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3.8 Safeguard Measures



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The WTO *Agreement on Safeguards* [hereinafter SA], together with Article XIX of the *General Agreement on Tariffs and Trade 1994* [hereinafter GATT 1994],¹ sets out the general WTO regime pursuant to which WTO Members may apply safeguard measures to prevent or remedy “serious injury” to an import-competing industry sector resulting from unforeseen import surges in their markets.

Compared to Article XIX of GATT 1994, drafted in 1947 and remaining virtually unchanged,² the SA provides the first elaboration on the substantive requirements for the adoption of safeguard measures, and on the requirements that these measures have to follow. It further sets out procedural obligations (both concerning domestic proceedings and the WTO level) that WTO Members wishing to take safeguard action must comply with. It also contains specific obligations that Members have to respect in case safeguard action is taken against imports from developing countries.

Special rules on the taking of safeguard measures against textile imports are laid down in Article 6 of the *Agreement on Textiles and Clothing* [hereinafter ATC]. In addition, pursuant to Article 5 of the *Agreement on Agriculture* [hereinafter AA] Members can adopt special safeguards in respect of agricultural products, provided their right in this respect has been recorded in their tariff schedules. As regards services, there are currently no safeguard rules. However, Article X of the *General Agreement on Trade in Services* [hereinafter GATS] provides for multilateral negotiations on such rules.

This Module provides an overview of the *Agreement on Safeguards*, as it has been interpreted by panels and the Appellate Body in particular since the entry into force of the *WTO Agreement* in 1995. It will review both substantive and procedural rules. Since the entry into force of the SA in 1995, six WTO panel reports have been issued interpreting SA provisions and Article XIX:1 of GATT,³ all of which were appealed. They add to the rare panel reports

¹ In this Module the *Agreement on Safeguards*, the GATT 1994 and the other WTO texts are referred to with their official names, it being understood that legally they constitute a single text together with the Marrakesh Agreement Establishing the World Trade Organization, to which they are annexed.

² See *Analytical Index to the GATT*, Vol. 1, 1995, p. 537.

³ Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (“Korea – Dairy”), WT/DS98/R, adopted 12 January 2000; Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000; Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear (EC)”), WT/DS121/R, adopted 12 January 2000; Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000; Panel Report, *United States – Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities* (“US – Wheat Gluten”), WT/DS166/R, adopted 19 January 2001; Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001; Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (“US – Lamb”), WT/DS177/R, WT/DS178/R, adopted 16 May 2001; Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001; Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (“US – Line Pipe”), WT/DS202/R, adopted 8 March 2002; Appellate Body Report, WT/DS202/AB/R, WT/DS178/AB/R, adopted 8 March 2002; another case, Panel Report, *Chile – Price Band System and Safeguard Measures Relating to certain Agricultural Products* (“Chile – Price Band”), WT/DS207/R, adopted 3 May 2002, and appealed 24 June 2002.

addressing safeguard measures under GATT 1947.⁴ Given that, notwithstanding the addition of the SA, the WTO safeguard regime is still rather limited and not very detailed, it comes as no surprise that panel and Appellate Body reports offer very important clarifications of key provisions of the Agreement. This Module takes into account reports issued until 15 February 2002.

Section 1 gives a general overview of the Agreement and briefly recalls the history of safeguard measures in GATT 1947.

Section 2 explains the substantive requirements for the determination of “increased imports” (Article XIX of the GATT 1994, Article 2.1 of the SA).

Section 3 covers the serious injury requirement, as well as related concepts such as the definitions of “domestic industry” and of “like or directly competitive product” and the causal link between the increased imports and the injury suffered by the domestic industry (Article 4 of the SA).

Section 4 addresses the type and scope of safeguard measures authorized, as well as the right to compensation (Articles 2, 5, 6, 7, 8, 10 and 11 of the SA, Articles XIX and XIII of the GATT 1994).

Section 5 highlights the requirements concerning domestic procedures imposed on WTO Members seeking to take safeguard action (Articles 3, 6 and 12 of the SA).

Section 6 examines certain issues, which have arisen in WTO dispute settlement procedures reviewing safeguard measures (amongst which the standard of review of safeguard measures by panels). It also summarizes the role of the Committee on Safeguards (Articles 12, 13 and 14 of the SA).

Section 7 analyses the position of developing countries under the SA (Article 9 of the SA).

Objectives

After having studied this Module the reader will be able:

- **to list the factors that shall be assessed for a WTO Member to justify the application of a safeguard measure.**
- **to explain to what extent a safeguard measure can be challenged within the DSU.**
- **to describe the rules aimed at strengthening developing countries' positions in regards to the application of safeguards.**

⁴ *Working Party Report*, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade, 27 March 1951, CP 106, adopted October 1951; *Panel Report*, Norway - Restrictions on imports of certain textile products, adopted June 18, 1980 L/4959, BISD 27S/119; Increase in the United States duty on dried figs, *Decision of November 8, 1952 SR.7/15, BISD 1S/28* (the latter one in fact is concerned with the suspension of substantially equivalent concessions by Turkey in response to a safeguard measure taken by the United States). The reports issued under GATT 1947 are available on the internet at the address http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm.

1. INTRODUCTION

This section presents an historical overview of safeguard regulation in the GATT. A descriptive summary of the *Agreement on Safeguards* [SA] is also provided.

1.1 History

The *WTO Agreement*,⁵ like all trade agreements, is meant to promote international trade and therefore is also expected to increase import flows by mutually advantageous concessions. It might therefore appear astonishing and somewhat contradictory that the same agreement allows WTO Members to “back-pedal” and place restrictions on imports in the form of safeguard measures if those imports increase.

“safety valve”

While an increase in imports is the natural effect of trade liberalization, it has generally been recognized in trade treaty practice that there are certain circumstances in which import liberalization may become difficult to sustain - to a point of straining the very functioning of those agreements. This is why, prior to the GATT 1947, bilateral trade agreements normally provided for a “safety valve” in the form of safeguard measures. This is meant to avoid those circumstances where the contracting parties, faced with the dilemma of either having their domestic market heavily disrupted or withdrawing from their agreements, choose the latter option, thus ultimately reducing the overall level of liberalization.

Article XIX GATT 1947

This is why the GATT 1947 contained a special provision on “Emergency Action”, in Article XIX. However, recognizing the potential for trade-restrictive application of such provision, the GATT 1947 prescribed in some detail the conditions under which safeguard measures may be imposed.

Article XIX, which has remained unchanged in GATT 1994, sets out such conditions in summary form. Paragraph 1 provides:

Emergency Action on Imports of Particular Products, Article XIX:1, GATT 1994

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.*

⁵ In this volume, the term “WTO Agreement” is used to refer collectively to the Results of the Uruguay Round Multilateral Trade Negotiations.

Unlike in the case of e.g. anti-dumping measures, safeguard measures do not address a specific pricing behaviour of exporting companies, but a more general increase in imports taking place under certain special circumstances. In addition, it is generally considered that safeguard measures address so-called “fair trade”, that is exports occurring under normal competitive conditions. In view of this, the Appellate Body has concluded that:

**Appellate Body
Report, Argentina –
Footwear (EC)**

[t]he application of a safeguard measure does not depend upon “unfair” trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account⁶.

Although the basic Article XIX provision was never supplemented during GATT 1947, this does not mean that the matter of safeguards did not raise the attention of the GATT Contracting Parties.

One of the very first cases taken to dispute settlement – the “*Hatter’s Fur*” or “*Fur Felt Hats*” case⁷ – concerned a measure taken by the United States against imports of women’s fur felt hats and hat bodies, challenged by Czechoslovakia.

“grey area”

Furthermore, some 150 safeguard measures were officially notified to the Contracting Parties to the GATT 1947.⁸ Soon, however, it became clear that measures other than Article XIX safeguard measures were resorted to by certain contracting parties to address import surges considered to be particularly injurious. Those were often designated with the term “grey area” measures and included the so-called Voluntary Export Restraints (VERs), Voluntary Restraint Arrangements (VRAs) and Orderly Marketing Arrangements (OMAs). These measures, instead of being formally adopted by the importing country, were formally taken by the exporting country or negotiated by exporting companies with the importing country.

The reason for shifting to this type of measures is generally found in the difficulty

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