

Agreement on Safeguards



Shashank Priya

Professor

Centre for WTO Studies

IIFT



3 Trade Defence Instruments

- WTO provides for 3 trade defence instruments for imposing duties beyond the bound rate
 - Anti-Dumping duty
 - Countervailing duty
 - Safeguard duty
- Detailed investigation procedure has to be followed before imposition of any of the above duties.



Where Does Trade Remedy Measures Fit In?

- WTO system allows “protection” in specific cases by means of trade remedy measures
- Anti-Dumping-Additional import duties
- Countervailing-Additional import duties
- Safeguards-Additional import duties or quotas
- First two permit violation of MFN and binding tariff principle of WTO whereas the third permits violation of binding tariff principle



Safeguard Measures:

Essential Features

- Protection against sudden surge in imports
- Should cause or threaten to cause serious injury to the Domestic Industry
- Can be in the form of tariff increases or Quantitative Restrictions
- Also concerns issues like Structural adjustment, compensation, retaliation etc.
- Compensation, retaliation etc come into play if measure continues beyond 3 years.
- Duty applicable on global basis subject to developing country exemption



Agreement on Safeguards

Differ from AD/CVD:

- Do not require “unfair” practice (hence no requirement to determine Normal Value or subsidy)
- To be taken on MFN basis (except for DCs having 3%-9% trade share)
- Have to “pay” when take them (after 3 years of application of measure)
- Can take the form of additional duty or quota
- Should be in public interest
- Adjustment required by domestic industry
- Domestic producer’s coverage wider-like or directly competitive products
- Temporary in nature- must terminate in 8/10 years



Meaning of Safeguards

- As per “Dictionary of Trade Policy Terms” Safeguards means “temporary measures designed to slow imports to enable a particular industry to adjust to heightened competition from foreign suppliers”
- Normally ‘safeguards’ refers to action taken under GATT Art.XIX (Emergency Action on Imports of Particular Products)
- Safeguard action also possible under Art.XII and XXVIII (to Safeguard the Balance-of-Payments)



GATT Article XIX

- 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.



GATT Art. XIX (contd.)

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.



WTO Agreement on Safeguards

- The effort to develop the Safeguard Code during the Tokyo Round failed.
- A new Agreement on Safeguards during Uruguay Round
- More elaborated rules and obligations than GATT Article XIX
 - One Notable Provision: Article 8.3 (If a safeguard measure is taken as a result of absolute increase in imports, the exporting country cannot use countermeasures for the first three years that a safeguard measure is in effect.)
 - Under GATT Article XIX, no exception for retaliation.



WTO Agreement on Safeguards (contd.)

- Prohibition of voluntary export restraints (VER) or orderly marketing arrangement
 - Often importing countries make an implicit arrangement with exporting countries to restrain the exports from their domestic firms.
 - Under the WTO system, such practices are explicitly prohibited.
- Other such similar measures that stand prohibited include export moderation, export-price and import-price monitoring systems, export or import surveillance, etc.



Agreement on Safeguards

Preamble

Article 1 General Provision

Article 2 Conditions

Article 3 Investigation

Article 4 Determination of Serious Injury or Threat Thereof

Article 5 Application of Safeguard Measures

Article 6 Provisional Safeguard Measures

Article 7 Duration and Review of Safeguard Measures

Article 8 Level of Concessions and Other Obligations

Article 9 Developing Country Members

Article 10 Pre-existing Article XIX Measures

Article 11 Prohibition and Elimination of Certain Measures

Article 12 Notification and Consultation

Article 13 Surveillance

Article 14 Dispute Settlement

ANNEX EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE 11



Safeguards: Basic Requirements (Art. XIX)

- A determination that,
- As a result of (i) unforeseen developments and (ii) the effect of a Member's obligation under GATT 1994
- A product is being imported in such increased quantities
- As to cause or threaten to cause
- Serious injury
- To the domestic industry
- Producing like or directly competitive products
- To be applied on MFN basis



Conditions for Application of Safeguards (Art.2)

- i. Increased imports - either absolute or relative to domestic production; increase must be sufficiently recent, sudden, sharp and significant
- ii. Serious injury or threat thereof caused by such increased imports



Serious Injury (Art.4)

- Significant overall impairment in the position of the domestic industry (Art.4.1(a))
- Serious injury required is higher level than material injury required in AD and CVD
- To determine serious injury, investigating authorities must evaluate all relevant factors having a bearing on the condition of the industry



Serious Injury (contd.)

Evaluation of all relevant factors to include at least:

- Rate of increase of imports
- Market share of imports
- Changes in level of:
 - i. Sales
 - ii. Production
 - iii. Productivity
 - iv. Capacity utilization
 - v. Profits and losses
 - vi. Employment

of the domestic industry (Art.4.2(a))



Causal Link

- There should be objective evidence of causal link between increased imports of the product concerned and serious injury
- If factors other than increased imports are causing injury to the domestic industry at the same time, such injury must not be attributed to increased imports



Threat of Serious Injury (Art.4(b))

- Safeguard measure can also be applied if an imminent threat of serious injury is found
- This be shown by facts and not based on mere allegation, conjecture or remote possibility



Domestic Industry

Defined as:

- Producers as a whole of the like or directly competitive products within a Member's territory

or

- Producers who collectively account for a major proportion of the total domestic production of those products
- This definition allows a broader consideration of effects than in AD/CVD cases.
- Differ from AD/CVD Investigation in:
 - (i) Having no test of standing requirement (25%/50% test)
 - (ii) No provision to apply safeguard measure in a situation of material retardation of an industry



Restructuring by the Domestic Industry

- i. Viability of the plan
- ii. Time period to substantially achieve the desired goal
- iii. Quantification of the likely benefit
- iv. Liberalization of SGD – benefits of Restructuring Plan
- v. Balancing of SGD – Restructuring V/s liberalization
- vi. Whether it is ultimately in the public interest



Investigation (Art.3)

- Investigating authorities required to hold public hearings or provide other appropriate means for interested parties (importers, exporters, producers, etc.) could present their views or respond to views of others
- Authorities to respect confidentiality of information upon good cause shown – there should be a public summary of such confidential information



Forms of Safeguard Measure

- Application of tariff above bound levels – only a general guideline that SGM be applied only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment (Art.5.1)
- Application of QRs – the level of QR must not be below the actual import level of the most recent 3 representative years (Art. 5.1)
- Rules laid as to how quota shares are to be allocated among supplier countries based on past market shares (Art.5.2(a))



Provisional Measures (Art.6)

- Provisional SG measures can be imposed under critical circumstances, defined as circumstances where delay would cause damage that would be difficult to repair
- It can be imposed on the basis of a preliminary determination that there is clear evidence that increased imports have caused or threaten to cause serious injury
- Such measures can be in place for a maximum of 200 days and should be in the form of refundable tariff increases
- Period of application of PM to be included in the total period of application of SGM



Duration

- Maximum duration of any SGM is 4 years, unless it is extended consistent with the Agreement's provisions
- A measure may be extended, only through a new investigation where it is found that its continuation is necessary to prevent or remedy serious injury and there is evidence that industry is adjusting (Art.7.1 & 7.2)
- Initial period of application plus any extension generally cannot exceed 8 years (Art.7.3)



Duration (contd.)

- A safeguard measure in place for longer than one year must be progressively liberalized at regular intervals during the period of application
- If a measure is extended beyond the initial period, it should continue to be liberalized
- Any measure of more than 3 years duration must be reviewed at mid-term – if appropriate, measure be withdrawn or pace of liberalization be increased



Reapplication of Safeguard Measures

- A safeguard may not be applied again to a product until a period equal to the duration of the original safeguard measure has elapsed
- Minimum period of non-application should generally be 2 years – it can be one year where a new safeguard measure has a duration of 180 days or less



Compensation

- A Member applying SGM must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members
- Any adequate means of trade compensation may be agreed among the affected Members
- If no agreement on compensation within 30 days, the affected exporting Member may “retaliate” i.e. suspend equivalent concessions and other obligations (Art.8.1 & 8.2)



Compensation (contd.)

- Right to retaliate, if compensation is not agreed on, cannot be exercised during the first 3 years of application of SGM where measure is taken based on an absolute increase in imports and otherwise conforms to the provisions of the agreement (Art.8.3)



Transparency Requirement

- Notification to WTO – of safeguard legislation and initiation of investigation, finding of serious injury, provisional safeguard measures

Data on Safeguard Measures: 29/03/1995 to 31/10/2010

Country	Number of Safeguard Measures
India	12
Turkey	12
Chile	7
Jordan	7
Philippines	6
United States	6
Czech Republic	5
Argentina	4
Egypt	4
Poland	4
Ecuador	3
Total	70



Safeguards Jurisprudence- Argentina-Footwear- DS121

Whether Safeguard Measure imposed under AOS must satisfy the requirements of GATT Art. XIX?

- AOS Art. 2 – “A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products”



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)


Panel's View:

- Safeguard Agreement as applying to disciplines of Art. XIX of GATT reflects the latest statements of WTO Members concerning their rights and obligations on safeguards
- The Safeguard Agreement should be understood as defining, clarifying and in some cases modifying the whole package of rights and obligations with respect to safeguard measures
- The express omission of the criterion of unforeseen developments in the new agreement must be given a meaning.



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

- Appellate Body's View:
- Art. II (2) of WTO Agreement provides: “The agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement, binding on all Members.
- GATT 1994 and the AOS are both multilateral agreements on Trade in Goods contained in Annex 1A of the WTO Agreement and as such are binding on all Members
- Provisions of Art. XIX and of AOS are all provisions of one Treaty, the WTO Agreement
- A Treaty be read in a way that it gives meaning to all applicable provisions of the Treaty



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

- Art. 1 of the AOS states that the purpose of AOS is to establish “rules for the application of safeguard measures which shall be understood to mean those measures provided for in Art. XIX...” This suggests that Art. XIX continues in full force and effect
- Art. 11.1 (a) of AOS- “A Member shall not take or seek any emergency action on imports of particular products as set forth in Art. XIX of GATT1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement”- this clearly means that compliance must to both GATT Art. XIX and AOS



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

Meaning of the term “as a result of unforeseen developments” in Art. XIX-

- Hatter’s Fur Case Working Party Report 1951- “unforeseen developments” should be interpreted to mean developments occurring after the negotiation of the relevant tariff concessions 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
- AB- Developments which led to a product being imported in increased quantities must have been “unexpected”



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

Imposition of safeguard measures by a Member of a Customs Union


- During the safeguard investigation, Argentina took into account imports from all sources and the injury caused on that account but did not apply the measure to other Mercosur Members
- Defence taken: Footnote 1 to Art. 2 of AOS – “A CU may apply a safeguard measure as a single unit or on behalf of a member State. When a CU applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on conditions existing in the CU as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State...”



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

AB's Finding

- The footnote only applies when a customs union applies a safeguard measure “ as a single unit or on behalf of member State”
- Mercosur did not apply these safeguard measures either as a single unit or on behalf of Argentina. Argentina applied the measures after investigation by Argentine authorities
- Art. 2.2 of AOS provides: “ Safeguard measures shall be applied to a product being imported irrespective of its source”
- Argentina’s investigation, which evaluated whether serious injury or threat thereof was caused by imports from all sources could only lead to the imposition of safeguard measures on imports from all sources



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

AB's finding on Serious Injury Determination

- Art. 4.2 (a) of AOS requires a demonstration that the competent authorities, evaluated at a minimum, each of the factors listed in Art. 4.2 (a) as well as all other factors that are relevant to the situation of the industry concerned.
- However this is not a sufficient ground to justify a determination of “serious injury”; in addition, definition of “Serious Injury” under Art. 4.1 (a) also needs to be fulfilled which states: “ “serious injury” shall be understood to mean a significant overall impairment in the position of a domestic industry”



Safeguards Jurisprudence- Argentina- Footwear- DS121(contd.)

- Overall position of the domestic industry also needs to be evaluated in light of all the relevant factors having a bearing on a situation of that industry to determine whether there is “a significant overall impairment” in the position of that industry.
- An evaluation of each listed factor will not necessarily to have show that each such factor is “declining”. In a given case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate “significant overall impairment of the industry”



Thank you