Scarman J.'s conclusion and reasoning in *The Merak* are important in that the reason for incorporation was the wording of the arbitration clause itself rather than the effect of clause 10. Thus, in Scarman J.'s view, clause 10, declaring that clauses were to be incorporated in the bill of lading, did not effect incorporation. Applying this rationale to *The Phonizien,* if clause 10 had been contained in the charterparty dealt with in that case, the arbitration clause would still not have been incorporated. On this basis, it is suggested that Scarman J.'s judgment correctly states the law and the reason for incorporation of the particular arbitration clause in that case. The statements in *The Annefield* relating to specific words in the charterparty are therefore correct. They are coloured by the High Court judgment of Brandon J. which the Court of Appeal did not contradict in relation to its statement of the law. They must be taken to refer to specific references to the bill of lading *in the clause sought to be incorporated;* not to clauses in the charter which outline from the charterer's point of view what clauses are to be incorporated in the bill of lading. Other statements referring to Staughton J.'s approach must either be regarded as wrong in the face of more recent authority or restricted to those cases where such an approach is dictated by the intentions of the parties to the bill of lading contract. Also, the more restrictive statements of Oliver L.J. in *The Varenna* must be regarded as obiter and wrong in light of *The Merak* which, it is submitted, is sound and logical.

V. CONCLUSION

The question of the incorporation of charterparty terms into bills of lading is important in determining what obligations are contained in the contract of carriage and, as such, are binding on the consignee or holder of the bill of lading. The issue which has been the subject of most controversy is the effect to be given to incorporation clauses and their relationship to charterparty clauses outlining what clauses are to be incorporated into bills of lading issued. The line of cases from *The Merak* to *The Emmanuel Colocotronis (No. 2)* arguably formulated the proposition that a bill of lading incorporation clause provides notice to its holder of the charter which could, in a clause other than that sought to be incorporated, outline what clauses were intended to be incorporated and effect incorporation of those clauses. This proposition, as has been argued, is nevertheless insupportable either in terms of established authority *or* reasoning and must be disregarded in favour of more traditional authority. It is difficult, however, to believe that this proposition will be completely disregarded, as it has found great support in articles and texts. Where a fact situation similar to that of *The Emmanuel Colocotronis (No. 2)* or that proposed by Hobhouse J. in *The Varenna* arises, it may well be that the Court of Appeal's decision in *The Varenna* will be distinguished and Staughton J.'s proposition followed. The proposition is also likely to be resurrected if *The Merak* is accepted as its origin (as was done by Staughton J. in *The Emmanuel Colocotronis (No. 2)*).

Another open issue is the suggestion (given some weight recently by Hobhouse J. and Oliver L.J.) that whilst "conditions" is a term of art, the words "terms", "clauses" and "provisions" are not. Although the Law Lords in *Thomas* and

other case authority noted here reject this, a future case dependent on the words "clauses" or "provisions" in an incorporation clause may take up hints in recent cases and give such words their ordinary meaning.

The law in this field is thus in a state of considerable confusion and recent cases promote rather than alleviate this confusion. The law must be regarded as having been correctly declared and rationalised by Scarman and Brandon JJ. (as they then were) in *The Merak* and *The Annefield* cases respectively, and it is this law which must be applied in future cases.

A new safeguards code for the GATT

Joe McMahon*

The aim of this paper is to propose a new code on safeguard measures which will replace Article XIX of the GATT. Article XIX is concerned with safeguard measures or emergency action on imports of particular products. However, due to the provisions of Article XIX and the proliferation of safeguard measures which contravene its provisions and the spirit of GATT, it is becoming increasingly irrelevant in this era of the "new protectionism". The proposal made seeks to establish the ground rules for the imposition of safeguard measures. The proposal answers the criticisms made of Article XIX and attempts to control the existing situation by including in its provisions some of the advantages of safeguard measures which fall outside the ambit of Article XIX. After a brief introduction to the GATT, the paper goes on to discuss the provisions of Article XIX, measures which fall outside Article XIX and, GATT attempts to deal with these problems before the proposal for a new code is made.

I. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

As an institution the GATT is charged with the regulation of the conduct of world trade.[1] The provisions of the GATT, which borrow heavily from the abortive ITO Charter,[2] rest on what Curzon[3] describes as four pillars. These are: non-discrimination, reciprocity, international trade order, and the expansion of trade via the reduction of international trade barriers. The basic obligations of all states (Contracting Parties) to the GATT is to grant all other Contracting Parties general and unconditional most-favoured nation treatment.[4] In other words, international trade shall be free of any form of discrimination. The GATT

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1 The preamble to the GATT states the resolve of the Contracting Parties to enhance international trade "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade".

2 For a discussion of the ITO-Charter see Wilcox C. *A Charter for World Trade* (1949, New York). In relation to Article XIX, it is similar to Article 40 of the ITO Charter.

3 G. and V. Curzon "The Management of Trade Relations in the GATT" in Shonfield (ed.) *International Economic Relations of the Western World 1959-1971* (Royal Institute of International Affairs, 1976, London.) 141, 147-163.

4 Article 1 GATT lays down the m.f.n. rule. For a further discussion see Jackson *World Trade and the Law of GATT* (1969, Merill, New York) Ch.11. Espiell "The m.f.n. Clause — Its present significance in GATT" (1970) 5 J.W.T.L. 29. The text of Article 1 is found in Basic Instruments & Selected Documents ("B.I.S.D."), Vol. 4, 2.

also imposes certain negative duties on the Contracting Parties such as the prohibition of import restrictions other than by means of tariff duties.[5] However, in recognition of the need in some situations for Contracting Parties to temporarily suspend GATT obligations, Article XIX of the GATT allows for certain safeguard actions. It is this provision, its interpretation and inadequacies which the rest of this paper addresses.

II. ARTICLE XIX GATT — EMERGENCY ACTION ON IMPORTS OF PARTICULAR PRODUCTS[6]

A Contracting Party may invoke Article XIX GATT and apply safeguard measures if the following conditions are satisfied[7]:

i. there has been an increased level of imports; and

ii. this increase is attributable to the effect of GATT obligations and unforeseen developments; and

iii. the increased level of imports causes or threatens to cause serious injury to domestic producers of like or directly competitive products.

Each of these conditions raises questions of interpretation; for example, What constitutes an increased level of imports? What GATT obligations are taken into account? What does the phrase "unforeseen developments" include? And how do you assess the likely impact on domestic producers of the increased level of imports? Each of these questions will be examined.

In relation to the level of imports, GATT practice indicates that an absolute increase in the level of imports is not necessary.[8] The increase in the level of imports may, therefore, be a relative increase. As such, this condition is open to abuse, as it is possible for any Contracting Party to prove that there has been a relative increase in imports. Given a downturn in world economic activity, it seems obvious that Article XIX could be used for protectionist purposes. The need for a causal connection between the increased level of imports and the injury to domestic producers is provided by the second condition outlined above — the need for the increase to be attributable to the effect of GATT obligations and unforeseen developments. By examining the interpretation of these conditions it will be possible to assess whether Article XIX can, in practice, be used for protectionist purposes.

Article XIX (1)(b) refers to "any product which is the subject of a concession . . .", it seems obvious that the effect of GATT obligations includes the granting of tariff concessions. However, as Jackson points out,[9] preparatory work on the GATT indicates that the GATT obligations referred to in Article XIX (1)(a) encompass more than tariff concessions. They could include,

5 Article XI GATT — General Elimination of Quantitative Restrictions B.I.S.D., Vol. 4, 17-18.

6 The full text of Article XIX is given in the Appendix.

7 See Jackson supra n.4 "Escape Clauses in GATT" 555, 557.

8 Merciai "Safeguard Measures in GATT" (1981) 15 J.W.T.L. 41.

9 Supra n.4, 556.

for example, the elimination of quantitative restrictions. Given the broad nature of the language used, it can be argued that any action taken by a Contracting Party under the rules of GATT is classifiable as a GATT obligation and therefore is capable of serving as justification for the imposition of safeguard measures.

In relation to the "unforeseen developments" phrase, a GATT working party report on the Hatter's Fur case noted[10]

> . . . unforeseen developments should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.

It is therefore possible to characterise any development, perhaps even an increase in the relative level of imports, as an unforeseen development resulting from the effect of GATT obligations, thereby serving to justify the imposition of safeguard measures. Given this interpretation of the phrase "unforeseen developments", the broad scope of the phrase "the effect of GATT obligations" and the generosity of the increased level of imports condition, it seems obvious that Article XIX may be manipulated by any Contracting Party wishing to invoke its provisions especially for protectionist purposes. This view is strengthened when one considers that the threat to domestic producers in the affected Contracting Party's state involves not an international, objective assessment but rather a national subjective assessment.[11] The problems inherent in Article XIX (1) emphasise the point already made that its provisions do not form an adequate check on the use of protectionist safeguard measures.

The Article does, however, limit the use of safeguard measures.[12] For example, notice must be given as far in advance as practicable by a Contracting Party of their intention to invoke Article XIX. This provides an opportunity for consultation with Contracting Parties likely to be affected by the safeguard measures. Furthermore, the concession which the Contracting Party seeks to withdraw must relate to the increase in the level of imports and its withdrawal must be only "to the extent and for such time as may be necessary to prevent or remedy"[13] the injury caused or threatened.

As a result of the withdrawal of a particular concession and the imposition of safeguard measures, Contracting Parties affected by the exercise of these measures are entitled to retaliate. The retaliation, according to Article XIX (3), may take the form of the withdrawal of substantially equivalent concessions, or the suspension of other GATT obligations against the Contracting Party taking the

10 Report on the withdrawal by the United States of a tariff concession under Article XIX GATT (GATT. 1951) 1, 10.

11 It is possible to assert that using the terminology of Article XIX there can never be an objective international assessment of "serious" injury since the response of government to pressure depends on the extent of the pressure and not the extent of the injury — Curzon supra n.3, 156. It then becomes a question of the new code establishing conditions which differ from those used in Article XIX and which are capable of objective international assessment.

12 Article XIX(2).

13 Article XIX(1)(a).

measures. Whereas, the Contracting Party invoking the measures must withdraw the concession which led to the increase of imports, it seems that a retaliating Contracting Party is free to withdraw any concession. However, it is desirable that the concessions withdrawn should be in the same product sector as that which necessitated the introduction of safeguard measures by the other Contracting Party.

It is the use of retaliatory measures which is one of the sources of criticism of the operation of Article XIX. As Tumlir notes[14]

> [It] is destructive of the spirit of reciprocity for a country in an emergency to be obliged to pay for taking bona-fide temporary action, to negotiate such a payment and to be threatened with retaliation if it does not offer enough.

The need for compensation to be paid for the withdrawal of concessions or in the event of it not being paid, the withdrawal of substantially equivalent concessions is not the major criticism of Article XIX. The fact that the withdrawal or suspension of concessions should be a non-discriminatory most-favoured-nation basis means that the safeguard measures cannot be invoked against selected Contracting Parties. The non-selective application of Article XIX indicates that a Contracting Party may have to pay compensation to or face retaliatory action by all Contracting Parties affected by the measures. Despite the wording of Article XIX (2) that Contracting Parties affected by the measures should have a substantial interest in the export of the product concerned, GATT practice indicates that any Contracting Party affected has a "substantial interest". It is often the case that a Contracting Party may wish to invoke safeguard measures against countries which do not have the dominant share of the import market. As such, the measures have effects beyond those necessary to counter the injury caused or threatened by the increased level of imports resulting from GATT obligations and unforeseen developments. This aspect of the application of Article XIX has led to the development of alternative methods to protect domestic industries from the effects of increased imports. Such methods are not only in breach of Article XIX but also contrary to the overall spirit of the GATT.

III. VOLUNTARY RESTRAINT AGREEMENTS AND ORDERLY MARKETING ARRANGEMENTS[15]

These arrangements are concluded by states without recourse to the provisions of Article XIX. There is no need for a serious injury or threat thereof to exist before safeguard action may be taken. Voluntary restraint agreements are usually concluded between nations, the aim of such measures being to limit the level of exports from a particular country to the country seeking to restrict imports. An example of such measures is the voluntary restraint agreements concluded by the European Community with nine countries[16] concerning the level of exports to

14 Tumlir J. "A revised Safeguard Clause for Gatt?" (1972) 7 J.W.T.L. 404.

15 For a general discussion of voluntary restraint agreements and orderly marketing arrangements see J. Hillman *Non-tariff Agricultural Trade Barriers* (University of Nebraska Press, 1978, Lincoln.)

16 The list of countries include Argentina, Australia, Bulgaria, Czechoslovakia, Hungary, Iceland, Poland, Romania and Uruguay.

the Community of mutton, lamb and goat meat.[17] Orderly marketing arrangements, on the other hand, generally set a level of imports, which all states are capable of fulfilling. As an example, the United States P.L.88-482[18] limits the free importation of certain meat and meat products.

From the point of view of importing countries such measures guarantee domestic producers stable prices given the variable nature of production conditions. From the point of view of exporters, such measures are acceptable because they maintain a certain level of trade with the importing country rather than the complete cessation of trade which would be caused if they refused to accept such measures. Exporting countries, rightly, point to the inadequacies of the GATT overall[19] and Article XIX in particular. From the point of view of GATT these measures constitute a threat not only to the legal framework of the GATT but also the continuing relevance of the organization, charged as it is with the regulation of international trade practices. Speaking of voluntary restraint agreements and other such measures the Chairman of the GATT Safeguards Committee has noted:[20]

> The existence of such actions and their cumulative effect poses a serious threat to the multilateral trading system and it is a matter of importance to generate the political will to follow multilateral disciplines in order to prevent the further erosion of the GATT system.

IV. THE TOKYO ROUND

In recognition of the problems associated not only with the application of Article XIX GATT but also the proliferation of voluntary restraint agreements and orderly marketing arrangements, the 1973 Tokyo Declaration, listed as one of the aims of the multilateral trade negotiations[21]

17 Originally the V.R.A. limit exports to the Community as a whole by establishing an annual quota for each country. More recently, the agreements have been renegotiated. The new agreements in most cases prohibit the exports of these products to the sensitive Community markets of France and Ireland.

18 The long title of PL. 88-482 is "An Act to provide for the free importation of certain wild animals and to provide for the imposition of quotas on certain meat and products". The Act establishes an annual quota relating to fresh, chilled or frozen cattle meat, goat meat and sheep meat. The Act empowers the Secretary of Agriculture to publish an annual aggregate quantity for the import of these products. This O.M.A. may be contrasted with the V.R.A. outlined above since unlike the latter, the O.M.A. does not seek to impose restrictions on the level of individual countries exports but rather on the total level of imports.

19 The most criticised Articles of the GATT from the point of view of exporting countries likely to be affected by these measures, are Articles XXII and XXIII — the dispute resolution procedure. The problem with respect to these articles is that purposeful economic sanctions cannot be imposed if a Contracting Party is found to be in breach of its obligations. The system rests on the force of organized normative pressure. For further reference see Hudec *The GATT Legal System and World Trade Diplomacy* (Praeger, 1975, New York), Hudec "GATT or GABB. The Future Design of the General Agreement on Tariffs and Trade" (1970-71) 80 Y.L.J. 1299, Jackson "Governmental Disputes in Industrial Trade Relations. A proposal on the Context of GATT" (1979) 13 J.W.T.L. 1. Text of Articles XXII and XXIII B.I.S.D., Vol. 4 39, 40.

20 B.I.S.D., 30th Supplement, 216, 219.

21 B.I.S.D., 20th Supplement, 19, 20.

> [to] include an examinaiton of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results.

Despite the extensive negotiations conducted during the Tokyo Round, it ended without the conclusion of a comprehensive code on safeguard measures.[22]

Some measure of agreement was, however, forthcoming. It was recognised that safeguard measures should be subject to greater international discipline. It was, also, recognised that any code on safeguard measures should involve the acceptance of two basic principles: that safeguard measures should be limited in scale and duration; and that such measures must be accompanied by efforts at structural re-adjustment to alleviate the cause of safeguard measures. The issue, on which the negotiations floundered, was that of selectivity. Developed countries, and in particular the nations of the European Community stated that the main failing of Article XIX was the lack of selectivity in its application.[23] They argued that any new code on safeguards must include the concept of selectivity, this being necessary to secure the effectiveness of the safeguard measures taken.

Developing countries were concerned about the possible use of selectivity to limit the growth of their exports. Their concerns about the possible abuse of selective safeguard measures militated against any agreement on a new code. They were unwilling to countenance the abolition of the m.f.n. requirement of Article XIX. This requirement effectively protects the weaker trading nations and therefore any new code if it introduces the concept of selectivity must control its application so that the interests of weaker trading nations are not seriously prejudiced.

V. BEYOND THE TOKYO ROUND

The failure of the Tokyo round of multilateral trade negotiations with respect to safeguards did not signal the end of the GATT attempts to come to terms with the problems presented by the proliferation of voluntary restraint agreements and the inadequacies of Article XIX.

The Ministerial Declaration of the 38th Session of GATT ministers, recognising that the response of the Contracting Parties to the contraction of world trade was to adopt inward looking policies, which both frustrated the aims of the GATT and undermined the GATT system, adopted a work programme for the 1980s which would meet these problems. The declaration stated that Contracting Parties would undertake, inter alia,[24]

> to make determined efforts to ensure that trade policies and measures are consistent with GATT principles and rules and to resist protectionist pressures in the formulation and implementation of national trade policy . . . ; and also to refrain from

22 For a discussion of the Tokyo Round negotiations see Balassa "The Toyko Round and Developing Countries" (1980) 14 J.W.T.L. 93. Merciai, supra n.8. Schultz and Schumacher "The Reliberalization of World Trade" (1984) 18 J.W.T.L. 206.

23 Stevens "The Search for Coherence" (in Stevens (ed.) *The E.E.C. and the third world — A Survey* (O.D.I., 1982, London).

24 B.I.S.D., 29th Supplement, 9, 11.

taking or maintaining any measures inconsistent with GATT and to make determined efforts to avoid measures which would limit or distort international trade.

In relation to the safeguards problem, the declaration noted the urgent need to bring into effect a comprehensive understanding on safeguards which would respect the principles of the General Agreement.

As a result of the discussions of the Tokyo Round, it was possible for the declaration to enumerate the various elements of this new "comprehensive understanding on safeguards". These elements were:[25]

(i) transparency;
(ii) coverage;
(iii) objective criteria for action including the concept of serious injury or threat thereof;
(iv) temporary nature, degressivity and structural adjustment;
(v) compensation and retaliation; and
(vi) notification, consultation, multilateral surveillance and dispute settlement with particular reference to the role and functions of the safeguards Committee.

Despite the exhortations of the declaration, that the understanding should be drawn up and adopted no later than the 1983 session, a comprehensive understanding on safeguards has not been adopted.[26] It is suggested that one reason for this, given the nature of the disagreements which surfaced during the Tokyo Round negotiations, is that the list of elements makes no reference to the concept of selectivity. Moreover, the elements of the new code do not attempt to come to terms with the greatest anomaly of Article XIX, the need to pay compensation even when bona fide safeguard action is taken. Any attempt to formulate a new code on safeguard measures must include not only the six elements of the 1982 Ministerial Declaration but also the concept of selective safeguard measures and eliminate the need to pay compensation even where the safeguard measures serve a legitimate purpose.

VI. A NEW CODE

In the light of the previous discussion of Article XIX, the author proposes the following new code. To be acceptable to all Contracting Parties a new code will have to provide a realistic alternative to the provisions of Article XIX GATT and also endeavour to end the practice of some Contracting Parties to have recourse to measures which fall outside the scope of the GATT.

25 Ibid. 12, 13.

26 A recent report of the Chairman of the Safeguards Committee indicates the convergence of the views of the Contracting Parties on certain points. These points include degressivity, temporary nature and structural adjustment. However disagreements have emerged on the concept of selectivity and measures to deal with the proliferation of V.R.A's. See B.I.S.D., 31/S, 136-138.

Clause 1 — Conditions governing the use of safeguard measures

1. Contracting Parties shall invoke the provisions of this code, if and only if, the following conditions are satisfied:
   (a) there is a serious disturbance or threat of serious disturbance in the domestic market of a Contracting Party; and
   (b) the serious disturbance or threat of serious disturbance must be such as to cause or threaten to cause grave impairment to the objectives of any domestic industrial or agricultural policy; and
   (c) the serious disturbance must result from an increase in the market share of a product which is similar to or directly competitive with domestic production; and
   (d) the conditions specified above must arise from the binding of a particular tariff concession at a rate other than zero.

2. Contracting Parties intending to invoke safeguard measures shall inform the GATT secretariat of their intention at least 30 days before they are implemented. Such notification must include a list of;
   (a) the proposed measures and the products concerned; and
   (b) the Contracting Parties against which such measures will be invoked.

   If the delay of thirty days would cause irreparable impairment of the objectives of any domestic industrial or agricultural policy, a Contracting Party may introduce emergency safeguard measures. The GATT shall be immediately notified of such measures.

3. Upon receipt of this notification, the GATT secretariat shall establish, without undue delay, a Panel. The Panel shall have the following functions;
   (a) to determine whether the conditions specified in paragraph 1 of this clause are satisfied in full; and
   (b) to determine whether the proposed measures are adequate to deal with the situation; and
   (c) to determine whether the proposed measures will have effects beyond those necessary to deal with the serious disturbance or threat thereof.

   The Panel shall reach its decision on these matters at least seven days before the intended introduction of the safeguard measures.

   The Panel shall have the same functions with respect to emergency safeguard measures. It shall reach its decision within 30 days of the notification of these measures to the GATT.

[**Comment.** The aim of clause 1 is to establish not only the conditions governing the use of safeguard measures but also to establish a framework for both multilateral surveillance and acceptance of such measures. By providing this framework, the transparency of safeguard measures will be ensured. The definition of serious disturbance or threat thereof is borrowed from the wording of Article XIX GATT. However, by requiring the serious disturbance or threat thereof to cause grave impairment to the objectives of national industrial or agricultural policies, it is hoped that

more objective criteria may be established. The use of the term "grave impairment" suggests that safeguard measures will be acceptable only in situations where the disturbance or threat thereof would lead to the frustration of domestic policy objectives. such a definition opens the way for easily verifiable, objective, international assessments. This objective assessment will be made by the Panel established by virtue of clause 1(3). It is envisaged that this Panel will comprise a group of economic analyists and representatives of either the Contracting Party invoking the measures or any Contracting Party likely to be affected by the use of such measures. This clause also envisages the use of emergency safeguard measures in situations where the objectives of any domestic policy would be impaired by a delay in the introduction of ordinary safeguard measures. However, the notification requirement ensures that the Panel will be able to determine whether these emergency measures meet the conditions of paragraph 1.]

Clause 2 — Adoption of safeguard measures

Given a positive determination by the Panel established under clause 1(3) a Contracting Party may lawfully adopt safeguard measures.

Provided the conditions specified in clause 3 are satisfied, the safeguard measures may be adopted with respect to selected Contracting Parties.

Clause 3 — Conditions governing the use of selective safeguard measures

1. Selective safeguard measures shall be permissible if each of the following conditions are satisfied:

   (a) the measures are temporary in nature, in no case shall the measures remain in force for more than seven years; and

   (b) the measures are degressive in nature, in all cases the measures should be scaled down at the end of a three year period following their introduction. Further scaling down should occur at the end of each subsequent year, given the requirement that the measures shall cease at the end of the seventh year after their introduction; and

   (c) the safeguard measures are accompanied by a plan leading to the structural adjustment of the product sector which necessitated the introduction of the measures. The plan shall be examined by a Panel to determine whether it will be effective in dealing with the problems of the affected sector within the time period specified above; and

   (d) the measures provide for adequate consultation with affected Contracting Parties.

2. Pending the acceptance of these requirements by the Contracting Party invoking the measures and the approval of the Panel, on the structural adjustment plan, selective safeguard measures shall enjoy provisional legal validity. On acceptance of these requirements and on approval of the Plan by the Panel, such measures shall have full legal validity.

[**Comment.** Clauses 2 and 3 are central to the new code. The purpose of clause 2 is to state that only measures which are accepted under clause 1 are valid safeguard measures. Clause 2 also introduces the concept of selectivity. While recognising that the Tokyo Round negotiations floundered on this point, it is essential that any new

safeguard code includes provisions allowing for selectivity. Clause 3 enumerates the conditions under which safeguard measures may be selectively applied. The elements of temporary nature, degressivity, structural adjustment and consultation referred to in the 1982 GATT Ministerial Declaration are included.[27] The time period of seven years will be sufficient to effect fundamental structural adjustments in the affected product sector. It is, however, essential that the structural adjustment plan should be capable of bringing about the necessary changes. It is for this reason that the Plan has to be submitted to and approved by a Panel. (Similar in constitution to that referred to in Clause 1.) The fact that full safeguard measures apply for the first three years should allow time to make changes which will allow the affected product sector to face some limited form of competition from the fourth year on. The consultation procedure provided for in clause 3(1)(d) will allow affected Contracting Parties to monitor progress in the implementation not only of the safeguard measures but also the structural adjustment plan. Clause 3 does not provide compensation for affected Contracting Parties. This omission is because actions taken under Clause 1-3 will be bona fide safeguard measures. This meets previous criticism of Article XIX, in that bonafide users of its provisions still had to pay compensation and could even face retaliation.]

Clause 4 — Non-selective safeguard measures

Given —

(a) a negative determination by the Panel established under clause 1(3); or

(b) the refusal of the Contracting Party invoking the measures to accept the requirements of clause 3(1); or

(c) the refusal of the Panel to accept the structural adjustment plan required under clause 3(1)(c);

a Contracting Party may still invoke safeguard measurse. However such measures may not have selective application and such measures shall be subject to the provisions of clause 5.

Clause 5 — Conditions governing the use of non-selective safeguard measures

1. The following provisions shall govern the use of safeguard measures invoked under Article 4:

   (a) The Contracting Party invoking safeguard measures shall afford adequate opportunity for other Contracting Parties to consult with it on the operation of these measures; and

   (b) the Contracting Party or Parties against which safeguard measures have been invoked shall be entitled to compensation. This shall be paid by the Contracting Party invoking the measures and in the first year of the application of the measures shall be equal to 90 per cent of the accepted import value of the product concerned in the relevant market. The import value shall be the value of imports in the full year preceding the use of safeguard measures. The level of compensation shall decline in each subsequent year to the following amounts, 75 per cent (second year) 50 per cent (third Year) and by 10 per cent in each subsequent year. Compensation

27 Supra n.25, 13.

shall not be payable after the seventh year of the application of safeguard measures.

(c) If three or more Contracting Parties are affected by the use of safeguard measures, compensation shall not be payable. However, these Contracting Parties shall have the right to withdraw substantially equivalent concessions.

(i) A Contracting Party shall be deemed to be affected if it has a market share of imports greater than 7.5 per cent;

(ii) Substantially equivalent concessions shall be defined as the withdrawal of concessions to the accepted value of trade affected by the use of safeguard measures;

(iii) Contracting Parties using this provision should strive to ensure that the concessions withdrawn relate as closely as possible to the product sector in which the other Contracting Party invoked safeguard measures.

2. Any dispute over the interpretation and application of this clause shall be referred to and resolved conclusively by the Safeguards Committee.

3. Taking into account, the determination of all Contracting Parties to control the use of safeguard measures and given the acceptance by the Contracting Parties of the need for consultation, compensation and retaliation, any disputes concerning the application of this provision shall be decided in favour of the Contracting Party or Parties subject to the safeguard measures. It shall be for the Contracting Party invoking the measures to persuade the Committee that the presumption should be reversed.

[**Comment.** The aim of clauses 4 and 5 is to control the use of safeguard clauses in situations where a bona fide purpose does not exist. It is for this reason that these non-selective safeguard measures allow affected Contracting Parties to receive compensation and to enable them to take retaliatory action. The provisions of clause 5 are such that it is hoped Contracting Parties invoking safeguard measures will seek to have them applied under clause 2 rather than clause 4. This incentive relates to the need to ensure an adequate level of structural adjustment in world trade, thereby preserving the results of trade liberalisation and limiting the proliferation of restrictive trade measures. The onus placed on the Contracting Party, invoking safeguard measures, by virtue of clause 5(3) is designed to counter situations in which larger trading nations or blocs impose safeguards which severely affect weaker trading nations.]

Clause 6 — Breach of the conditions of selectivity

1. In the event of the selective safeguard measures provided for in clauses 2 and 3 failing to comply with the provisions of clause 3 after they have been introduced, such measures shall be deemed to be applied under clause 4 and thereby become subject to the provisions of clause 5.

2. The Safeguards Committee shall keep all safeguard measures under review and shall determine, annually, whether selective safeguard measures maintain their compliance with the provisions of clause 3(1).

[**Comment.** It is essential that all safeguard measures should be subject to multilateral surveillance, hence the role of the Safeguards Committee. It is equally imperative that selective safeguard measures, because they impose burdens on affected Contracting

Parties should be kept under continual review. For this reason, clause 6 provides that if selective measures fail to meet the requirements of clause 3, degressivity, structural adjustment and consultation, they shall become subject to the provisions of clause 5, consultation, compensation and retaliation. A positive incentive to abide by the requirements of clause 3 is thereby provided.]

Clause 7 — Control of the existing situations

1. Given the widespread use of safeguard measures which fall outside the framework of Article XIX the following provisions shall apply to such measures:
   (a) All Contracting Parties shall notify the Safeguards Committee of measures they impose and measures they are subject to, which restrain trade. This notification shall occur within 90 days of this code entering into force.
   (b) When such measures have been notified the Safeguards Committee shall establish sectoral sub-committees to examine these measures.
   (c) The sectoral sub-committees shall report on the effects of these measures within 180 days of their establishment. Their reports shall include recommendations on how the existing situation may be remedied and whether any of the measures notified fulfil the conditions of clause 1(1) or clause 3(1).
2. Contracting Parties, using safeguard measures which fall outside the framework of Article XIX and which have been notified to the Safeguards Committee, on the recommendations of the sectoral sub-committees, shall have the following options:
   (a) to abolish the measures in question; or
   (b) to submit the measures to the provisions of this code; or
   (c) to continue to apply the measures.

   If a Contracting Party chooses option (c), any Contracting Party affected by such measures shall be deemed to have the rights guaranteed by clause 5 of this code.

[**Comment.** This provision seeks to ensure that all safeguard measures, especially those in contravention of Article XIX will be subject to the code. It is for this reason that Contracting Parties are asked to inform the Safeguards Committee of measures they apply and are subject to. The provision of sectoral sub-committees for example in agricultural, will mean that for the first time the GATT will be able to measure the size of the problem confronted by the inadequacies of Article XIX. The sub-committees' recommendations will, hopefully, force Contracting Parties to subject the safeguard measures to the provisions of the code. Even if a Contracting Party refuses, clause 6(2) envisages that henceforth the provisions of clause 5 will apply — consultation, compensation and retaliation. With the presumption inherent in clause 5(3), it is expected that affected Contracting Parties will be able to enforce their rights under the new code.]

Clause 8 — The developing country clause

1. The provisions of this code shall not apply to the use of safeguard measures by developing countries.

2. Developed Contracting Parties shall endeavour, recalling the objectives of Part IV of the General Agreement,[28] not to apply selective safeguard measures against developing countries.

3. Taking into account the rapid development of some developing countries, the Safeguards Committee shall determine whether a particular developing country, given its rate of economic growth, export performance and balance of payments situation, no longer qualifies as a developing country. If the Safeguards Committee decides a particular developing country has graduated, that country shall, henceforth, apply the provisions of this code. The Safeguards Committee shall consider this question only if requested to by at least five Contracting Parties.

[**Comment.** The special position occupied by developing countries in the world economy means that the provisions of this code would be inapplicable to their economic position. The need to industrialise and to maintain their level of agricultural output indicate that developed countries should aid this process and therefore endeavour to avoid the application of safeguard measures against them. Yet the emergence of newly industrialised countries from the ranks of the developing countries shows that some countries have established themselves. Given this fact, clause 8 includes a graduation provision, whereby such countries would start to apply the code on their graduation. Irrespective of the merits or demerits of any graduation clause,[29] it is recognised that such countries are able to face the rigors of international trade.]

Clause 9 — Final Provisions

1. No safeguard measure may be invoked by a Contracting Party unless it fulfils the requirements of this code.

2. Any disputes over the interpretation of this code shall be decided by the Safeguards Committee. This provision shall not prejudice recourse to other disputes resolution procedures when the Contracting Parties concerned agree that the dispute should be resolved by other means.

[**Comment.** Clause 9(1) seeks to establish this code as a comprehensive understanding on the use of safeguards. The provisions of the code, especially clause 9(2) emphasise the role of the Safeguards Committee in ensuring that the provisions of the code are satisfied and any disputes are resolved by a body which has expertise in the area.]

VII. CONCLUSION

The proposed code on safeguard measures outlined above encompasses every element considered in the Ministerial Declaration referred to earlier. The failure of Article XIX is due to the lack of selectivity in its provisions and the need to pay compensation even when the use of safeguard measures is bona fide. The code outlined encompasses selectivity, yet in a way which seeks to allay the fears raised by its use during the Tokyo Round. Speaking of these negotiations an UNCTAD

28 Part IV of the GATT concentrates on measures which will enhance the trade and development of developing countries. See Berger "Preferential Trade Treatment for Ldcs — Implications of the Tokyo Round" (1979) 20 Harv. Int. L.J. 540 Dorsey "Preferential Treatment. A New Standard for International Economic Relations" (1977) 18 Harv. Int. L.J. 109, for wording of Part IV, B.I.S.D., Vol. 4, 53-57.

29 See Frank "The Graduation Issue for Developing Countries" (1979) 13 J.W.T.L. 289.