# A Study on Safeguards Agreement of the WTO

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**This article is funded by Research and Innovation Project of Graduate International Students of Zhongnan University of Economics and Law-**

***Abstract***
*This article examines the Agreement on Safeguards sets forth the rules for the application of safeguard measures pursuant to Article XIX of GATT 1994. Safeguard measures are defined as* ***"emergency" actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member's domestic industry****. Safeguard measures, which in broad terms take the form of suspension of concessions or obligations, can consist of quantitative import restrictions or of duty increases to higher than bound rates. The main guiding principles of Safeguard Agreement with respect to safeguarding measures are that such measures must be temporary; that they may be imposed only when imports are found to cause or threaten serious injury to a competing domestic industry; that they be applied on a non-selective (i.e., or "MFN", basis); that they be progressively liberalized while in effect; and that the Member imposing them must pay compensation to the Members whose trade is affected. The Safeguard Agreement was negotiated in large part because GATT Contracting Parties increasingly had been applying a variety of so-called* ***"grey area" measures*** *(bilateral voluntary export restraints, orderly marketing agreements, and similar measures) to limit imports of certain products. These measures were not imposed pursuant to Article XIX, and thus were not subject to multilateral discipline through the GATT, and the legality of such measures under the GATT was doubtful. The* ***Agreement now clearly prohibits such measures*** *and has specific provisions for eliminating those that were in place at the time the WTO Agreement entered into force.* ***Safeguard Agreement explicitly applies equally to all Members****, aims to: (1) clarify and reinforce GATT disciplines, particularly those of Article XIX; (2) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (3) encourage structural adjustment on the part of industries adversely affected by increased imports, thereby enhancing competition in international markets.*
***KEYWORD:*** *Article XIX of GATT 1994, WTO, Safeguard Agreement, a grey area, domestic industry, increased imports*

## I. Introduction

International Trade Rules have distinguished between the ways in fair trade and unfair trade practices. Safeguard measures are available under certain conditions in response to fair trade with unfair trade practices. **Temporary protection from fairly traded imports under the World Trade Organization (WTO) typically refers to a national government's use of a "safeguard" tariff, quota or tariff rate quota**. Prior to the Uruguay Round, Safeguard measures were governed solely by Article XIX of the GATT's escape clauses. Safeguard measures were to be used only when, "as a result of unforeseen developments and of the effect of obligations incurred" under the GATT, "increased imports" caused or threatened "Serious Injuries" to domestic industries.

Broadly defined, the term "safeguard protection" refers to a provision in an agreement permitting governments under specified circumstances to withdraw or cease to apply their normal obligations in order to protect (safeguard) certain overriding interests.[1] As a matter of fact, all the international trade agreements embody safeguard provision and exceptions. A safeguard mechanism for an international trade agreement is the core element to secure market access commitments in trade negotiations and effectively sustain trade liberalization despite domestic resistance from comparatively disadvantaged economic sectors.[2]

[1] Bernard M. Hoekman, and Michelm. M. Koestecki, The Political Economy of the World Trading System: The WTO and Beyond, 2nd ed. New York: Oxford University Press, 2001, p.303
[2] Dukgeun Ahn*, Restructuring the WTO Safeguard system

The safeguard protection under GATT and WTO can be divided into two categories: **permanent exceptions and temporary exceptions**.[3] Temporary safeguard measures are applicable under predefined conditions for temporary import barriers. Except for the most significant safeguard under GATT Article XIX and the Safeguard Agreement, there are several other mechanisms that also fall under the general rule of safeguard, namely, anti-dumping measures under GATT Article VI. Under the WTO's Safeguards Agreement, **a member may restrict imports of a product temporarily (take "safeguard" actions) through higher tariffs or other measures if its domestic industry is seriously injured, or threatened with serious injury, due to an unforeseen surge in imports.** Therefore Safeguard measures apply to all imports and not just those from a particular country (developing countries accounting for less than 3% of exports are excluded from a measure). **Because safeguards target "fair" trade, an exporting country can seek compensation for lost trade through consultations** or, if no agreement is reached, it can raise tariffs on exports from the country that is enforcing the safeguard measure.

A safeguard system is **not only essential to provide safety nets for overly excessive importation within such a short period of time, but also critical to facilitate structural adjustment induced by import competition.** The first attempt by the GATT contracting parties to establish a separate agreement on safeguard along with the Anti-dumping Code and the Subsidy Code failed during the Tokyo Round negotiation. The **WTO Agreement on Safeguard was later concluded during the Uruguay Round negotiation and entered into force in 1995 with the inception of the WTO**.

In 2004, 133 out of 148 WTO Members notified their safeguard laws and regulations. Although there were only two dispute settlement cases relating to Article XIX of the GATT during the GATT system. Unfortunately, however, the current structure of the WTO safeguard system has not been sufficiently articulated to prevent abusive safeguard protection by many Members. Moreover, **the WTO jurisprudence concerning the Safeguard Agreement has raised several controversial issues that have been welcomed by WTO constituents, neither as complainants nor as defendants**.[4]

In this article, I will first explain Scope of the Safeguards, followed by the historical origin of safeguard and its subsequent development under GATT and the WTO. Then, I will focus on the structure of Safeguard Agreement, and I will move to the cases filed and the dispute settlement practice. To conclude, I will give some suggestions for the further improvement of the Safeguard Agreement.

## II. Overview of Safeguard Measure

The formation of the GATT in 1947 as a multilateral trade pact to reduce tariffs needed an "escape clause" to permit the signatories to address political pressures from potential losers at home**. Article XIX, titled "Emergency Actions on Imports of Particular Products," often referred to as the escape clause or safeguard clause, provided countries quick access to short-term relief by restricting imports for domestic industries facing "serious injury" due to the agreement.** In the early years of the GATT, this was a continuation of the negotiation. If imports caused or threatened serious injury to domestic producers, the country could take emergency action to restrict those imports, typically restoring a duty or quota that had been negotiated away. Exporters had to be consulted. If not provided some satisfactory compensation, they could retaliate. This form of pressure valve was used 110 times by 1963.[5] Through May 1993, 151 safeguard actions under Article XIX were notified to the GATT.[6]Efforts were building to make the application of the escape clause more rigorous, but it could not overcome the resistance of many nations fearful of the loss of control over this safety valve. In the Tokyo Round, negotiators failed to reach agreement on a code of conduct for measures applying Article XIX. Hence, one of the more important achievements in the Uruguay Round was the

[3] Bernard M. Hoekman, and Michelm. M. Koestecki, The Political Economy of the World Trading System: The WTO and Beyond, 2nd ed. New York: Oxford University Press, 2001

[4] Dukgeun Ahn*, Restructuring the WTO Safeguard system

[5] Michael Finger, "GATT Experience with Safeguards: Making Economic and Political Sense of the Possibilities that the GATT Allows to Restrict Imports," mimeo, World Bank, 2000.

[6] Jeffery Schott, The Uruguay Round: An Assessment, (IIE,) 1994, p. 94 About one-third had been imposed since the end of the Tokyo Round in 1979; 18 times by the EU. The US only invoked it 4 times during that period.

completion of the AS. The AS detailed provisions to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control."[7] These measures refer particularly to voluntary export restraints (VERs) and other inter-industry arrangements.

## III. Historical Background of Safeguard

Safeguard measure pursuant to GATT Article XIX (known as "escape clause") in 1943 Reciprocal Trade Agreement between the USA and Mexico. When the text of GATT and ITO was under negotiation in 1947, US executive issued an order requiring the inclusion of escape clause in all trade agreement entered into by the USA.

The safeguard mechanism of the modern international trading system was first introduced into the GATT in 1947 as Article XIX, titled "Emergency Action on Imports of Particular Products." The language of Article XIX is quite similar to the escape clause in the 1943 Reciprocal Trade Agreement. The prerequisite for the invocation of Article XIX under the GATT 1947 was (a) result of unforeseen developments and GATT obligation, (b) the existence of increased imports, (c) serious injury or threat thereof, and (d) a causal link between (b) and (c). Though Article XIX gave certain criteria for invocation of safeguard measures, those critical legal concepts, like "unforeseen developments," "serious injury and threat thereof" and "like or directly competitive products," remain unclear. Therefore, the GATT language of Article XIX as to these variable concepts, as well as to the various criteria, is quite ambiguous, resulting in the difficulty in interpretation and uncertainty in the application. In addition, the lack of specific procedural requirements and no provision for the time limits of safeguard measures add to the systemic uncertainties.

Article XIX of the GATT provides the rules to be observed when a Member government takes emergency measures to restrict imports (i.e., the safeguard measures) to prevent injury to domestic industry from a sudden surge of imports. However, this Article failed to clearly specify the conditions under which safeguard measures may be imposed. For instance, a clear definition of what constitutes serious injury or threat thereof to domestic industry was lacking. Time limits for the application of restrictions were not specified, nor were concrete modes of application (the admissibility of selective application to particular sources of imports, for example). Consequently, the feeling grew that elaboration and clarification of the rules for using safeguards were necessary, and the issue was debated during the Tokyo Round of multilateral trade negotiations.

A goal specified for the Tokyo Round in the Tokyo Declaration of September 1973 was "to include an examination of the adequacy of the multilateral safeguard system." Pursuant to this declaration, debate focused on the following four points: (a) the propriety of selective application of safeguards and the terms of their authorization; (b) the clarification of requirements for implementation (the definition of "serious injury," etc.); (c) the terms of safeguards (especially the obligation to progressively liberalize, maximum duration of safeguards, the obligation for structural adjustment, etc.); and (d) the notification and consultation procedures, as well as the possibility of setting up an international supervisory mechanism. However, on the most important issue, **the question of criteria for applying safeguards, the European Economic Community and the developing countries remained at loggerheads, and no agreement could be obtained.**

Thus a great **many difficulties remained in the implementation of a formal safeguards system, for example, the fear that countries which are targets of safeguards will retaliate with their own restrictive measures.** Since the 1970's, there has been a tendency to move to voluntary export restrictions, the so-called "grey-area measures" that have no clear basis in the GATT, raising concerns that the GATT system might become empty of meaning and substance. The feeling has grown that the rules concerning safeguards ought to be strengthened to deal with these grey-area measures. In this connection, the GATT ministerial meeting in 1982 issued a declaration that stated in part, "there is a need for an improved and more efficient safeguard system." However, a confrontation developed between parties like the developing countries, the United States, Australia and New Zealand, who argued that grey-area measures either should be scrapped or the rules on them

[7] Preamble, Agreement on Safeguards.

strengthened, and the European Economic Community, who held that this position simply ignored reality. As a consequence, no concrete progress was made on the issue.[8]

Negotiations on safeguards in the **Uruguay Round** proceeded on the basis of aims spelled out in the Punta del Este Declaration of September 1986, the gist of which was that "the agreement on safeguards (a) **shall be based on the basic principles of the General Agreement; (b) shall contain, inter alia, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, digressively and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement; and (c) shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties."**

The resultant Agreement on Safeguards was incorporated in the WTO Agreement. It must be noted. Finally, that **special safeguard applications are permitted under the Agreement on Agriculture and the Agreement on Textiles and Clothing.**

Within the WTO, safeguard measures were available under the (GATT) (Article XIX). However, they were infrequently used, and some governments preferred to protect their industries by "a grey area" measures ("voluntary" export restraint arrangements on products such as cars, steel, and semiconductors). As part of the WTO deal, members gave up the "grey area" measures and adopted a specific WTO Safeguards Agreement to discipline the use of safeguard measures. Safeguards are responses to economic development and trade processes that align with international law, as opposed to negative practices, such as dumping or subsidies.

**In the context of world trade, they are supposed to be used only in very specific circumstances, with compensation, and on a universal basis.** For example, a member restricting imports for safeguard purposes would have to restrict imports from all other countries. However, exceptions to the nondiscriminatory rule are provided for in the Agreement on Safeguards itself as well as in some ad hoc agreements. **In the last respect, it is worthwhile to note that China accepted that discriminatory safeguards might be imposed on its exports to other WTO members until 2013**. Regional trading arrangements have their own rules relating to safeguards. Some safeguard measures can be resorted to in the area of services, as provided for in the General Agreement on Trade in Services (GATS).[9]

## IV. The scope of the Safeguards

International Trade Rules have distinguished between the ways in fair trade and unfair trade practices. **Safeguard measures are available under certain conditions in response to fair trade with unfair trade practices. Prior to the Uruguay Round, Safeguard measures were governed solely by Article XIX of the GATT's escape clauses. Safeguard measures were to be used only when, "as a result of unforeseen developments and of the effect of obligations incurred" under the GATT, "increased imports" caused or threatened "Serious Injuries" to domestic industries.**

Safeguards (Escape Clause) The formation of the GATT in 1947 as a multilateral trade pact to reduce tariffs needed an "escape clause" to permit the signatories to address political pressures from potential losers at home. Article XIX, titled "Emergency Actions on Imports of Particular Products," often referred to as the escape clause or safeguard clause, provided countries quick access to short-term relief by restricting imports for domestic industries facing "serious injury" due to the agreement. In the early years of the GATT, this was a continuation of the negotiation. If imports caused or threatened serious injury to domestic producers, the country could take emergency action to restrict those imports, typically restoring a duty or quota that had been negotiated away. Exporters had to be consulted. If not provided some satisfactory compensation, they could retaliate. This form of pressure valve was used 110 times by 1963.[10]

[8] http://www.meti.go.jp/english/report/data/gCT9907e.html

[9] http://www.meti.go.jp

[10] Michael Finger, "GATT Experience with Safeguards: Making Economic and Political Sense of the Possibilities that the GATT Allows to Restrict Imports," mimeo, World Bank, 2000

In 1993, 151 safeguard actions under Article XIX were notified to the GATT.[11]Efforts were building to make the application of the escape clause more rigorous, but it could not overcome the resistance of many nations fearful of the loss of control over this safety valve. In the Tokyo Round, negotiators failed to reach agreement on a code of conduct for measures applying Article XIX. Hence, one of the more important achievements in the Uruguay Round was the completion of the AS. The Agreement on Safeguard detailed provisions to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control."[12]

These measures refer particularly to voluntary export restraints (VERs) and other inter-industry arrangements. Since 1995, when the Agreement on Safeguards was established, the international community has seen a significant increase in the use of this instrument. From just two cases notified to the WTO in 1995, 10 cases were notified in 1998 and 26 in 2000. Safeguards seem primarily to be a trade remedy of new users. Safeguard analysis is less complex and more straightforward than antidumping adjudication, so it may be more attractive to new users and to countries with fewer resources to devote to trade remedy adjudication processes. It is further interesting that two industrial sectors animals/food and chemicals/plastics/rubber account for almost 70 percent of all investigations since 1995. Ten of India's 11 investigations have involved chemical products. Only four of the 61 cases involve steel, a heavy user of antidumping and countervailing duty remedies.[13] Increasingly, WTO members are challenging adverse safeguard and antidumping/countervailing duty rulings by national authorities. Four recent rulings on safeguards defined with more precision the general parameters set forth by the AS, and are offering an object lesson, at this point primarily for the United States, on how national authorities should be revising its safeguard laws and enforcement to comply with that higher authority.

## V. Safeguard Agreement

**Safeguards Committee was established to administer the Safeguards Agreement. It oversees the operation of the Agreement and is responsible for the surveillance of Members' commitments**. Governments have to notify and provide copies of their legislation authorizing the application of safeguard measures to the Committee, as well as report each phase of a safeguard investigation and related decision-making. The Committee reviews these reports and provides a forum for discussion of measures in place.

Safeguards Agreement incorporates into WTO rules many of the concepts embodied in U.S. safeguards law (section 201 of the Trade Act of 1974, as amended). Among its key provisions, the Safeguards Agreement:

1- Requires a transparent, public process for making serious injury determinations;

2- Sets out clearer definitions of the criteria for serious injury determinations;

3- Requires that safeguard measures be steadily liberalized over their duration;

4- Establishes maximum periods for safeguard actions;

5-Requires a review no later than the mid-term of any measure with a duration exceeding three years;

Allows safeguard actions to be taken for three years, without the requirement of compensation or the possibility of retaliation; and Prohibits so-called "grey area" measures, such as voluntary restraint agreements and orderly marketing agreements. In the United States, the U.S. International Trade Commission conducts safeguard investigations.

Article XIX of the General Agreement allows a GATT member to take a "safeguard" action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry.

The agreement breaks major ground in establishing a prohibition against so-called "grey area" measures, and in setting a "sunset clause" on all safeguard actions. **The agreement stipulates that a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other**

[11] Jeffery Schott, The Uruguay Round: An Assessment, (IIE,) 1994, p. 94 About one-third had been imposed since the end of the Tokyo Round in 1979; 18 times by the EU. The US only invoked it 4 times during that period.

[12] Preamble, Agreement on Safeguards.

[13] Cliff Stevenson, Global Trade Protection Report 2000, April 2001 (Rowe & Maw)

**similar measures on the export or the import side. Any such measure in effect at the time of entry into force of the agreement would be brought into conformity with this agreement or would have to be phased out within four years after the entry into force of the agreement establishing the WTO.** An exception could be made for one specific measure for each importing member, subject to mutual agreement with the directly concerned member, where the phase-out date would be 31 December 1999.

All existing safeguard measures taken under Article XIX of the General Agreement 1947 shall be terminated not later than eight years after the date on which they were first applied or five years after the date of entry into force of the agreement establishing the WTO, whichever comes later.

**The agreement sets out requirements for safeguard investigation which includes a public notice for hearings and other appropriate means for interested parties to present evidence, including on whether a measure would be in the public interest**. In the event of critical circumstances, a provisional safeguard measure may be imposed based upon a preliminary determination of serious injury. The duration of such a provisional measure would not exceed 200 days.

The agreement sets out the criteria for "serious injury" and the factors which must be considered in determining the impact of imports. **The safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment**. Where quantitative restrictions are imposed, they normally should not reduce the quantities of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

In **principle**, safeguard measures have to be applied irrespective of source. In cases in which a quota is allocated among supplying countries, the member applying restrictions may seek agreement with others. Members are having a substantial interest in supplying the product concerned. Normally, allocation of shares would be on the basis of the proportion of total quantity or value of the imported product over a previous representative period. However, it would be possible for the importing country to depart from this approach if it could demonstrate, in consultations under the auspices of the Safeguards Committee, that imports from certain contracting parties had increased disproportionately in relation to the total increase and that such a departure would be justified and equitable to all suppliers. The duration of the safeguard measure, in this case, cannot exceed four years.

**The agreement lays down time limits for all safeguard measures. Generally, the duration of a measure should not exceed four years though this could be extended up to a maximum of eight years, subject to confirmation of continued necessity by the competent national authorities and if there is evidence that the industry is adjusting.** Any measure imposed for a period greater than one year should be progressively liberalized during its lifetime. No safeguard measure could be applied again to a product that had been subject to such action for a period equal to the duration of the previous measure, subject to a non-application period of at least two years. A safeguard measure with a duration of 180 days or less may be applied again to the import of a product if at least one year had elapsed since the date of introduction of the measure on that product, and if such a measure had not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure. **The agreement envisages consultations on compensation for safeguard measures. Where consultations are not successful, the affected members may withdraw equivalent concessions or other obligations under GATT 1994. However, such action is not allowed for the first three years of the safeguard measure if it conforms to the provisions of the agreement, and is taken as a result of an absolute increase in imports.**

Safeguard measures would not be applicable to a product from a developing country member, if the share of the developing country member in the imports of the product concerned does not exceed 3 per cent, and that developing country members with less than 3 per cent import share collectively account for no more than 9 per cent of total imports of the product concerned. **A developing country member has the right to extend the period of application of a safeguard measure for a period of up to two years beyond the normal maximum. It can also apply a safeguard measure again to a product that had been subject to such action**

**after a period equal to half of the duration of the previous measure, subject to a non-application period of at least two years.**

The agreement would establish a Safeguards Committee which would oversee the operation of its provisions and, in particular, be responsible for surveillance of its commitments. The Agreement on Safeguards sets forth the rules for the application of safeguard measures pursuant to Article XIX of GATT 1994. Safeguard measures are defined as "emergency" actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member's domestic industry.[14]

**V.1 Structure of the Safeguard Agreement**

The Agreement consists of 14 articles and one annex. In general terms, it has four main components:

(1) General provisions (Articles 1 and 2);

(2) Rules governing Members' application of new safeguard measures (i.e., those applied after entry into force of WTO Agreement (Articles 3-9));

(3) Rules pertaining to pre-existing measures that were applied before the WTO's entry into force (Articles 10 and 11); and

(4) Multilateral surveillance and institutions (Articles 12-14).

**(1) General provisions**

Article 1 establishes that the Safeguard Agreement is **the vehicle through which measures may be applied pursuant to Article XIX of GATT 1994. That is, any measure for which the coverage of Article XIX (which allows suspension of GATT concessions and obligations under the defined "emergency" circumstances) is invoked must be taken in accordance with the provisions of the Safeguard Agreement**. The Agreement explicitly does not apply to measures taken pursuant to other provisions of GATT 1994, to other Annex 1A Multilateral Trade Agreements, or to protocols and agreements or arrangements concluded within the framework of GATT 1994. (Art. 11.1(c))

**(2) Conditions for Application**

Article 2 sets forth the conditions (i.e., **serious injury or threat thereof caused by increased imports**) under which safeguard measures may be applied. It also contains the requirement that such measures be applied on an MFN basis. Rules governing new safeguard measures (applied after entry into force of WTO Agreement)

***Requirements of Investigation***

New safeguard measures may be applied only following an investigation conducted by competent authorities pursuant to previously published procedures. Although the Agreement does not contain detailed procedural requirements, it does require reasonable public notice of the investigation, and that interested parties (importers, exporters, producers, etc.) be given the opportunity to present their views and to respond to the views of others. Among the topics on which views are to be sought is whether or not a safeguard measure would be in the public interest. The relevant authorities are obligated to publish a report presenting and explaining their findings on all pertinent issues, including a demonstration of the relevance of the factors examined. The Agreement also contains specific rules for the handling of confidential information in the context of an investigation.

***(a) Serious Injury or Threat***

The Agreement defines "serious injury" as significant impairment in the position of a domestic industry. "Threat of serious injury" is a threat that is clearly imminent as shown by facts, and not based on a mere allegation, conjecture or remote possibility. **A "domestic industry" is defined as the producers as a whole of the like or directly competitive products operating within the territory of a Member, or producers who collectively account for a major proportion of the total domestic production of those products.**

In determining whether serious injury or threat is present, investigating authorities are to evaluate all relevant factors having a bearing on the condition of the industry and are not to attribute to imports injury

[14] https://www.wto.org

caused by other factors. Factors that must be analyzed are the absolute and relative rate and amount of increase in imports, the market share taken by the increased imports, and changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment of the domestic industry.

***(b) Application of Safeguard Measures***

Safeguard measures **may only be applied to the extent necessary to remedy or prevent serious injury and to facilitate adjustment, within certain limits.** If the measure takes the form of a quantitative restriction, the level must not be below the actual import level of the most recent three representative years, unless there is clear justification for doing otherwise. **Rules also apply as to how quota shares are to be allocated among supplier countries, as to compensation to Members whose trade is affected, and as to consultations with affected Members.**

**The maximum duration of any safeguard measure is four years unless it is extended consistent with the Agreement's provisions.** In particular, a measure may be extended only if its continuation is found to be necessary to prevent or remedy serious injury, and only if evidence shows that the industry is adjusting.

The initial period of application plus **any extension normally cannot exceed eight years**. In addition, safeguard measures 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 of application, it can be no more restrictive during this period than it was at the end of the initial period, and it should continue to be liberalized.

Any measure of more than three years duration must be reviewed at mid-term. If appropriate based on that review, the Member applying the measure must withdraw it or increase the pace of its liberalization. Under critical circumstances, defined as circumstances where delay would cause damage that would be difficult to repair, provisional measures may be imposed. Such measures may be in the form of tariff increases only and may be kept in place for a maximum of 200 days. In addition, **the period of application of any provisional measure must be included in the total period of application of a safeguard measure.**

Repeated application of safeguards with respect to a given product is limited by the Agreement. Ordinarily, a safeguard may not be applied again to a product until a period equal to the duration of the original safeguard has elapsed, so long as the period of non-application is at least two years.

Nonetheless, if a new safeguard measure has a duration of 180 days or less, it may be applied so long as one year has elapsed since the date the original safeguard measure was introduced, and so long as no more than two safeguard measures have been applied on the product during the five years immediately preceding the date of introduction of the new safeguard measure.

***(c) Concessions and Other Obligations***

In applying a safeguard measure, **the Member must maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members. To do so, any adequate means of trade compensation may be agreed with the affected Members. Absent such agreement, the affected exporting Members individually may suspend substantially equivalent concessions and other obligations.** This latter right cannot be exercised during the first three years of application of a safeguard measure if the measure is taken based on an absolute increase in imports, and otherwise conforms to the provisions of the Agreement.

***(d) Developing Country Members***

**Developing country Members receive special and differential treatment with respect to other Members' safeguard measures, and with respect to applying their own such measures.** A safeguard measure shall not be applied to low volume imports from developing country Members, that is, where a single developing country Member's products account **for no more than 3 percent of the total subject imports, as long as products originating in those low-import-share developing country Members collectively do not exceed 9 percent of imports.**

In applying safeguard measures, developing country Members **may extend the application of a safeguard measure for an extra two years beyond that normally permitted**. In addition, the rules for re-applying safeguard measures with respect to a given product are relaxed for developing country Members.

**(3) Rules governing Pre-existing measures**

Pre-existing measures imposed pursuant to GATT Article XIX that were in effect at the time of the WTO Agreement's entry into force are to be terminated no later than eight years after they were first applied, or five years after the entry into force of the WTO Agreement, whichever comes later.

Pre-existing "grey area" measures that were in effect at the time of the WTO's entry into force are to be brought into conformity with the SG Agreement or phased out pursuant to timetables to have been presented to the SG Committee by 30 June 1995 within four years of the WTO's entry into force. Although all Members had the right to an exception with respect to a single specific measure, whereby they would have had until 1999 for the required phase-out, no Member other than the EC (whose single exception is contained in the Annex to the Agreement itself) exercised this option.

**(4) Multilateral surveillance and institutions**

Multilateral oversight of the use of safeguard measures is **conducted through notification requirements, as well as through the creation of a Committee on Safeguards charged with reviewing safeguard notifications, among other duties.**

**Members are required to notify the Committee of initiations of investigations into the existence of serious injury or threat and the reasons therefore; findings of serious injury or threat caused by increased imports; and decisions to apply or extend safeguard measures**. Such notifications are required to contain the relevant information on which the decisions are based.

Members are required, before applying or extending a safeguard measure, to provide an adequate opportunity for consultations with Members who have substantial interests as exporters of the product. The aims of such consultations shall include a review of information as to the facts of the situation, exchanging views on the proposed measures, and reaching an understanding as to maintain a substantially equivalent level of concessions and obligations.

Provisional measures must be notified before being applied, and consultations must be initiated immediately after such measures are applied. The results of consultations, mid-term reviews of measures taken, compensation, and/or suspension of concessions, must be notified immediately to the Council for Trade in Goods through the Safeguards Committee by the Member concerned. Members are obligated to notify their own laws, regulations and administrative procedures to the Committee, as well as their own pre-existing Article XIX and a grey area measures. Members also are entitled to counter notify other Members' relevant laws and regulations, actions, or measures in force. Members are not obligated to disclose confidential information in their notifications.

The Committee's role generally is to monitor (and report to the Council for Trade in Goods on) the implementation and operation of the Agreement, to review Members' notifications, and to make findings as to Members' compliance with respect to the procedural provisions of the Agreement for the application of safeguard measures, to assist with consultations, and to review proposed retaliation.

**V.2 Provisions of the Safeguards Agreement**

In creating a single agreement encompassing safeguard measures, **the drafters codified rules and procedures that further discipline the unilateral right to impose safeguard measures and secured the efficacy that was so elusive under Article XIX. To that end, the Safeguards Agreement contains provisions that clarify and reinforce the principles embodied by that article**. As stated by the WTO itself, the Safeguards Agreement "reduces the size of the loophole to allow only for measures that are really designed to facilitate adjustment." [15] **The most significant achievement of the Safeguards Agreement is the requirement that safeguard measures be applied on an MFN basis. Another notable but expected**

[15] BACCHETTA & JANSEN, supra note 29, at 52.

**accomplishment is the explicit prohibition of grey-area measures**.[16] In addition, under the Safeguards Agreement, **a WTO Member must conduct a thorough and fair investigation of the imported product prior to applying a safeguard measure**,[17] **and limit the duration of the safeguard measure to four years absent further investigation by the appropriate domestic authority.**[18] The Safeguards Agreement also provides more detailed notification and consultation requirements in the event that a Member seeks to impose a safeguard measure.[19] While the language and negotiating history of the Safeguards Agreement demonstrates that the provisions were drafted with an eye toward making Article XIX an attractive alternative for domestic relief, the actual success of the drafters in doing so remains to be seen. Although the figures undoubtedly reveal the success of the Safeguards Agreement in achieving its primary goal of encouraging Members to resort to that article for relief, the experience of WTO safeguards under that agreement warrants a mixed reaction, as demonstrated by various safeguard disputes discussed in this article. In particular, it remains uncertain whether the new retaliation and compensation provisions, which are discussed in further detail below, achieved the balance that was sought between limiting the right of rebalancing and serving as a check on the use of safeguards. Equally ambivalent is whether the ends sought by the drafters were negated by procedural deficiencies that surfaced from the compensation and retaliation provisions. Like anything in the law, the devil is in the details, and the Safeguards Agreement is no exception.

## VI. The relationship between Safeguard Agreement and GATT Article XIX

The continuing applicability of **GATT Article XIX was challenged by Uruguay Round Safeguard Agreement since its coming into force**. The **Safeguard Agreement states in its preamble that Members recognize "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XI"**.[20] Then, Article 1 provides that "the **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**".[21] In addition, Article 10 requires Members to terminate all existing safeguard measures taken pursuant to Article XIX of GATT 1947 no later than eight years after their application or five years after the WTO agreement takes effect, whichever comes later. Article 11.1(a) emphasizes that Members "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 to the provisions of that Article applied in accordance with this Agreement".[22] Practically, no language in Safeguard Agreement defines the legal relationship between GATT Article XIX and Safeguard Agreement.

The issue was raised in **three WTO safeguard cases, i.e., Argentina-Footwear, Korea-Dairy and US-Lamb Meat,** and was thereby addressed by Appellate Body. In both the **Argentina-Footwear and Korea-Dairy, the Panels concluded that safeguard measures that meet the requirements of the Safeguard Agreement are necessarily consistent with the requirements GATT Article XIX; therefore, GATT Article XIX does not add any independent obligation to Members.**[23]However, the Appellate Body overruled the Panels' decision. **In reaching a conclusion, the Appellate Body first referred to Article II of Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), which provides the agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement, binding on all Members".[24] By this provision, the Article XIX of GATT 1994 and the Safeguard Agreement are "integral parts" of the WTO Agreement and "binding on all Members."** "And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that

[16] See Safeguards Agreement, supra note 8, Art. 11

[17] Id. Art. 3 (describing the process of investigation that must be conducted before the application of safeguard measures).

[18] Id. See Safeguards Agreement, Art. 7

[19] Id. See Safeguards Agreement, Art. 12

[20] WTO, *Safeguard Agreement*, 1994.

[21] Ibid

[22] Ibid

[23] Supra note 15, Panel Report paras.8.50-57, 8.69.

[24] WTO, Marrakesh Agreement Establishing the World Trade Organization, 1994

gives meaning to all the relevant provisions of these two equally binding agreements."[25] Then, the Appellate Bodies moved to Article 1 and Article 11.1(a) of the Safeguard Agreement and found that the literal language thereof suggests "**any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994".[26]** Later in the US-Lamb Meat case, the Panel followed the Appellate Body decision in the Argentina-Footwear and Korea-Dairy cases.[27]

It is clear now that the Safeguard Agreement does not entirely replace GATT Article XIX. Instead, the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions.

## VII. Dispute Settlement Cases on Safeguard Measures under the WTO

Four safeguard cases have completed the WTO dispute settlement process and AB opinions rendered:

(1) Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products (hereinafter "Korea - Dairy Products"),
(2) Argentina - Safeguard Measures on Imports of Footwear ("Argentina - Footwear"),
(3) United States Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, ("United States - Wheat Gluten"), and
(4) United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia ("United States - Lamb Meat").

Through *these cases, the WTO has developed the basic requirements of the law to be implemented by the member nations based on the broad outlines set forth in the Safeguard Agreement negotiated in the Uruguay Round.*

### *United States - Lamb Meat*

In February 1999, the USITC unanimously found that lamb meat was being imported into the United States in quantities that would constitute a substantial cause of the threat of serious injury to the industry. The USITC forwarded its finding and proposed relief to the President in April 1999. After consultation with Australia and New Zealand, the President imposed a definitive safeguard measure on imports of lamb meat. Canada, Mexico, Israel and ben Andean Trade Preference Act or certain developing countries receiving GSP treatment were excluded. Australia and New Zealand challenged the U.S. ruling before the WTO. A Dispute Settlement Body Panel was convened.[28]It rendered a decision on December 21, 2000.

The panel raised a number of issues of legal interpretation and analytical form. Among these, it concluded that the United States acted inconsistently with:

1) Article XIX: 1(a) by failing to demonstrate that the injury was coming from an "unforeseen development" in the marketplace.
2) Article 4.1(c) of the AS by defining the domestic industry to include growers and feeders of live lamb as producers of the like product (lamb meat), and by failing to obtain data on producers representing a major proportion of the total domestic production.
3) Article 4.2(b) of the AS because the USITC did not demonstrate the required causal link between increased imports and the threat of serious injury, nor did it "establish that increased imports were, by themselves, a necessary and sufficient cause of threat of serious injury, and in that the determination did not ensure that threat of serious injury caused by 'other factors' was not attributed to increased imports." As a result, the United States also violated Article 2.1 of the Agreement on Safeguard since the serious injury, which is necessary to permit safeguard measures, was not proven.

Conversely, the panel found that complainants Australia and New Zealand failed to establish:

[25] Supra note 15, Appellate Body Report, paras.79-81; and supra note 14, Appellate Body Report, paras.74-77.
[26] Supra note 15, Appellate Body Report, paras.82-84; and supra note 14, Appellate Body Report, para.78.
[27] See supra note 17, Panel Report para.7.11.
[28] Panel is a selection from a large group of available candidates of three trade experts who are convened to judge the merits of the case and issue an opinion.

- that the USITC's analytical approach to determining the threat of serious injury (the prospective analysis and time-period used), was inconsistent with Article 4.1B(b) (assuming the USITC had defined the industry properly).
- that the USITC's approach to evaluating all the factors listed in Article 4.2(a) is inconsistent with that provision (assuming the USITC had defined the industry properly).

Appeals were made by all parties in January 2001. A third party submission was offered by the European Communities. A hearing was held in March, and the Appellate Body (AB) released its report on May 1. The appeals raised questions that had appeared in the earlier decisions Korea - Dairy Products, Argentina - Footwear, and United States - Wheat Gluten. In Lamb Meat the AB further clarified certain key factors that members must consider in applying safeguard measures, in particular, unforeseen developments, defining the domestic industry, and serious injury/causation. These are of interest here because they are central to applying safeguard measures and because they are illustrative of the influence of the WTO dispute settlement mechanism on domestic law.

***Unforeseen Developments***

The unforeseen developments problem is two-fold.

(1) Article XIX of the GATT 1994 requires for a safeguard measure that the competent national authority demonstrate the existence of unforeseen developments. In contrast, the Safeguard Agreement (Article 2.1) makes no mention of it. If unforeseen developments create a condition for imposing a safeguard remedy, the two provisions are in conflict.

(2) No guidance is given as to what constitutes an unforeseen development. Reversing the panels in both Korea - Dairy Products and Argentina- Footwear, the AB affirmed that GATT Article XIX was in no conflict with the Safeguard Agreement since they applied cumulatively:[29] "all provisions of one treaty, the WTO Agreement."[30]

The AB concluded that Article XIX "describes certain circumstance which must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994."[31] The United States ran into trouble again on this matter when the panel in the United States - Lamb Meat found that the United States failed to "demonstrate as a matter of fact the existence of unforeseen developments."[32] The United States appealed the panel's more narrow finding that a written "reasoned conclusion" was necessary, that is one written out and dealing with the unforeseen development specifically. The AB found no indication in the USITC report that the issue of "unforeseen developments" had been raised at all. While granting that the USITC report considered changes in the type of lamb meat imported and of the substitutability of imported and domestic lamb, the AB observed "that the USITC report does not discuss or offer any explanation as to why these changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994.

It follows that the USITC report does not demonstrate that the safeguard measure at issue has been applied, inter alia, 'as a result of unforeseen developments'[33](emphasis in original). More noteworthy, the AB noted that conclusions it had drawn requiring demonstration of the unforeseen developments were not known to the USITC at the time they completed their investigation and proposed a remedy to the President. "The USITC's failure to address the existence of unforeseen developments, in the USITC report of April 1999, is not surprising, as the USITC is not obliged by any United States legislation, regulation, or another domestic rule, to examine the existence of unforeseen developments in its investigation into the situation of a domestic industry"

[29] The Panel distinguished between "unforeseen" and "unforeseeable," (Panel Report, paras. 7.22 and 7.24), a distinction that was not appealed.

[30] AB Lamb Meat Report, para. 69, WT/DS177/AB/R. "We reiterate: Articles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards." para. 70

[31] WT/DS98/AB/R, para. 85.

[32] WT/DS/177/AB/R, cited in para. 66.

[33] AB Lamb Meat Report, para. 73, WT/DS177/AB/R

(emphasis added).[34] The implication of this statement is, of course, that members will adjust their laws to comply with the new standards set forth by the WTO.

## VIII. Conclusion

Under the Agreement on Safeguards, if the measure is taken as the result of an absolute increase in imports and is consistent with the Agreement on Safeguards, retaliatory measures may not be invoked by exporting countries for the first three years of the safeguard measures. One hundred fifty safeguard measures had been taken in total during the period between the establishment of the GATT 1947 and 31 December 1994 (ninety six since 1970). They were invoked mainly by developed countries such as Australia, the European Union, and the United States. This is partly because tariff rates in developed countries had been bound at such a low level that it was virtually impossible to protect domestic industries through the use of tariffs.

The United States and other developed countries have applied safeguard measures less often than before the conclusion of the Uruguay Round. Provisions for invoking safeguard measures entailed a fairly weighty burden of proof that serious injury had occurred and because safeguards must be applied against all exporting countries, the United States and the European Union have turned to other more easily triggered measures that single out specific countries while giving competitive advantages to imports from other countries.

The potentially large benefits of safeguards, the additional trade and more efficient allocation of resources arising from greater tariff reductions, cannot easily be quantified. Safeguards are not providing insurance against macroeconomic shocks. This is surprising in light of the empirical research on anti-dumping. Benefits of safeguards likely outweigh their costs, that conclusion might be premature. While safeguards have been used relatively rarely to date, that could change. Perhaps the best argument against including safeguards in a trade agreement is the concern that they could evolve into a protectionist tool like the antidumping duty, a policy instrument that was conceived to serve an economically sound objective, but that today simply enriches import-competing producers at a high cost to consumers. Presence of a safeguard clause in the WTO agreement may have facilitated greater tariff reductions during the Uruguay Round. No evidence that safeguards are used more intensively by countries exposed to more aggregate economic uncertainty.

Despite various problems manifested in the course of implementing the current WTO safeguard mechanism, the rectification of the problems is not likely to come in the foreseeable future. Unlike other trade remedy issues, safeguard matters are not squarely addressed in the Doha Development Agenda. It leaves a much more difficult task to WTO Members than amending the current text of the Safeguard Agreement. In order to sustain the whole WTO trading system with structurally deficient safeguard system, the WTO Members should exert more sensible efforts to confine abusive attempts and develop reasonable standards for adequate implementation. After all, solutions for these problems are at the hands of the WTO Members.

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