporary relief during the process of trade liberalization. The idea is to speed up the adjustment of industries and recover or raise their competitive capabilities. In the long-

term, an import relief system has a more positive function than trade sanctions. Following revisions to the Agreement on Safeguards in Article XIX of GATT 1994, the importance of successful adjustment of industries is now ever greater in order to resist illegal and excessive trade protection.

Taiwan's export-oriented policies resulted in great dependence on foreign markets, especially in Europe and the United States. Moreover, because of the narrowness of its own domestic market and the limitations of its diplomatic ties, it was extremely difficult for Taiwan to have the political strength to prevent its trade partners from forcing voluntary export restraints and other grey area measures against it. Therefore, in addition to the necessity of establishing its own import safeguard system, entering the WTO will help Taiwan by providing an international and legitimate framework for negotiations or obtaining relief. Taiwan has had an import safeguard system in place since 1994. However, there has not yet been a case where the safeguard clause has been invoked. As a result, it is not possible to discuss the shortcomings of Taiwan's import relief system based on practice. One can only examine the system in comparison to other national systems and the WTO rules.

Due to previous problematic trade policies and the large costs of protectionism that resulted from pressures from interested parties in industrialized countries, it is helpful for Taiwan to consider the methods of other developed countries when establishing or amending its own safeguard clause. Generally speaking, Taiwan's import relief system is similar to those of many developed countries and is in the spirit of the WTO (after Taiwan finished its first revision of the RHIRC in 1998). Major

differences exist in the executive procedures and methods of applying safeguards. If one compares the 1994 RHIRC to the current RHIRC, the most significant changes are the elimination of orderly marketing agreements as remedies, and more stress on the importance of industrial adjustment.

However, the new Taiwan import safeguard system does not contain details about how to carry out the goal of industrial adjustment. Since the final goal of the safeguard clause is to help industries through difficult times and to allow them to recover their competitiveness during the duration of the safeguard measure, it will be necessary to establish a set of trade assistance regulations. The experience of the United States in establishing its Trade Adjustment Assistance is quite helpful for Taiwan's reference. Currently, Taiwan only has an agricultural assistance fund for injured agricultural producers. In the future, similar assistance should be established for all industrial sectors. Further, the matter of how to balance the government's finances and the interests of the affected industries and displaced workers needs to be carefully taken into account when establishing such assistance regulations.

Taiwan is entering the final stages for entry into the WTO. The government and the people are preparing to adapt to the new conditions following the opening of Taiwan's markets. Taiwanese industries not only need to raise their own level of competitiveness, but also need to understand the nature of the import safeguard system. A sound and thorough import safeguard system will help Taiwan solve many unanticipated economic consequences, and reduce unnecessary trade conflicts with other trade partners. Although Taiwan's RHIRC largely meets WTO standards, based

on the discussion and comparisons set out in above chapters, several substantive provisions still need to be addressed and improved:

1. The RHIRC should include provisional safeguard measures for critical circumstances. Emergency safeguards should not be limited in scope to perishable agricultural products but should also include industrial products. Referring to the regulations of the EU, the U.S. and the WTO, the best type of provisional safeguard is tariffs. This provision will allow Taiwanese industries greater confidence after Taiwan's entry into the WTO.

2. In order to avoid trade conflicts when applying safeguard measures such as quotas or quantitative restraints, both EU and U.S. law have detailed requirements and principles to determine the quantities of imports that trigger relief. Taiwan should follow the examples of the EU and the U.S. and establish a definite way of setting quotas.

3. The RHIRC should contain clear provisions for progressive liberalization of safeguard measures. It should also follow the principles of the WTO, requiring safeguard measures to be progressively liberalized after one year from the date of their implementation.

4. The RHIRC should provide for the special treatment of developing countries, to undermine future opposition from them. In dealing with low-price imports from non-market countries, Taiwan should establish special safeguard rules, following the experience of the U.S. and the EU. Because of the special relationship between Taiwan and China, if Taiwan decides not to apply the WTO's non-application clause to China, a

revision to the RHIRC will be necessary, while re-evaluating channels of negotiation and communication for the future.

5. The RHIRC should require notice to the WTO Committee of Safeguard Measures when import relief measures are imposed. The RHIRC should also provide compensation in such cases. This will prevent violations of multilateral regulations and retaliation from affected countries.

6. Different types of safeguard measures will result in different public or private relations between the government and the petitioner. It is possible for an industry, through a civil or administrative proceeding, to seek settlements if there is any dispute regarding safeguard measures. However, since an import relief case will usually become a focus of social or political concerns and a safeguard measure that has the nature of a public law relationship can impose greater restraints on the administrative agency, it seems preferable to deal with such a case in the context of public law. In this way, those parties whose interests are affected in an import relief case can obtain more protections.

In the future, domestic dispute settlement channels must be improved. Taiwan can also use the WTO dispute settlement mechanism to resolve disputes with other trading partners. Prior monitoring of economic developments and collecting related trade information are still the best ways for Taiwan to prevent or reduce potential economic injury from foreign exports. After all, government trade protection cannot always be counted upon to solve industry problems over the long term. It is more important for Taiwanese industry to improve its own ability to face future foreign competition. The

safeguard clause is only a short-term mechanism. Only if industry voluntarily promotes its own competitive capability will Taiwan be heading in the right direction to deal with future challenges.

BIBLIOGRAPHY

BOOKS

(English)

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Savage, Md.: Rowman & Littlefield, 1993).

Alan O. Sykes, "GATT Safeguards Reform: The Injury Test" in Michael J. Trebilcock and Robert C. York, eds, *Fair Exchange: Reforming Trade Remedy Laws* (C.D. Howe Institute, 1990).

Alting Von Geusau, *Economic Relations After the Kennedy Round* (Leyden: A. W. Sijthoff, 1969).

Bergsten & Cline, "Trade Policy in the 1980's: An Overview" in *Trade Policy In The 1980s* (Washington, DC: Institute for International Economics, 1983).

Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: Oxford University Press, 1995).

Brian Hindley, "Safeguards, VERs and Anti-dumping Action", in OECD, *The New World Trading System: Readings* (Paris: OECD, 1994).

Charles P. Kindleberger, *International Economics* (Homewood, Ill.: R.D. Irwin, 1973).

David Greenaway & Brian Hindley, *What Britain Pays for Voluntary Export Restraints* (Trade Policy Research Center, Thames Essay No. 43, 1985).

David Robertson, *GATT Rules for Emergency Protection*, Thames Essay, No. 57 (London: Trade Policy Research Centre, 1992).

D. Snider, *Introduction to International Economics* (Homewood, Ill.: R. D. Irwin, 1979).

David W. Leebron, "Implementation of the Uruguay Round Results in the United States", in John H. Jackson and Alan O. Sykes ed., *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997).

Edmond McGovern, *International Trade Regulation: GATT, the United States and the European Community* (Exeter [Devon]: Globefield Press, 1986).

Gary Clyde Hufbauer and Howard F. Rosen, *Trade Policy for Troubled Industries* (Washington: Institute for International economics, 1986).

Gary Sampson, "Safeguards", in J. Michael Finger and Andrzej Loechowski, eds, *The Uruguay Round: A Handbook on the Multilateral Trade negotiations* (Washington DC: The World Bank, 1987).

I. Van Bael & J. F. Bellis, *Anti-dumping and other Trade Protection Laws of EEC* (Bicester, Oxfordshire : CCH Editions, 1990).

J. David Richardson, "Safeguards Issues in the Uruguay Round and Beyond", in Robert E. Baldwin and J. David Richardson, eds, *Issues in the Uruguay Round* (National Bureau of Economic Research, 1988).

J. F. Beseler and A. N. Williams, *Anti-dumping and Anti-Subsidy Law: The European Communities* (London: Sweet & Maxwell, 1986).

John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (The University of Michigan Press, 1989).

J. H. Jackson & W. J. Davey, *Legal Problems of International Economic Relations* (St. Paul, Minn.: West Pub. Co., 1986).

J. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969).

J. Michael Finger, "Legalized Backsliding: Safeguard Provisions in GATT", in Will Martin and L. Alan Winters ed., *The Uruguay Round and the Developing Countries* (New York: Cambridge University Press, 1996).

Kenneth W. Dam, *The GATT: Law and The International Economic Organization* (Chicago: University of Chicago Press, 1970).

Leddy & Norwood, "The Escape Clause and Peril Points Under the Trade Agreements Program" in Harry C. Hawkins and John M. Leddy, *Studies in United States Commercial Policy* (Chapel Hill: University of North Carolina Press, 1966).

Marco C.E.J. Bronckers, "Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism" in *GATT European Community and United States Law* (Hingham, MA, U.S.A.: Kluwer Law and Taxation, 1985).

Martin Wolf, *Emergency Protection and its Selective Application, The European Community and the Uruguay Round Negotiations* (London: Macmillan, 1986).

Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995).

P. Lindert, *International Economics* (Homewood, Ill.: Irwin, 1986).

R. Lawrence & R. Litan, *Saving Free Trade* (Washington, D.C.: Brookings Institution, 1986).

Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan for the Trade Policy Research Centre, 1980).

Robert E. Baldwin, *Trade Policy in a Changing World Economy* (New York: Harvester/Wheatsheaf, 1988).

Suchman, "Adjustment to Import Competition: Section 201", in David E. Birenbaum, *The 1988 Trade Law: What It Affects and What It Means* (Clifton, N.J.: Prentice Hall Law & Business, 1988).

Wilcox C., *A Charter for World Trade* (New York: Macmillan Co., 1949).

(Chinese)

Chung Hua Institute for Economic Research, *The Research on Import Relief Measures (Jin Kou Jiu Ji Cuo Shi Zhi Yan Jiu)* (Taiwan, ROC: Chung Hua Institute for Economic Research, 1997).

International Trade Commission of the Ministry of Economic Affairs, *Rules for Handling Import Relief Cases: legislative purpose and introduction (Huo Pin Jin Kou Jiu Ji An Jian Chu Li Ban Fa: Li Fa Mu Di Ji Jie Shao)* (Taiwan, ROC: The Ministry of Economic Affairs, October 1994).

International Trade Commission of the Ministry of Economic Affairs, *Import Relief System: Frequently Asked Questions (Jin Kou Jiu Ji Zhi Du: Da Ke Wen)* (Taiwan, ROC: The Ministry of Economic Affairs, November 1997).

International Trade Commission of the Ministry of Economic Affairs, *Related Import Relief Regulations (Xiang Guan Jin Kou Jiu Ji Gui Ding)* (Taiwan, ROC: The Ministry of Economic Affairs, 1998).

International Trade Commission of the Ministry of Economic Affairs, *Import Relief System and Its Practice (Jin Kou Jiu Ji Zhi Du Ji Shi Shi)* (Taiwan, ROC: The Ministry of Economic Affairs, 1998).

Jiang Bing-Kun, *Impacts on Taiwan' Industries after Joining the WTO (Jia Ru WTO Dur Taiwan Chan Ye Di Ying Xiang)* (Taiwan, ROC: Council of Economic Development of the Executive Yuan, 1998).

Liu Fu-Shan, *The Introduction of Rules for Relieving Import Injury of Agricultural*

Products (*Nong Chan Pin Shou Jin Kuo Sun Hai Jiu Zuh Ban Fa Di Jie Shao*) (Taiwan, ROC: Council of Agriculture of the Executive Yuan, 1998).

The Ministry of Economic Affairs, *Liberalized Measures and Effects in Taiwan* (*Zi You Hua Cuo Shi Ji Ji Dui Taiwan Di Ying Xiang*) (Taiwan, ROC: The Ministry of Economic Affairs, 1989).

Xie Zheng-Yi, *The Evolution of Taiwan's Economic Miracle* (*Taiwan Jing Ji Qi Ji Di Fan Zhan*) (Taiwan, ROC: 1995).

ARTICLES

(English)

Ada Koon Hang Tse, "The Emerging Legal Framework for Regulating Economic Relations Between Taiwan and the Mainland" (1992) 6 J. Chinese L.

Alan C. Swan, "The Escape Clause and the Safeguards Wrangle" (1989) Brigham Young University Law Review.

Alan O. Sykes, "Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations" (1991) 58 The University of Chicago Law Review.

Alasdair I. MacBean, "How to Repair the 'Safety Net' of the International Trading System" (1978) 1 World Economy.

Augustin Tan, "Payments Imbalances, Sudden Surges and Safeguards" (1989) 12 World Economy.

B. Balassa, "The New Protectionism and the International Economy" (1978) 12 Journal of World Trade Law.

Brian Hindley, "GATT Safeguard and Voluntary Export Restraints: What are the Interests of Developing Countries?" (1987) 1 World Bank Economic Review.

Christopher W. Derrick, "The Evolution of the Escape Clause: The United States' Quest for Effective Relief from Fairly Traded Imports" (1988) 13 North Carolina Journal of International Law and Commercial Regulation.

Eric C. Emerson, "Voluntary Restraint Agreements and Democratic Decision-making" (1991) 31 Virg. J. Int'l L.

Ernesto M. Hizon, "The Safeguard Measure / VER Dilemma: The Jekyll and Hyde of Trade Protection" (1994) 15 Northwestern Journal of International Law & Business.

Ezra Ginzburg, "An Analysis of Article XIX: The Safeguard Problem after the Uruguay Round" (1992) 71 Nebraska Law Review.

George D. Holliday, "The Uruguay Round's Agreement on Safeguards" (1995) 29 Journal of World Trade.

Gerald M. Meier, "Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations" (1977) 18 Harvard International Law Journal.

Jackson, Louis, & Matsushita, "Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules" (1982) 81 Michigan Law Review.

James V. Feinerman, "Taiwan and the GATT" (1992) 1992 Colum. Bus. L. Rev.

John H. Jackson, "Export-Restraint Measures and the GATT" (1988) 11 World Economy.

Jorge F. Perez-Lopez, "GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries" (1991) 23 Case W. Res. J. of Int'l L.

Lussenburg, "New EEC Safeguard Measures: Regulation 288/82" (1984) 16 Case Western Reserve Journal of International Law.

Macro C.E.J. Bronckers, "The Non-Discriminatory Application of Article XIX GATT: Tradition or Fiction?" (1982) 1981/2 Legal Issues Eur. Interation.

Martin Wolf, "Why Voluntary Export Restraints? An Historical Analysis" (1989) 12 World Economy.

Mary Anne Joseph, "Trade Adjustment Assistance: an analysis" (1990) 6 Conn. J. Int'l L.

Michael D. Esch & Daniel E. Waltz, "The Impact of the Uruguay Round Amendments on U.S. Antidumping Law" (1995) 5 Fed. Circuit B.J.

Michael J. Trebilcock and Thomas M. Boddez, "The Case for Liberalizing North American Trade Remedy Laws" (1995) 4:1 Minn. J. Global Trade.

Michel Kostecki, "Export-restraint Arrangements and Trade Liberalization" (1987) 1987 The World Economy.

Mitchell A. Silk, "Silent Partners" (Sept.- Oct. 1990) 17 China Bus. Rev.

Note, "An Examination of ITC Determinations on Imports: The Basis for Substantial Injury" (1980-81) 6 Int'l Trade L. J.

Note, "Escape Clause Causation After the Auto Case: 1.8 Million Japanese Imports As Less Than a Substantial Cause of Injury" (1982) 16 Geo. Wash. J. Int'l & Econ.

P. Kleen, "The Safeguard Issue in the Uruguay Round – A Comprehensive Approach" (1989) 23:5 Journal of World Trade.

Patrizio Merciai, "Safeguard Measures in GATT" (1981) 15 Journal of World Trade Law.

Paul C. Rosenthal and Robin H. Gilbert, "The 1988 Amendments to Section 201: It Isn't Just for Import Relief Anymore" (1989) 20 Law & Policy in International Business.

Richard L. O'Meara, "Comment -- United States Trade Laws: Re-examining the Escape Clause" (1985) 26:1 Virginia Journal of International Law.

Ruth E. Olson, "GATT-Legal Application of Safeguards in the Context of Regional Trade Arrangements and its Implications for the Canada-United States Free Trade Agreement" (1989) 73 Minn. L. Rev.

Susanna Chan, "Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round" (1994) 2 Ind. J. Global Legal Stud.

Whitney John Smith, "Trade Adjustment Assistance: An Underdeveloped Alternation to Import Restriction" (1993) 56 Alb. L. Rev.

Y. Feng, "Taiwan and GATT" (1990) 13:1 World Economy.

Y. Kurt Chang, "Special 301 and Taiwan: a case study of protecting United States intellectual property in foreign countries" (1995) 15 Nw. J. Int'l L. & Bus.

(Chinese)

Chang Chang-Pang, "The Impacts on Taiwan's Economic Development After Taiwan enters the WTO (Taiwan Jia Ru WTO Dui Taiwan Jing Ji Di Ying Xiang)" (1998) 370 Economy Today.

Chen May-Lan, "Reviews to the low-price products imported from Mainland China (Da Lu Di Jia Jin Kou Huo Pin Zhi Yan Jiu)" (May 1996) 5 Industry Magazine.

Chen Song-Zhang, "Should Taiwan use the Non-application Clause to Mainland China after joining into the WTO (Taiwan Shi Fou Dui Da Lu Shi Yong Pai Chu Tiao Kuan)?" (1998) 21:6 Taiwan Economic Research Monthly.

Chiu Mao-Ying, "Report of the Council of Agricultural Committee (Nong Wei Hui Bao Gao)" (March 22 1997) 86 Gazette of the Legislative Yuan.

Hsiao, Simon F. S, "An Introduction to the Agreement on Safeguards and the Safeguard Clauses in WTO Agreements--The Impact on and Response of Taiwan (WTO Fang Wei Xie Ding Ji Fang Wei Tiao Kuan Di Jie Shao - Lun Dui Taiwan Di Ying Xing Ji Yin

Ying)" (1997) 3 Chung Yuan Financial & Economic Law Review.

Hsu Wei-Nong, "Import Relief System and Industrial Competitiveness (Jin Kou Jiu Ji Zhi Du Ji Gong Ye Jing Zheng Li)" (1998) 29 Taipei Bank Monthly Journal.

Huang Zhi-Hui, "Trade Liberalization and Import Relief System in Taiwan (Mao Yi Zi You Hua Han Taiwan Jin Kou Jiu Ji Zhi Du)" (Nov. 1994) 17 Taiwan Economic Research Monthly.

Huang Zhi-Hui, "The Evolution and Development of Import Relief System (Jin Kou Jiu Ji Zhi Du Zhi Fa Zhan Han Yan Jin)" (1995) 30 Export Processing Zone Concentrates.

Huang Zhi-Hui, "The Strategy to Win An Import Relief (Jin Kou Jiu Ji Ying Di Ce Lve)" (1995) 26 Taipei Bank Monthly Journal.

Huang Zhi-Hui, "Present Import Relief System (Jin Kou Jiu Ji Zhi Du Di Xian Kuang)" (1999) 35 Taiwan Economy and Finance Monthly.

Hwang Tsrng-Chyi & Wu Ming-Ming, "Taiwan's Agricultural Policy Adjustments for Trade Liberalization (Mao Yi Zi You Hua Han Taiwan Nong Ye Zheng Ce Di Tiao Zheng)" (1998) 64 Journal of Agricultural Economics.

Lin I-Nan, "WTO and Its Impacts on Taiwan's Trade (WTO Han Ji Dui Taiwan Mao Yi Di Ying Xiang)" (May 1996) 8 Journal of Trade Relief.

Lin Qi-Yuan, "WTO Safeguards Agreement and Taiwan's Practice (WTO Fang Wei Xie Ding Han Taiwan Di Shi Shi)" (1998) 28, Taipei Bank Monthly Journal.

Nai Ping, "Financial Policy and Economic Development in Taiwan (Taiwan Di Jin Rong Zheng Ce Han Jing Ji Fa Zhan)" (1994) 34 Pacific Economic Review.

Ou Jia-Rui, "WTO and Taiwan's Vehicle Industry (WTO Han Taiwan Di Qi Che Gong Ye)" (1998) 33 Journal of Policy.

The Ministry of Economic Affairs, Executive Yuan, Taipei, Taiwan (ROC) "The Meaning, Process and Prospects for Taiwan's Entry to the WTO (Taiwan Jia Ru WTO Di Yi Yi, Guo Cheng Han Zhan Wang)" (May 1998) 3 Monograph of International Trade Commission.

Tsai Hong-Min, "US-ROC Economic and Trade Relationship under International Protectionism (Guo Ji Bao Hu Zhu Yi Xia Di Zhong Mei Jing Mao Guan Xi)" (1993) 29 Taiwan Economy and Finance Monthly.

Tsai Hong-Min, "The Necessity for Taiwan to Establish a Special Institute of Import Relief (Taiwan Jian Li Jin Kou Jiu Ji Zhuan Ze Ji Gou Zhi Bi Yao Xing)" (1993) 25 Taipei Bank Monthly Journal.

Tsai Hong-Min, "The Uruguay Round and Import Relief System (Wu La Gui Hui He Han Jin Kou Jiu Ji Zhi Du)" (1994) 14 Socioeconomic Law and Institution Review.

Tsai Hong-Min, "The Impacts on Cross Strait Relationships After Entering the WTO (Jia Ru WTO Dui Hai Xia Liang An Guan Xi Di Ying Xiang)" (Fall 1997) 3 Theory and Policy.

Tsai Hong-Min, "The Impacts on Trade and Industries After Taiwan and China Enter the WTO (Taiwan Han Da Lu Jia Ru WTO Dui Mao Yi Ji Gong Ye Di Ying Xiang)" (1999) 4 Economy Outlook.

Tsai Ying-Wen, "Legal and Economic Transformation After Taiwan Enters the WTO (Taiwan Jia Ru WTO Hou Di Fa Lv Han Jing Ji Bian Ge)" (1997) 213 Lawyer Magazine.

Wang Jian-Quan, "The Impact of Asian Financial Risk to Taiwan's Economy (Ya Zhou Jin Rong Wei Ji Dui Taiwan Jing Ji Di Ying Xiang)" (March 1998) 31 Journal of Policy.

Xiao Wan-Zhang, "Trade Liberalization in Taiwan: Retrospect and Prospect (Taiwan Di Mao Yi Zi You Hua: Hui Gu Han Zhan Wang)" (Oct. 1992) 78 Industry of Free China.

Xu Shi-Xun, "Impacts of Trade Liberalization on Agricultural Trade Across the Strait (Mao Yi Zi You Hua Dui Hai Xia Liang An Nong Ye Mao Yi Di Ying Xiang)" (1996)
60 Agricultural Economy.

Appendix 1

Article XIX

Emergency Action on Imports of Particular Products

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

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.