

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.8 Safeguard Measures



UNITED NATIONS
New York and Geneva, 2003

NOTE

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

This Module has been prepared by Ms. Elisabetta Montaguti at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

The designations employed and the presentation of the material do not imply an expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or areas or of its authorities, or concerning the delimitations of its frontiers or boundaries. In quotations from the official documents and the jurisprudence of international organizations and tribunals countries are designated as reported.

The United Nations holds copyright to this document. The course is also available in electronic format on the UNCTAD website (www.unctad.org). Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is requested.

UNCTAD/EDM/Misc.232/Add.16

Copyright © United Nations, 2003
All rights reserved

TABLE OF CONTENTS

Note	ii
What you will learn	1
1. Introduction	3
1.1 <i>History</i>	3
1.2 <i>Current Situation</i>	5
1.3 <i>Outline of the SA</i>	5
1.4 <i>Scope of the Safeguard Regime</i>	6
1.5 <i>Test Your Understanding</i>	8
2. The Determination of “Increased Imports”	9
2.1 <i>Overview of Article 2.1, SA and Article XIX, GATT 1994</i>	9
2.2 <i>The Determination of “Unforeseen Developments”</i>	10
2.3 <i>The Investigation Period</i>	12
2.4 <i>The Assessment of the Increase in imports</i>	12
2.4.1 <i>The Absolute or Relative Nature of the Increase</i>	12
2.4.2 <i>Substantial Characteristics; Quantity and Duration of the Increase</i>	13
2.4.3 <i>Supplementary Characteristics, “and under such conditions”</i>	17
2.5 <i>Test Your Understanding</i>	18
3. The Determination of “Serious Injury”	19
3.1 <i>Overview of Article 4 of the SA</i>	19
3.2 <i>Definition of Serious Injury/ Threat of Serious Injury</i>	20
3.3 <i>Definition of the Domestic Industry</i>	20
3.3.1 <i>“Like” or “Directly Competitive” Products</i>	21
3.3.2 <i>The “Domestic Industry”</i>	23
3.4 <i>The Determination of “Serious Injury”</i>	23
3.5 <i>Threat of Serious Injury</i>	26
3.6 <i>Causation</i>	26
3.7 <i>Test Your Understanding</i>	29
4. Remedies	31
4.1 <i>Introduction</i>	31
4.2 <i>Definitive Measures</i>	32
4.3 <i>Duration of Definitive Safeguard Measures</i>	33
4.3.1 <i>The General Rules</i>	33
4.3.2 <i>Extensions</i>	33
4.3.3 <i>New Measures</i>	34
4.3.4 <i>Developing Countries</i>	34
4.4 <i>Provisional Measures</i>	34
4.5 <i>Non-Discriminatory Application of Safeguard Measures</i>	35
4.6 <i>Compensation and Suspension Equivalent Obligations</i>	36
4.7 <i>Formal Requirements of the Imposition of Safeguard Measures</i>	38
4.8 <i>Test Your Understanding</i>	38

5. The Domestic Procedures	41
5.1 Overview of Articles 3, 6 and 12 SA	41
5.2 Obligation to State Reasons	42
5.3 Procedural Rights – Confidential Information	43
5.4 Test Your Understanding	45
6. The WTO Procedures	47
6.1 The Role of the Committee on Safeguards	47
6.2 Dispute Settlement Procedures	48
6.2.1 Standard of Review	48
6.2.2 ‘New’ Claims Compared to those Raised in Domestic Proceedings	49
6.2.3 Treatment of Confidential Information	49
6.3 Test Your Understanding	50
7. Developing Country Members	51
7.1 Article 9.1 of the SA	51
7.2 Article 9.1, Panel Interpretation	51
7.3 Other Rights of Developing Countries in the Application of the SA	52
7.4 Developing Countries and the Application of the SA	52
7.5 Test Your Understanding	53
8. Case Study	55
9. Further Reading	57
9.1 Official Documents	58
9.2 List of Relevant Panel and Appellate Reports	58
9.2.1 Appellate Body Reports	58
9.3 Panel Reports	58

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 to face the request for compensation from the rest of the contracting parties, as allowed by Article XIX [infra, section 4.6], and moreover, in the perceived additional difficulty in imposing safeguard measures targeting only the main exporting countries (the so-called “selective” application of safeguard measures).

Attempts to enact supplementary safeguard rules during the “Tokyo Round” of multilateral trade negotiations (1979) to, *inter alia*, contain this phenomenon

⁶ *Appellate Body Report, Argentina – Footwear (EC), WT/DS121/AB/R, para. 94.*

⁷ Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade (*Hatter’s Fur*), 27 March 1951, CP 106, adopted October 1951.

⁸ See Analytical Index to the GATT, 1995, Vol. 1, pp. 539 ff.

did not succeed and no “Safeguards Code” existed until the establishment of the WTO. The SA thus represents the first supplementary safeguard discipline since 1947.

Thus, compared to the other trade defence rules (anti-dumping and countervailing duty rules), which started being supplemented in the late 1960s, safeguard rules are understandably less sophisticated. Some osmosis between the various trade defence rules has nonetheless resulted from dispute settlement interpretation under the WTO.

1.2 Current Situation

Given the issues arisen in the application of safeguards under the GATT 1947, an *Agreement on Safeguards* was negotiated during the Uruguay Round with the following objectives:⁹

- improve and strengthen GATT 1994
- clarify and reinforce GATT 1994, and specifically Article XIX (Emergency Action on Imports of Particular Products)
- re-establish multilateral control over safeguards and eliminate measures that escape such control
- enhance rather than limit competition on international markets.

Article XIX of GATT 1947 was carried forward into GATT 1994. As a result of the Uruguay Round, further safeguard rules were written in the *Agreement on Safeguards*, which forms an integral part of the *WTO Agreement*. Article XIX of GATT 1994 and the SA apply together. As clarified by the Appellate Body:

**Appellate Body
Report, Korea - Dairy**

...[t]he ordinary meaning of the language in Article 11.1(a) – “unless such action conforms with the provisions of that Article applied in accordance with this Agreement” – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards. Thus, 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 1994.¹⁰*

**With the exception of special safeguard measures taken pursuant to Article 5 of the Agreement on Agriculture or Article 6 of the Agreement on Textiles and Clothing.*

1.3 Outline of the SA

The SA is a rather short text, partly confirming or building on the provisions of Article XIX of GATT 1994 and partly developing entirely new rules. It covers three areas. Together with Article XIX:1 of GATT 1994, Articles 2

⁹ SA, Preamble.

¹⁰ Appellate Body Report, Korea – Dairy, para. 77

and 4 lay down the substantive requirements that must be shown to be met in order to adopt a safeguard measure. Fulfilment of such requirements must be assessed through an investigation procedure carried out by the authorities of the country seeking to impose a measure. Furthermore this procedure must be accounted for in a written document issued by the authorities at the end of the process. Both aspects are addressed by Article 3. Articles 5 to 9 lay down various conditions relating to the measures that may be taken to prevent or remedy serious injury or threat thereof. They have to be applied together with Article XIII of the GATT 1994. In addition, Article 8 provides for mutually agreed trade compensation by the WTO Member taking the measure to those affected by the measure.

Article 12 sets out the procedural requirements that must be complied with by a WTO Member seeking to take a safeguard measure. Article 13 establishes multilateral surveillance over the implementation of the agreement by setting up a Committee on Safeguards under the authority of the Council for Trade in Goods.

1.4 Scope of the Safeguard Regime

Article XIX of the GATT 1947 applied to all goods. In practice, however, as for textile and agricultural products trade was largely restrained (in the latter case by the bilateral agreements under the *Multifibre Arrangement*), the need for action under Article XIX was somehow reduced.

In the WTO system, GATT 1994, as strengthened and modified by the SA, remains the generally applicable safeguard regime. However, special regimes are provided for in the *WTO Agreement*, notably in:

(1) *Agreement on Agriculture* (AA)

Article 5 of the AA provides for a special transitional regime for certain agricultural products. This regime will eventually expire once the reform of support and protective measures to agricultural products referred to in Article 20 of the AA is completed. This regime is applicable to the agricultural imports covered by the AA, for which the restraining WTO Member has “tariffed” (i.e. converted into tariffs written in its schedule) certain restrictive measures (referred to in Article 4.2 of the AA) **and** for which the mention “SSG” is included in its tariff schedule next to the other import and production conditions. For such products, a special safeguard measure (SSG) may be imposed if (1) the volume of imports during a year exceeds a certain trigger level **or** (2) the price at which imports may enter falls below a certain trigger price. The measure may only take the form of a tariff duty, to be applied until the end of the year in which it has been imposed.

Imports which have not been designated as “SSG” can still be restrained under the *Agreement on Safeguards* if the relevant conditions are met.

(2) *Agreement on Textiles and Clothing (ATC)*

Article 6 of the ATC provides for a transitional safeguard regime for certain textile products, which will expire in 2005 as will the rest of the ATC. It is applicable to products covered by the ATC, which the restraining Member has not yet “integrated into GATT 1994” (that is, not yet accepted to subject to the more liberalizing GATT provisions). For such products, a transitional safeguard measure may be imposed if (1) there is an increase in import quantities (2) causing or threatening to cause (3) serious damage to the domestic industry producing like or directly competitive products.

Safeguard measures under this clause are applied to selected products and on a Member-by-Member basis (i.e. they are “selective”). Such measures may be applied for a maximum of three years.

Given the similarity in wording with the provisions of the SA, interpretations provided in respect of ATC safeguard provisions have influenced the interpretation of the provisions of the SA.¹¹

(3) *Protocol of Accession of the People’s Republic of China*¹²

China’s Accession Protocol provides for a transitional safeguard clause that other WTO Members can rely upon to limit imports from China. This clause is applicable for 12 years after China’s accession.

Accordingly, a transitional safeguard measure may be imposed if (1) imports from China increase in quantities or (2) enter in such conditions (3) as to cause or threaten to cause (4) market disruption to the domestic producers of like or directly competitive products.

In case a measure is taken under this clause by an individual WTO Member, other WTO Members can in turn restrict imports of Chinese origin if they show that such a safeguard measure taken by the first WTO Member causes or threatens to cause significant diversions of trade into their markets.

(4) *General Agreement in Trade in Services (GATS)*

Obviously, services are not covered by either the GATT 1994 or the SA, which both form part of the goods regime in the *WTO Agreement*.

¹¹ Three panel reports interpreting Article 6 of the ATC have been issued so far, all of which were appealed: Panel Report, United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear from India (“US – Underwear”), WT/DS24/R, adopted 25 February 1997; Appellate Body Report, WT/DS24/AB/R, adopted 25 February 1997; Panel Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India (“US – Shirts and Blouses”), WT/DS33/R, adopted 23 May 1997; Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997; Panel Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (“US – Cotton Yarn”), WT/DS192/R, 31 May 2001; Appellate Body Report, WT/DS192/AB/R, 8 October 2001).

¹² WT/ACC/CHN/49, Section 16 of the Protocol of Accession, p. 80. A safeguard-type mechanism for textile products subject to the ATC regime is also provided for in the same document (Section 11 of the Working Party Report, p. 45).

At the time of writing, services do not have a specific multilateral safeguard regime. However, Article X of the GATS provides for the WTO Members to negotiate such a regime. The deadline set for completion of such negotiations was set at three years after the entry into force of the *WTO Agreement*. It was subsequently extended and negotiations are currently going on.

1.5 Test Your Understanding

- 1. A WTO Member receives a complaint for safeguard protection from the domestic industry producing certain agricultural products. The WTO Member has reserved no right to impose special safeguard measures in its agricultural schedules. Can it still follow up its industry's request?**
- 2. Can coffee producers in a WTO Member bring a safeguard complaint against increased imports of tea from another WTO Member?**
- 3. If Country A imposes a safeguard measure due to the increase in imports from China, can the neighbouring country B impose a similar safeguard measure? If so, what shall country B show to justify such a measure?**

2. THE DETERMINATION OF “INCREASED IMPORTS”

In this section, the determination of whether imports have increased in accordance with Article XIX of the GATT 1994 and Article 2.1 of the SA will be reviewed.

For a determination of “increased imports” under the WTO safeguard regime, not any import increase is sufficient. The provisions set out two main conditions, which must be met for the increased imports to justify the imposition of safeguard measures. Firstly, such increase must have occurred “as a result of unforeseen developments and of the effect of the obligations incurred by” a WTO Member. Secondly, imports should enter into the importing country “in such increased quantities and under such conditions” as to cause or threaten serious injury to the domestic industry.

2.1 Overview of Article 2.1, SA and Article XIX, GATT 1994

The characteristics that import trends must possess to justify a safeguard measure are described in Article 2.1 of the SA.

Article 2.1, SA

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 ...

Article 2.1 must then be read together with Article 4.2 of the SA, which sets out the operational requirements for determining whether the conditions identified in Article 2.1 exist. Article 4.2(a) requires in relevant part that:

Article 4.2, SA

...[i]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate (...) in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports ...

Article 2.1, SA

Two requirements must be fulfilled under Article 2.1. The first one is a quantitative requirement, while the second is more generally related to the “conditions” under which foreign products come into the territory of the Member seeking to take a safeguard measure.

The link with Article 4.2(a) also suggests that to be relevant under Article 2.1, import increases must have such characteristics as to cause or threaten to cause serious injury.¹³

Article 2.1 of the SA essentially reproduces and confirms the language of Article XIX:1 of the GATT 1994. There is one notable exception, namely the clause in Article XIX:1(a) requiring that the increase in imports occurs as a result of “unforeseen developments” and “of the effect of the obligations incurred by a contracting party”:

Article XIX:1(a)
GATT 1994

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 ...

2.2 The Determination of “Unforeseen Developments”

Increased imports (just as increased exports) are the normal and indeed expected consequence of trade liberalization – for example of tariffs reductions. Accordingly, it is not any increase in imports, but only increases in imports qualified by certain conditions and circumstances that authorize the adoption of import safeguards. The first condition is set out in Article XIX:1 of GATT 1994, providing that the increase in imports must result from “unforeseen developments”.

This clause is not further defined or illustrated by examples either in Article XIX of the GATT 1994 or in the SA. Its broad language is presumably meant to cover a wide range of unexpected circumstances, which by definition is difficult to anticipate precisely in the abstract. The clause was first interpreted in the *US - Hatters’ Fur* case. The Working Party observed that

**Working Party, US –
Hatter’s Fur**

...the term ‘unforeseen development’ 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...¹⁴

In the WTO era, the Appellate Body has also had several chances to interpret the clause. As a general matter, it considered that:

**Appellate Body
Report, Korea – Dairy**

...the ordinary meaning of the phrase “as a result of unforeseen developments” requires that the developments which led to a product being imported in such

¹³ Cf. Appellate Body Report, Argentina – Footwear (EC), para. 131.

¹⁴ Working Party Report, US – Hatters’ Fur, p. 10, para. 9.

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

*increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been “unexpected”.*¹⁵

*...[These] circumstances ... must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994...*¹⁶

In addition, in the *US –Lamb* case the Appellate Body clarified that the “demonstration” must be provided by the competent domestic authorities before taking the measure. This means that the measure itself must contain an express finding to this effect, otherwise its legal basis is flawed.¹⁷

What does this requirement mean in practice? So far, the only case where the “unforeseen developments” requirement was held to have been met is the *US – Hatter’s Fur* case. The United States had argued that the change in hats fashion which had led to the increase in imports of felt hats and hat bodies was unforeseen, particularly in view of its magnitude. The Working Party agreed with the United States:

**Working Party, US –
Hatter’s Fur**

*...the fact that hat styles had changed did not constitute an “unforeseen development” within the meaning of Article XIX”.*¹⁸

*... the effects of the circumstances indicated in the above, and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947.*¹⁹

In all other cases in which non-compliance with the “unforeseen developments” language has been claimed, the total lack of any prior demonstration or explanation on this point has been sufficient to uphold such claims without any in-depth evaluation.

The Appellate Body has also had the chance to pronounce on the language “as a result ... of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions”²⁰. It considered that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.

¹⁵ *Appellate Body Report, Korea – Dairy, para. 84; Appellate Body Report, Argentina – Footwear(EC), para. 91.*

¹⁶ *Appellate Body Report, Korea – Dairy, para. 85; Appellate Body Report, Argentina – Footwear (EC), para. 92.*

¹⁷ *Appellate Body Report, US – Lamb, paras. 72, 76.*

¹⁸ *Working Party Report, US – Hatters’ Fur, para. 11*

¹⁹ *Working Party Report, US – Hatters’ Fur, para.12*

²⁰ *Appellate Body Report, Korea – Dairy, para. 84; Appellate Body Report, Argentina – Footwear (EC), para. 91.*

2.3 The Investigation Period

“investigation period”

Analysis of increased imports by domestic authorities assumes that such authorities select a so-called “reference period” or “investigation period” (“IP”), that is, a time span prior to the determination whose import trends will be studied. The SA contains no indication as to how the reference period should be selected. Therefore, the WTO Members remain in principle free to select whatever period they deem appropriate notwithstanding the importance of the issue. Accordingly, the only guidance so far has been provided in panel and Appellate Body reports.

If it is one considered [**infra, section 2.4.2**] that the increase relevant under Article 2.1 must be “recent” and “sudden”, it may be argued that it should not go too far backwards, but should rather be the one for which the most recent import data are available.

It may also be noted that, in practice, the reference period for examination of the import trends tends to coincide with that for the examination of the “serious injury” to the domestic industry producing like or directly competitive products [**infra, section 3**]. This contrasts with the practice in anti-dumping investigations, where two reference periods are clearly distinct.

2.4 The Assessment of the Increase in imports

Article 2.1 SA

The increase in imports, which is relevant under Article 2.1 of the SA, may be assessed either in absolute terms (for example, an increase by tons or units of imported products) or in its magnitude relative to domestic production of like/directly competitive products. A determination of “increased imports” raises several questions:

- (1) how much must imports have increased?
- (2) besides an increase in quantities, is an increase in value also relevant?
- (3) over which time span?

Each of these questions is addressed below.

2.4.1 The Absolute or Relative Nature of the Increase

“absolute increase”

Absolute increases and relative increases are two different situations and do not necessarily coexist. For example, it may happen that in an exporting WTO Member, production increases, or simply a larger share of the production, becomes available for export. This may result in a higher quantity of imports into another WTO Member without simultaneously also leading to a relative increase, if the importing Member’s domestic production also increases.

“relative increase”

Conversely, there may be cases where the quantity of imports actually entering the border remains constant, but because domestic production shrinks, the

ratio between imports and domestic production results in a higher figure. Assume for example that in 1999 imports into X amount to 100t and domestic production amounts to 200t. The import-to-domestic-production ratio is therefore 1:2 or 0.5. If in 2000 imports remain 100 t, but domestic production falls down to 150t, the ratio is 1:1.5, or 0.66. There will thus have been a 0.16 increase in imports *relative to* domestic production without, however, one extra import entering the importing Member's territory. Depending on the magnitude of the change in ratio, this type of development may be sufficient to fulfil the "increased imports" requirement in Article 2.1 of the SA.

Under Article 2.1 of the SA, absolute imports and relative imports are alternative conditions. Accordingly, in order to meet the "increased imports" requirement it is sufficient that one form of increase has occurred. Thus, for example, in *US – Line Pipe*, the panel considered that even if it had found that imports of line pipe into the United States had not increased in absolute terms, its conclusion that there had been "increased imports" consistent with the SA would have been supported by the fact that imports had increased *relative to* domestic production.²¹

It should be noted that while the presence of an absolute increase or a relative increase are equally relevant to meet Article 2.1, a difference in the application of Article 8.3 of the SA may result depending on the type of increase [infra, section 4].

In *Argentina – Footwear (EC)*, the Panel considered that, since the wording of Article 2.1 of the SA refers to quantities, the analysis of domestic authorities and panel review must focus on quantities rather than value.²²

2.4.2 Substantial Characteristics; Quantity and Duration of the Increase

Two main questions arise in connexion with the requirement that imports have increased. The first is "how much increased?", *i.e.* the volume of the increase. The second question to be answered is "over which time span?" or rather the duration of the increase. A first general response to both questions was provided by the Appellate Body in *Argentina – Footwear (EC)*:

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

*...the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".*²³

"quantity"

A first answer to the question of relevant quantity is indirectly provided by the Appellate Body's clarification in *Argentina – Footwear (EC)*. Accordingly,

²¹ Panel Report, *US – Line Pipe*, WT/DS202/R, para. 7.211.

²² Panel Report, *Argentina – Footwear (EC)*, WT/DS121/R, para 8.152.

²³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

the increase must be “sharp”, a term confirming that the *magnitude* of the increase as such is important to an “increased imports” determination. In addition, the term “sudden” suggests that the relevant increase must take place over a relatively short time span.

No method to assess the increase in imports is set out in the SA. Reports so far have clarified that both the *rate* and the *amount* of the increase in imports (in absolute and relative terms) must be evaluated. This further entails that the competent authorities are required to consider the *trends* in imports over the period of investigation, rather than just comparing the situation of imports at the beginning and at the end of the reference period (the so-called “end points” of the period).²⁴

As a practical example, a panel found that the “recent, sudden and sharp” increase requirement was met in a case where (1) imports had risen (in absolute terms) from 124 to 177 million pounds, with the highest increase occurring towards the end of the reference period, and (2) the ratio of imports to production had risen from 100.6 per cent to 145.4 per cent at the end of the reference period.²⁵

“duration”

With regard to the second question of the duration of the increase, some guidance is indirectly provided by the Appellate Body’s recognition that the increase must be “recent” and also that it must be “sudden”.

The requirement that the increase in imports must be sudden and recent is understandable if it is borne in mind that the adoption of safeguard measures is supposed to respond to an “emergency” situation in the importing WTO Member.²⁶ When a trend of increased imports is observed for quite a long time, it can hardly be termed as “sudden”. In such a case, it is legitimate to infer that the problem is in fact a structural one, not one arising from an unexpected and emergency situation, and therefore not suitable for being redressed by an “emergency” measure.²⁷ On the other hand, if the increase in imports stopped well before the initiation of the investigation, the emergency is likely to have disappeared. It may further be inferred that the domestic industry has had the time to adjust to the new market situation, and thus temporary safeguard relief is not warranted.

The fact that historical import trends must be assessed assumes the selection of an appropriate IP, that is a period in the past whose import data will be used as the basis for the determination.

WTO Members have discretion as to the choice of IP, providing that the selected period complies with the general indications given by the AB as to the recent and sudden character of the increase. However, the choice of IP may have

²⁴ Cf. *Appellate Body Report, Argentina – Footwear (EC)*, para. 126.

²⁵ *Panel Report, US - Wheat Gluten*, para. 8.32 (not appealed).

²⁶ *Appellate Body Report, Korea – Dairy*, para. 86; *Appellate Body Report, Argentina – Footwear (EC)*, para. 93.

²⁷ Cf. also *Panel Report, Argentina – Footwear (EC)*, para. 8.162.

considerable implications. In particular, in some cases the choice of the beginning of the period (the “base year”) may be decisive as to whether the determination of “increased imports” over the entire IP will be affirmative or negative. Assume the following example:

Total Imports of widgets into X, 1991-1996

Year	Quantity (million items)
1991	8.86
1992	16.63
1993	21.78
1994	19.84
1995	15.07
1996	13.47

The import data above show mixed trends. On the one hand, if one looks at the end points of the IP, the overall 1991-96 period shows an increase in quantity at the end of it ($13.47 > 8.86$). On the other hand, within the period selected the increase only occurs in the first two years (between 1991 and 1992, and between 1992 and 1993), while the last three years (the most “recent” period) show a decline.

However, the choice of the base year (1991) has an influence on whether the end-point-to-end-point comparison shows an increase or a decrease. More specifically, if 1992 rather than 1991 is taken as the base year, one must conclude that total imports declined even based on an end-point-to-end-point comparison ($13.47 < 16.63$). Thus, only if 1991 is taken as the base year can an absolute increase in total import volume be found.²⁸

Accordingly, observing whether an affirmative determination would be “sensitive” to the change in the years used as the end-points is quite important, as it might confirm or reverse the apparent initial conclusion. If changing the starting-point and/or end-point of the investigation period by just one year entails that the comparison between end-points shows a decline in imports rather than an increase, this calls into question the conclusion that there are increased imports.

If an increase in imports is really present, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period. That is, the two analyses should be mutually reinforcing. Where, as in the example, their results diverge, this at least raises doubts as to whether imports have increased in the sense of Article 2.1.²⁹

²⁸ Panel Report, Argentina – Footwear (EC), para. 8.154.

²⁹ Appellate Body Report, Argentina – Footwear(EC), para. 129.

Assuming that a change in the base year does not affect the determination, an additional question that arises concerns the relative importance of *trends at the end of the reference period* compared to opposite trends during other parts (or the whole) reference period. In other words, *what if imports decreased towards the end of the reference period but had overall increased at the end of the period, compared to the beginning of it?*

Here again, there is no single definitive answer, and a case-by-case examination appears necessary. The general decisive criterion appears to be whether the countertrend which is visible at the end of the reference period is merely temporary, or it is rather sufficiently long term within the selected reference period to cast doubts as to the reality of the increase. This was the opinion of the Panel in *Argentina – Footwear (EC)*:

**Panel Report,
Argentina –
Footwear(EC)**

We too believe that the question of whether any decline in imports is “temporary” is relevant in assessing whether the “increased imports” requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)’s requirement that “the rate and amount of the increase in imports” be evaluated. In our view this constitutes a requirement that the intervening trends of imports over the period of investigation be analysed. We note that the term “rate” connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred.³⁰*

** We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in “such increased quantities” (emphasis added). Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end-points of an investigation period, but for the entirety of that period.*

How is this general statement (which was upheld by the Appellate Body) applied in practice?

In the *Argentina - Footwear (EC)* case, the panel noted that a 38 per cent import decline observed over the last three years of a five-year reference period was of such a magnitude as to be considered a long term rather than a “temporary” reversal of the increasing trend.

Another panel considered that the Article 2.1 requirement was met notwithstanding the fact that towards the very end of the reference period (the last year over a five and a half-year IP) imports had clearly decreased.³¹ This finding was not reviewed by the Appellate Body.

Also, it must be borne in mind that according to the Appellate Body the increase

³⁰ Panel Report, *Argentina – Footwear*, para.(EC) 8.159.

³¹ Panel Report, *US – Line Pipe*, para. 7.214.

in imports must be “recent” and “sudden” to be relevant under Article 2.1. Therefore, for example, the Appellate Body considered a five-year reference period to be *too long*, particularly as import trends were analyzed over that entire period without special focus on the end of that period, i.e. the *most recent* import trends. It considered that:

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

*...the use of the present tense of the verb phrase “is being imported” in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years. * In our view, the phrase “is being imported” implies that the increase in imports must have been sudden and recent.³²*

**The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states “would seem to indicate that, whatever the starting-point of an investigation period, it has to end no later than the very recent past.” (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past.*

On the other hand, the Appellate Body has recognized that, for the purposes of assessing “serious injury”, the reference period should be sufficiently long to allow drawing appropriate conclusions on the state of the domestic industry.³³ Otherwise, for example temporary or cyclical downturns in the domestic industry’s performance may risk being incorrectly taken to indicate a situation of serious injury.³⁴

2.4.3 *Supplementary Characteristics, “and under such conditions”*

Article 2.1 of the SA also contains the wording “and under such conditions”. The exact meaning of this requirement has not been entirely clarified. In *US-Wheat Gluten*, the Appellate Body interpreted the phrase “under such conditions” (which it considered to be “context” to the provisions of Article 4.2 of the SA on causation [*infra*, section 3]). The Appellate Body considered that Article 2.1’s reference to the “conditions” under which imports come is, in fact, a reference to the conditions in the marketplace *in the importing country*. It further inferred that the term “conditions” is a “shorthand reference to the ... factors [other than increased import quantities] listed in Article 4.2(a), which are relevant to assess the overall state of the domestic industry.³⁵

The Appellate Body did not apply its interpretation of the clause “under such conditions” to the case before it. If it must be inferred from the Appellate

³² Appellate Body Report, Argentina – Footwear(EC), para. 130.

³³ Appellate Body Report, US-Lamb, footnote 88, referring to the reference period for assessment of injury.

³⁴ Appellate Body Report, US-Lamb, para. 138.

³⁵ Appellate Body Report, US – Wheat Gluten, paras. 76-78.

Body's statements that the clause is *exclusively* related to the conditions on the *importing* market and of the domestic industry, which conditions also need to be analyzed under Article 4.2(a) [*infra*, section 3], one may wonder whether this clause really constitutes an additional requirement to the ones set out in Article 4.2(a). The Appellate Body has however not expressly ruled out that the clause might also refer to other conditions than those present on the importing market.

2.5 Test Your Understanding

1. **A company files a petition for safeguard relief and argues that because of an international financial crisis, which has struck many WTO Members with consequent high depreciation of their currencies, domestic production of such countries is bound to be massively exported. Is this sufficient to warrant an affirmative determination of “increased imports”**
2. **A company files a petition for safeguard relief arguing that, because of the removal of a balance-of-payment measure restricting the importation of a given product, it is anticipated that imports of such products will dramatically increase. Is this sufficient to warrant an affirmative determination of “increased imports”?**³⁶
3. **Imports of widgets into country X start massively to increase in 1997, with a 30 per cent increase over the entire year. In 1998 there is a further increase of one per cent, and so in 1999, while in 2000 imports decrease by one per cent each year. Assume domestic production remains constant over the 1997-2000 period. In 2001 a safeguard investigation is conducted and, relying upon the 1997-2000 data, an “increased imports” finding is made. Is this consistent with Article 2.1?**
4. **In 1998-2001 imports of widgets into country X increase by 5 per cent each year (all compared to the 1997 volume). Assume domestic production remains constant over the 1998-2001 period. Can a finding of “increased imports” consistent with Article 2.1 be made?**
5. **In 1998-2001 imports of widgets into country X increase by 5 per cent each year (all compared to the 1997 volume). Assume domestic production remains constant over the 1998-2001 period. However, in 2000 and 2001 the value of these imports on the domestic market increases. Does the answer to question 4 change in this case?**

³⁶ Cf. Panel Report, Argentina – Footwear(EC), paras.8.163-164.

3. THE DETERMINATION OF “SERIOUS INJURY”

The determination of injury consists of an assessment that the increased imports have caused or threatened to cause serious injury to the domestic industry producing the like or directly competitive product.

The presence of serious injury or threat thereof to the domestic industry as a result of the increased imports is a major substantive requirement for the imposition of a safeguard measure. A finding that the domestic industry is suffering or is threatened with serious injury requires a positive answer to the following main questions:

- (1) what is the domestically produced product which is “like” or “directly competitive” to the imports under investigation?**
- (2) which “domestic industry” is producing such a product?**
- (3) can the situation of the domestic industry be described as one of “serious injury” or of “threat of serious injury”?**
- (4) is this situation caused by imports?**

Each of these questions is addressed below.

3.1 *Overview of Article 4 of the SA*

Article 4.1 provides the definitions of “serious injury” and of “threat of serious injury”, as well as elements to identify the “domestic industry”.

Article 4.2(a) provides that the injury assessment must be based on the evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the domestic industry situation (the so-called “injury factors”). It then lists a series of such factors, all of which must at a minimum be evaluated by domestic authorities ((1) rate and amount of the increase in imports of the product concerned in absolute and relative terms; (2) share of the domestic market taken by increased imports; changes in the level of (3) sales, (4) production, (5) productivity, (6) capacity utilization, (7) profits and losses, and (8) employment). For threat of serious injury some additional indications are contained in Article 4.1(c), providing that a threat determination must be based on facts and not on conjecture or remote possibility.

Article 4.2(b) lays down the causation requirement, which is twofold. On the one hand, a demonstration of the causal link between increased imports and serious injury is required. On the other hand, it is also required that any injury caused by factors other than the increased imports must not be attributed to such imports.

3.2 Definition of Serious Injury/ Threat of Serious Injury

“serious injury”

In order for a safeguard measure to be lawfully taken, increased imports fulfilling the requirements of Article 2.1 of the SA must have caused serious injury or threat of serious injury to the domestic industry. These terms are defined in Article 4.1 of the SA.

Article 4.1(a) defines “serious injury” as

Article 4.1(a), SA

...a significant overall impairment in the position of a domestic industry;

In addition, Article 4.1(b) of the SA provides that “threat of serious injury”

Article 4.1(b), SA

...shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility;

As a general matter, the standard of “serious injury” built in the SA has been recognized by the Appellate Body to be “very high” (“exacting”),³⁷ and in particular to be stricter than the “material injury” standard in the *Anti-Dumping Agreement*.³⁸

In view of the definitions set out in Article 4 of the SA, before concluding that the situation of the domestic industry is such as to amount to “serious injury” or “threat of serious injury”, three steps must be completed: (1) identifying the domestic products which are “like” or “directly competitive” to the imports under investigation, (2) identifying the industry producing such products, (3) assessing a “significant overall impairment” of the domestic industry conditions (or of a threat thereof in the case where the domestic authorities rely on the threat of serious injury).

3.3 Definition of the Domestic Industry

Article 4.1(c) of the SA provides two criteria to identify the relevant “domestic industry”. First, it defines the domestic industry as the producers making products, which are “like” or “directly competitive” to the imports targeted by the investigation. Second, it adds that the serious injury must be assessed with respect to either the whole of such domestic industry, or to that part thereof which amounts to a “major proportion”.

³⁷ Appellate Body Report, US – Wheat Gluten, para. 149.

³⁸ Appellate Body Report, US – Lamb, para. 124.

3.3.1 “Like” or “Directly Competitive” Products

The first criterion laid down in Article 4.1(c) to identify the domestic industry is product-centred. Although mention is made of “producers”, this term is immediately qualified by a reference to the particular products that must be produced by the relevant industry: only those producers making products that are “like or directly competitive” to imports form part of the domestic industry. Domestic authorities enjoy discretion as to the product scope of safeguard investigations, that is, as to which foreign products they investigate. However, once the basic choice as to the product scope is made, it determines the scope of their analysis of the domestic market.

Accordingly, the first step in determining the scope of the domestic industry is the identification of the domestic products which are “like or directly competitive” to the imported product. Only when those products have been identified is it possible to identify their “producers”.³⁹ This in turn raises the question of what are the products, which are “like”, or “directly competitive” to the investigated imports.

Unlike for “serious injury” or for “domestic industry”, the terms “like” and “directly competitive” are no further defined in the SA. So far, the Appellate Body has hardly had any chance to interpret those terms as they appear in Article XIX of the GATT 1994 and in Articles 2 and 4 of the SA.

The Appellate Body has however had a chance to rule generally on the meaning of those terms in the WTO provisions, where they appear several times. While it has admitted that the exact scope of these terms (particularly of the term “like product”) may vary (like an “accordion”) depending on the particular provision in which it appears, it has pointed to certain common criteria which apply to decide whether, in a given case, domestic and imported products are “like” or “directly competitive”:⁴⁰

- First, the “like products” category is a “subset” of the broader group of “directly competitive” products. In other words, only a part of products, which are directly competitive, is also “like”.
- Second, the notion of “likeness” is mainly focused on the physical characteristics of the products under comparison. “Like products” share properties, nature, qualities, and end uses. Their falling under the same tariff heading for classification purposes may also be revealing, in the case of a tariff schedule, which is sufficiently detailed. Thus, for example, white spirits have been found to be “like”, whereas white and brown spirits have been considered to be directly competitive. More recently, the Appellate Body has clarified that a difference in physical characteristics between two

³⁹ *Appellate Body Report, US – Lamb, para. 87.*

⁴⁰ *Appellate Body Report, Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R-11, adopted 1 November 1996, DSR 1996:I, 97 (pp. 20 ff.)*

similar products, which has a different impact on human health, may cast doubts on the “likeness” of such products.⁴¹

- Third, “direct competitiveness” focuses on “the marketplace”, that is on the competitive conditions on the importing country, starting from elasticity of substitution between the imports and the allegedly directly competitive domestic products.⁴² The way in which the domestic and imported products under comparison are advertised and consumed on the importing market is also relevant.

With regard to more specifically the notion of “like products” in the SA, there has been only one challenge to the findings of the domestic authorities concerning the likeness or the direct competitiveness of the domestic and imported products. In reviewing this challenge, the Appellate Body has excluded the contention that certain domestic products can be “like” investigated imports simply because they are in a “*continuous line of production*” to the domestic products which are “like” on the basis of the criteria outlined above.⁴³ This exclusion is unqualified. In particular, it is not conditional on whether or not separate data are or can be collected by domestic authorities for the genuine “like product” industry (unlike in the case of anti-dumping investigations).

Second, the Appellate Body has ruled out that domestic products can be considered “like” investigated imports because they are manufactured by producers who have a “*substantial coincidence of economic interests*” with that of the domestic producers of the genuinely “like” domestic products.⁴⁴

Third, the Appellate Body has excluded generally that *production structures* may have an impact on deciding whether two products are “like” or “directly competitive”. Thus, for example, the fact that a domestic producer, who makes, *inter alia*, products which are “like” the imports, has a vertically integrated structure, does not warrant the conclusion that the other products it makes through that vertically integrated structure are also “like” or “directly competitive” to the imports.⁴⁵

The rationale of these Appellate Body’s findings is that the focus of the SA is on products, not on production processes.

Under Article 2.1 of the SA, the domestic industry is made solely of the producers of the “like” or “directly competitive” products.⁴⁶ A safeguard measure is imposed on a specific “product”, namely, the imported product under investigation, and only if that specific imported product is having the required injurious effects on the domestic industry producing the like or directly

⁴¹ *Appellate Body Report*, European Communities – Measures Affecting Asbestos and Asbestos Containing Products (EC –Asbestos), *WT/DS135/AB/R*, adopted 5 April 2001, para. 118.

⁴² *Appellate Body Report*, Japan – Alcoholic Beverages II, (p. 25.)

⁴³ *Appellate Body Report*, US – Lamb, para. 90.

⁴⁴ *Appellate Body Report*, US – Lamb, paras. 89-90.

⁴⁵ *Appellate Body Report*, US – Lamb, para. 94.

⁴⁶ *Appellate Body Report*, US – Lamb, para. 81.

competitive products. It would thus be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects of imports on domestic producers of products that are not like or directly competitive.

3.3.2 *The “Domestic Industry”*

The other criterion laid down in Article 4.1(c) to define the “domestic industry” is essentially a quantitative one, and focuses on the number and the representative nature of the producers constituting the domestic industry covered by the investigation. It is the requirement that the serious injury be found to occur either to the totality of the domestic producers or at least to a major proportion thereof.

There is, however, no clear indication as to what can constitute a “major proportion” of the domestic industry for the purposes of Article 4.1(c). As a consequence, the evaluation of whether this criterion is met is necessarily a case-by-case one, which depends on the specific circumstances of each investigation.

Nonetheless, the Appellate Body has at least clarified that the collection of data relating to the so called “injury factors” in Article 4.2(a) need neither cover the totality of the producers of the like or directly competitive products, nor even a major proportion. A serious injury finding can also be based on data collected for a part of the “major proportion”, provided that it is sufficiently representative.⁴⁷ The possibility of employing “statistically valid samples” has impliedly been recognized by the Appellate Body.⁴⁸

3.4 *The Determination of “Serious Injury”*

Once the like or directly competitive domestic products and the industry producing them are identified, the situation of such industry needs to be investigated to assess whether it corresponds to a situation of “serious injury” or of “threat of serious injury”. As regards specifically serious injury, Article 4.2(a) of the SA provides that

Article 4.2(a) SA

...the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. Article 4.2(a)SA

⁴⁷ Appellate Body Report, US – Lamb, paras. 91-92, 132.

⁴⁸ Appellate Body Report, US – Lamb, para. 132.

The list above, which is not exhaustive, comprises the so-called “injury factors”.

“injury factors”

The domestic authorities must conduct a substantive evaluation of the “bearing” or the “effect” that such factors have on the situation of the domestic industry. By conducting such a substantive evaluation of the relevant factors, competent authorities are able to make a proper overall determination as to whether the domestic industry is seriously injured or threatened with such injury.⁴⁹

The Appellate Body has extended to the safeguard sector its finding, made in the Thailand - H-Beams⁵⁰ case in connexion with the review of an anti-dumping measure, that the arguments reviewed are not confined to those raised in the proceedings before the domestic authorities:

Appellate Body Report, US-Lamb

...The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute.⁵¹ Appellate Body Report, US - Lamb

“formal aspect”

The examination of the injury factors by the domestic authorities has a formal and a substantive aspect.⁵² The formal aspect requires the domestic authorities to evaluate all relevant factors (and possibly relevant “other factors”).⁵³ Failure to account, in full or in part, for the trend in one of the relevant factors automatically results in a violation of Article 4.2(a).⁵⁴

The substantive aspect entails an evaluation and a reasoned and adequate explanation by the domestic authorities of how the facts support their conclusion that the domestic industry is suffering or is threatened with “serious injury”.⁵⁵

Likewise, panel review of safeguard measures entails a formal aspect and a substantive aspect. It should be noted that a claim under Article 4.2(a) might not relate at the same time to both the formal and the substantive aspect of the review. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.

Since the injury factors list is not exhaustive, it is possible that other, additional

⁴⁹ Appellate Body Report, US – Lamb, para. 104.

⁵⁰ Appellate Body Report, Thailand – Anti-Dumping Duties on Angels, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand - H-Beams), WT/DS122/AB/R, 12 March 2001, adopted 5 April 2001

⁵¹ Appellate Body Report, US – Lamb, paras. 112, quoting from Appellate Body Report Thailand - H-Beams, para.94

⁵² Appellate Body Report, US – Lamb, para. 103.

⁵³ Appellate Body Report, Argentina – Footwear (EC), para. 136; Appellate Body Report, US – Wheat Gluten, para. 55; Appellate Body Report, US – Lamb, para. 103.

⁵⁴ Panel Report, Korea – Dairy, paras. 7.58, 7.63, 7.68, 7.69, 7.75, 7.76, 7.78.

⁵⁵ Appellate Body Report, US – Lamb, para. 103.

“factors” may have an impact on the situation of the domestic industry and thus be relevant in a particular case. These other factors are often brought to the attention of the domestic authorities by responding exporters in order to show that a finding of serious injury is not warranted. They may either have a bearing on the interpretation of the listed factors, or have a relevance of their own.

For example, in calculating the profitability of the domestic industry, domestic authorities may be confronted with aggregated data also relating to different products of the same plants. Clearly, unless the costs and profits are allocated to the different production lines, there is a risk that the profitability performance for the like or directly competitive products may be biased by data relating to other products. Thus, the fact that “co-products” may result from the same broad production process, but have different costs, is one “other factor” which must be investigated and evaluated by the domestic authorities.

The Appellate Body has also clarified that domestic authorities do not have an unlimited open-ended duty to investigate all possible other factors.⁵⁶ However, if some element is brought to their attention, or if they have reason to suspect that some other factor may be relevant, they must investigate, evaluate and take into account such other factor, or explain why it is not relevant. This requirement to investigate on one's own volition suffers from an inherent limit, since complete control over the information available to domestic authorities may prove arduous, so may also be reviewing whether such authorities correctly examined the “other factors”.

It is not necessary for a finding of “serious injury” that all such factors - whether listed or not - show a declining trend for the domestic industry.⁵⁷ Thus, for example, declining capacity utilization and employment coupled with a marked increase in imports may be sufficient to justify a finding of serious injury even if profitability may still show a positive sign.

So far, panel review of how domestic authorities evaluated the injury factors has not been extremely sophisticated. The reason is presumably that the claims brought under Article 4.2(a) so far mostly related to measures which were clearly in violation of such requirements. Thus, for example, in the first dispute settlement proceeding brought under the SA (Korea - Dairy), several factors in the list had simply not been examined and accounted for by the domestic authorities in the measure under review.

It is not to be excluded that, as happened in other areas, some interpretations developed relative to dumping practice be imported into the safeguards practice also with respect to the analysis of the injury factors.

⁵⁶ *Appellate Body Report, US – Wheat Gluten, paras. 55-56.*

⁵⁷ *Appellate Body Report, US – Lamb, paras. 132, 144, 146.*

3.5 Threat of Serious Injury

Article 4.1 (b)

The analysis required for a finding of “threat of serious injury” is largely similar to that required for a “serious injury” finding. Article 4.1(b) of the SA, when defining threat of serious injury, refers to Article 4.2, regulating determinations of actual “serious injury”. The Appellate Body has underlined such similarity, recalling that the very high standard implied in the term “serious injury” must be borne in mind also when making a determination of “threat of serious injury”.⁵⁸ Some differences result, however, from the different focus of the two notions.

A determination of “threat of serious injury” is future-oriented,⁵⁹ in the sense that it is concerned with a future event. Furthermore, the materialization of serious injury in the future is not entirely sure.

However, under Article 4.1(b) such a determination must be based on facts, not on conjecture. Since facts relate to the present or past, there is a tension between the future oriented analysis, which ultimately calls for a degree of extrapolation about the likelihood of a future event, and the need for a fact-based determination.⁶⁰

Article 4.2 provides that it must be “clearly imminent”. The Appellate Body has interpreted such requirement in US-Lamb. The use of the term “imminent” has to do with the timing of the materialization, and it implies that the anticipated “serious injury” must be on the very verge of occurring.

The use of the term “clearly” indicates that there must be a high degree of likelihood that the threat will materialize very soon. Together with the requirement that a finding of serious injury must be based on facts, not on conjectures, it also relates to the factual demonstration of the existence of the threat, and it suggests that the imminence must be manifest.⁶¹

Another difference with the case of actual serious injury is that in the case of threat determinations, the most recent part of the investigation period is even more important, because it will provide the strongest indications of the future state of the domestic industry.⁶²

3.6 Causation

Apart from examination of all relevant “injury factors”, under Article 4.2(b) of the SA, a determination of the existence of “serious injury” requires a demonstration of “the causal link between increased imports and serious injury or threat”.

⁵⁸ Appellate Body Report, US - Lamb, para. 126.

⁵⁹ Appellate Body Report, US - Lamb, para. 136.

⁶⁰ Appellate Body Report, US - Lamb, para. 136.

⁶¹ Appellate Body Report, US - Lamb, para. 125.

⁶² Appellate Body Report, US - Lamb, para. 137.

“causal link”

The assessment of “causation” is a two-step process, since Article 4.2(b) establishes two distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a demonstration of the “existence of the causal link between increased imports of the product concerned and serious injury or threat thereof”. Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.⁶³ The latter is often referred to as the “non attribution” requirement.

In addition, under Article 4.2(c) of the SA domestic authorities are required to publish promptly a detailed analysis of the case under investigation and a demonstration of the relevance of the factors examined. This is a specification of the general requirement to set forth reasoned conclusions on all pertinent issues of fact and law in Article 3.1 [infra, section 5].

As a practical matter, the examination of the “injury factors” pursuant to Article 4.2(a) will often be relevant not only for the determination of “serious injury” or of “threat of serious injury”, but also for the determination of whether the injury has been caused by the increased imports or by the “other factors”. This link is acknowledged by the text of Article 4.2(b), which regulates causation but refers back to the “injury factors” mentioned in subparagraph (a).

The issue of causation is a difficult one and has given rise to considerable controversy. This has offered the Appellate Body an opportunity to clarify the interpretation of the requirement in Article 4.2(b). This interpretation has been summarized in its reports in US - Lamb and US - Line Pipe.

With respect to the first step of the causation analysis, the Appellate Body has indicated that to establish causation pursuant to Article 4.2(b), it is not necessary to show that increased imports alone - on their own - must be capable of causing serious injury.⁶⁴ It should be clarified that this finding only relates to the issue of whether causation exists between the increased imports and the situation of the domestic industry. As will be clarified below, it does not affect the question of the permissible extent of the safeguard measure.

“non attribution”

With regard to the “non-attribution” step, the Appellate Body has summarized the interpretation of Article 4.2 as follows:

**Appellate Body
Report, US-Lamb**

...In a situation where several factors are causing injury “at the same time”, a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors - increased imports - rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased

⁶³ Appellate Body Report, US - Line Pipe, para. 208.

⁶⁴ Appellate Body Report, US - Wheat Gluten, para. 70; Appellate Body Report, US - Line Pipe, para. 209.

imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.⁶⁵

In other words, domestic authorities must:

**Appellate Body
Report, US - Lamb**

...[ensure] that the injurious effects of the other causal factors...[are]...not included in the assessment of the injury ascribed to increased imports.⁶⁶

The Appellate Body also concluded that, since the domestic authorities are required to separate and distinguish the effects of “other factors” from those of increased imports, the authorities are required to identify:

**Appellate Body
Report, US - Line Pipe**

... “the nature and extent of the injurious effects of the known factors” as well as “a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the increased imports”.⁶⁷

The Appellate Body has further referred to the procedural obligation of competent domestic authorities to provide an explanation as regards their determinations. Building on such obligation, it concluded that:

**Appellate Body
Report, US - Line Pipe**

...to fulfil the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.⁶⁸

Thus, for example, if the domestic authorities recognize that certain “other factors” are actually causing injury to the domestic industry, they must also assess the injurious effects of these other factors and explain what injurious effects these had on the domestic industry. They cannot only state that a given “other factor” hurts the domestic industry, they must evaluate it and estimate how it may evolve or disappear.⁶⁹

Also, domestic authorities cannot replace an appreciation of what the effects of the “other factors” on the domestic industry are by simply comparing the

⁶⁵ Appellate Body Report, US - Lamb, para. 179.

⁶⁶ Appellate Body Report, US - Lamb, para. 185.

⁶⁷ Appellate Body Report, US - Line Pipe, para. 213.

⁶⁸ Appellate Body Report, US - Line Pipe, para. 217.

⁶⁹ Appellate Body Report, US - Lamb, para. 185.

impact of each of them to the impact of increased imports. A comparative test (weighing the relative impact of imports and of other factors against one another) is no substitute for the test set out in Article 4.2(b).⁷⁰

The Appellate Body also excluded that the mere assertion by the domestic authorities that injury caused by other factors has not been attributed to increased imports, with no further explanation, be sufficient to meet the requirement of Article 4.2(b). To decide whether domestic authorities have met the standard of Article 4.2(b) the investigation report, not the information provided in subsequent dispute settlement procedures, is relevant.⁷¹ This is consistent with the principle that the causal link must be demonstrated and accounted for by the domestic authorities before taking the measure.

3.7 Test Your Understanding

1. **The competent domestic authorities of country X open a safeguard investigation against imports of lamb meat. Many domestic producers of lamb meat directly grow the cattle that they then slaughter and sell as meat. Can domestic authorities incorporate the cattle-growing activity in the definition of domestic industry for the purpose of assessing “serious injury” or “threat of serious injury”? Should the answer change if the domestic authorities included growers, which did not also slaughter and sell their cattle as meat?**
2. **An administering authority, investigating injury allegedly caused by dumped tomato imports, determines that inventories are not a relevant injury factor for such a highly perishable product and therefore does not evaluate it in the definitive measure. Is this legal?**
3. **The investigating authority finds that the volume of imports has consistently decreased during the past three years. Can it nevertheless find that injury has been caused by imports?**
4. **Country X imposes a safeguard measure on imports of line pipe, on the basis of a threat finding. The line pipe market has cyclical trends, because it follows the trends in the oil industry (drilling and refining).**
 - (a) **During the last three years of the investigation period, imports decreased, both in absolute terms and relative to domestic production.**
 - (b) **During the last two years of the investigation period, imports increased, but this period corresponded to the peak in the industry's cycle, to which in the past a recession used to follow, irrespective of import trends.**

⁷⁰ Appellate Body Report, *US - Lamb*, para. 184.

⁷¹ Appellate Body Report, *US - Line Pipe*, para. 220; Appellate Body Report, *US - Lamb*, para. 184.

5. **Could the domestic authorities rely on an increase in imports in the (a) case? and (b)**
6. **The competent authorities of country X realize that part of the significant overall impairment to the domestic industry results from the fact that a longstanding subsidy to the production of products, which are directly competitive to the imports, was discontinued. However, they conclude that the impact of such event is not as important as that of the imports, and therefore make a finding of “serious injury”. Is this consistent with Article 4 of the SA?**

4. REMEDIES

This Section shows the detailed requirements relating to safeguard measures. It covers, inter alia, duration and types of permitted safeguard measures, as well as formalities in connexion with the imposition of measures and actions allowed to re-establish the balance of rights and obligations after the taking of such measures. Concepts such as “provisional measure”, “compensation” and “suspension of substantially equivalent concessions or obligations” are analysed.

4.1 Introduction

As “emergency” actions against “fair trade” [supra, section 1.1], safeguard measures are typically temporary import restraints to allow some “breathing time” to the domestic industry for adapting to a new market situation, including through appropriate restructuring.

In principle, the adoption of safeguard measures must be preceded by a thorough investigation to assess in particular that the conditions set out in Articles 2 to 4 of the SA are fulfilled. Exceptionally, however, the SA allows anticipation of safeguard relief through provisional measures (Article 6). Both definitive and provisional measures are addressed below.

Unlike in the case of anti-dumping or countervailing measures, safeguard measures are not typified, that is, they are not limited to particular types or forms. Indeed, Article XIX:1 of the GATT 1994 very generally refers to the possibility of suspending obligations or withdrawing or modifying tariff concessions granted under its provisions, and this for such time as may be necessary to prevent or remedy the serious injury inflicted or threatened by the imports under investigation. In practice, under GATT 1947 safeguard import relief in the proper sense of the term has mostly taken the form of increased tariffs (including tariff quotas), surcharges, quantitative restrictions, and import authorizations.⁷²

Article 11.1 (b)

The situation has not fundamentally been changed by the SA (which, in Article 11.1(a), refers back to Article XIX of the GATT 1994), except in one important respect. Article 11.1(b) has expressly prohibited the so-called “grey area” measures (“voluntary export restraints”, “orderly marketing arrangements” or similar measures, that is measures entailing limitations of exports by the exporting countries or sometimes by the exporters directly, rather than import limitations by the importing country). Existing “grey area” measures were to be phased out by 1999 at the latest.

⁷² See *Analytical Index to the GATT, 1995, Vol. 1, pp. 539 ff.*

4.2 Definitive Measures

Article 5.1 SA

Pursuant to the first sentence of Article 5.1 of the SA, all safeguard measures can be applied “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment of the domestic industry”.

This sentence has been interpreted in the sense that it does not require the competent domestic authorities to provide, at the time they impose a measure, a clear and specific justification as to how such measure is necessary (having regard to its scope, level and type) to prevent or remedy the serious injury and to facilitate adjustment of the domestic industry.⁷³ However, in case a measure is imposed without the substantive requirements of the SA being satisfied, in particular if the measure counters injury or threat thereof not caused by the imports found to have increased, the measure exceeds what is “necessary”. As a consequence, there is a rebuttable presumption (a “prima facie case”) that such measure violates the first sentence of Article 5.1.⁷⁴

Furthermore, if a Member chooses to provide safeguard relief in the form of a quantitative restriction, pursuant to the second sentence of Article 5.1, the measure must not reduce the quantity of imports below the level of a recent period (i.e. the average of imports in 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 other words, in this particular case a specific justification of the necessity of the measure at the time it is taken is required.⁷⁵

Article 5.2 (a) SA

As to quantitative restrictions, Article 5.2(a) also lays down specific rules applicable to the allocation of quotas between supplying countries. The Member intending to apply the measure may seek agreement of substantial supplying Members as to such allocation. In the absence of an agreement, the allocation should be based on the respective shares of the supplying Members over a previous representative period, adjusted so as to take account of special factors which may have affected or may be affecting the trade in the product concerned.

Article 5.2 (b) SA

The quota levels may be modulated differently from past market shares upon the importing Member showing good cause in accordance with Article 5.2(b) of the SA and with other substantive and procedural requirements. First, departure from Article 5.2(a) is only allowed if a measure is taken to remedy serious injury, not merely a threat. Second, prior consultations must have been held with the supplying Members. Third, the importing Member must show clearly to the Committee on Safeguards that (1) imports from certain Members have increased in disproportionate percentage compared to the overall increase in imports, (2) the derogation is overall justified, and (3) the

⁷³ Appellate Body Report, *Korea - Dairy*, para. 99; Appellate Body Report, *US - Line Pipe*, paras. 133-134.

⁷⁴ Appellate Body Report, *US - Line Pipe*, paras. 242-243, 261.

⁷⁵ Appellate Body Report, *Korea - Dairy*, para. 99.

conditions of such a departure are equitable to all suppliers of the product concerned. Last, a measure taken on this basis cannot last longer than four years.

Article 5.2 of the SA echoes Article XIII:2(d) of GATT 1994. The latter article, primarily aiming at quantitative restrictions, also applies to tariff quotas by virtue of the express extension to such measures in its paragraph 5. By contrast, in the absence of an express extension, the applicability of Article 5.1, first sentence and 5.2 of the SA to tariff quotas was ruled out in the US - Line Pipe case.⁷⁶ Accordingly, the allocation of tariff quotas taken as safeguard measures can only be challenged under Article XIII of the GATT 1994, not under Article 5.2 of the SA.

4.3 Duration of Definitive Safeguard Measures

Article 7.1 SA

In line with the nature of safeguard measures as emergency temporary relief to the domestic industry, several provisions are laid down in the SA to regulate duration.⁷⁷ Article 7.1 of the SA only allows safeguards “for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment”.

4.3.1 The General Rules

Article 7.4 SA

More specifically, the initial period of application of definitive safeguard measures must not exceed four years, including the duration of provisional measures, if applied (Articles 6 and 7.1 of the SA).

In addition, safeguard measures exceeding one year's duration must be progressively liberalized at regular intervals during the period of their application (Article 7.4 of the SA). If, moreover, the duration of the measure exceeds three years, the Member applying the measure must review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization.

For measures existing at the entry into force of the WTO Agreement, Article 10 provided for termination at the latest five years after such entry into force.

4.3.2 Extensions

The original duration of a definitive safeguard measure may be extended, but only if (1) such a measure continues to be necessary to prevent or remedy serious injury and (2) there is evidence that the domestic industry is adjusting (Article 7.2). These conditions are partly different from those set out in the first sentence of Article 5.1 of the SA for initial application. Since reference is made to the fact that the measure continues to be necessary, one must arguably

⁷⁶ Panel Report, *US - Line Pipe*, para. 7.75.

⁷⁷ Working Party Report, *US - Hatters' Fur*, p. 18, para. 50.

have regard to economic data relating to the period subsequent to the initial imposition of the measure. In addition, adjustment of the domestic industry must demonstrably have begun.

Article 7.3 SA

In the case of extension, the total period of application, including provisional measures, must in any event not exceed eight years (Article 7.3 of the SA).

If the period of application of a measure is extended, the extended measure shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized if exceeding one year in total.

4.3.3 New Measures

“cooling off period”

Not only is the duration of safeguard measures regulated by the SA. The SA also makes sure that the repeated application of safeguard measures with respect to the same product is limited. This is to avoid that temporary import protection is in practice turned into a permanent closure of the domestic market by way of a series of separate measures. Allowing reiterated safeguard measures on the same products would also circumvent the four-year and eight-year deadlines set out for initial application and extension of a (single) measure. This is why Article 7 of the SA also imposes a “cooling off” period after expiry of a measure before a new one can be applied to the same products.

In principle, a safeguard measure may not be applied again to a product until a period of time equal to the duration of the initial measure (or at least two years) has expired (Article 7.5 of the SA). However, if the first safeguard measure lasted no longer than 180 days, a new one may be applied to the same product if (1) at least one year has elapsed since the introduction of the first safeguard measure, and (2) the same product has not been the subject of a safeguard measure more than twice in the five-year period immediately preceding the introduction of the new measure.

4.3.4 Developing Countries

Article 9.2 SA

Article 9.2 of the SA allows developing country Members, as users of safeguard measures, additional flexibility as to the duration. Such Members may apply safeguard relief for a total of up to ten years, rather than eight as provided for in Article 7.3 of the SA. Furthermore, the “cooling off” period for applying a new safeguard measure on the same period is only half of the duration of the original measure (though the minimum two-year interval must be maintained).

4.4 Provisional Measures

Article 6 SA

The requirements for imposing provisional safeguard measures are set out rather summarily in Article 6 of the SA and have not yet been clarified through panel or Appellate Body interpretation. It is therefore not easy to comment and anticipate how they may be interpreted should provisional measures be reviewed in dispute settlement procedures.

Article 6 of the SA authorizes the taking of provisional safeguard measures in “critical circumstances”. Those are defined as circumstances “where delay would cause damage which it would be difficult to repair”.

In addition, the application of a provisional measure is premised on a preliminary determination that there is clear evidence that the increased imports have caused or are threatening to cause serious injury.

Provisional measures may only take the form of tariff increases. They may be applied for a maximum of 200 days. This duration cannot be extended, and Article 6 of the SA further provides that it is counted for the purposes of calculating the initial period and any extension referred to in Article 7.1, 2 and 3.

Pending the duration of the provisional measure, the Member applying it must make sure that the conditions set out in Articles 2 through 7 and 12 of the SA are met. However, if the subsequent investigation does not determine that increased imports have caused or threaten to cause serious injury, provisional measures shall lapse and the duties perceived must be promptly refunded.

The reference to the “subsequent investigation” (that is, following the imposition of the provisional measure) may indicate that a provisional measure may be imposed without a fully-fledged investigation [*supra*, sections 2 and 3; *infra*, section 5]; provided, of course, that the domestic authorities have made a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury, and presumably, that there are “critical circumstances”. This inference may be confirmed by the fact that only after the imposition of the provisional measures is a Member required under Article 6 of the SA to meet the conditions in Articles 2 through 7 (amongst which are those relating to the investigations).

4.5 Non-Discriminatory Application of Safeguard Measures

Article 2.2 SA

Article 2.2 of the SA provides that safeguard measures must be applied to imports “irrespective of their source”. The application of safeguards on a “most-favoured-nation” (MFN) basis, that is, without discriminating between supplying Members, is a major guiding principle of the SA and indeed a fundamental achievement compared to Article XIX of the GATT. The possibility to apply “selective” safeguard measures (that is, only against certain supplying countries) was hotly debated under GATT 1947.⁷⁸

A specific question relating to non-discriminatory application of safeguard measures is whether a Member can exclude products originating in its partners in a Free Trade Area (FTA) or a Customs Union (CU) from a safeguard measure (thus discriminating against other WTO Members). It must be recalled that

⁷⁸ See *Analytical Index to the GATT, 1995, Vol. 1, p. 519.*

Article XXIV of the GATT 1994 allows, in order to facilitate deeper economic integration between members of a FTA or a CU and under certain conditions, departures from the MFN obligation and other GATT provisions. In other words, it allows members of a FTA or a CU to agree further liberalization, which need not be extended to other WTO Members.

It is however debated whether the exclusion of FTA or CU partners from safeguard measures is one of the permissible departures. The issue is further complicated by the fact that Article XXIV only refers to GATT rules (thus, in principle, it does not cover derogations from other WTO provisions, such as Article 2.2 of the SA). The Appellate Body recently reversed a panel's finding that such departure was permissible, but did not itself rule on the issue.⁷⁹

Article 2.1 SA

“parallelism”

In addition to the non-discrimination principle in paragraph 2, Article 2.1 of the SA has been interpreted by the Appellate Body to embody the so-called “parallelism” requirement. In accordance with this principle, the scope of a safeguard measure must correspond to the scope of imports which were investigated and in respect of which the requirements for the imposition of safeguard measures (“increased imports”, “serious injury” or threat thereof, and “causation”) were established.⁸⁰

This means, for example, that exclusion of imports from certain supplying Members from a measure is not warranted if the requirements for imposition of the measure have been assessed also considering the imports from such Members.

Thus, ultimately, discrimination between “sources” within the meaning of Article 2.2 may also result from failure to respect the “parallelism” between the imports subject to the investigation and those subject to the safeguard measure. The Appellate Body has considered that if a WTO Member has imposed a measure after conducting an investigation on imports from all sources, it is also required under Article 2.2 of the SA to apply such measure to all sources (including partners in a FTA).⁸¹

Notwithstanding the non-discrimination obligation in Article 2, WTO Members are obliged not to apply safeguard measure to imports from developing countries if below certain thresholds [infra, section 7].

4.6 Compensation and Suspension of Substantially Equivalent Obligations

Article 8.1 SA

The adoption of safeguard measures represents a temporary departure of the importing WTO Member from its obligations. This breaches the balance of rights and obligations vis-à-vis the affected WTO Members. Therefore, Article

⁷⁹ Appellate Body Report, *US - Line Pipe*, para. 263, point (f).

⁸⁰ Appellate Body Report, *Argentina - Footwear (EC)*, para. 111; Appellate Body Report, *US - Line Pipe*, para. 197.

⁸¹ Appellate Body Report, *Argentina - Footwear (EC)*, para. 112.

8.1 of the SA requires such Member first of all to endeavour to maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members.

To attain this objective, the importing Member may first negotiate trade compensation with the affected Members for the adverse effects of the measure.

However, without an agreement within 30 days, the affected exporting Members individually may suspend substantially equivalent concessions and other obligations vis-à-vis the Member imposing the safeguard measure. The right to suspend “substantially equivalent concessions” was already set out in Article XIX:3 of the GATT and was exercised under GATT 1947. The right is conditional upon the notification of the proposed suspension measure to the Council for Trade in Goods and the non-disapproval by such body. The authorization procedure must be completed within 90 days of the application of the safeguard measure (Article 8.2 of the SA).⁸²

Article 8.3 SA

While confirming the right to suspend equivalent concessions, the SA has introduced an additional constraint on its exercise. Article 8.3 of the SA provides that the right to suspend substantially equivalent concessions and other obligations cannot be exercised during the first three years of application of a safeguard measure if two conditions are met: (1) the measure is taken based on an absolute increase in imports, and (2) otherwise conforms to the provisions of the Agreement.

Practice under Article 8.3 of the SA is very limited so far and has not been reviewed in dispute settlement. The two above-mentioned conditions in Article 8.3 just mentioned have been interpreted in the sense that suspension of equivalent concessions may be exercised without waiting for three years if either condition is not fulfilled. A consequence of such interpretation is, for example, that a measure based on a relative increase in imports [supra, section 2.4.1] may entitle the immediate exercise of the right to suspend equivalent concessions or other obligations.

It has also been advanced that the decision as to whether a measure “otherwise conforms to the provisions of the Agreement” is reserved to multilateral dispute settlement, not to the Member seeking suspension of equivalent concessions. In accordance with this interpretation, a Member affected by a safeguard measure deferred actual suspension of substantially equivalent concessions, which had been authorized within the 90-day deadline in Article 8.2, until after the adoption of dispute settlement reports by the DSB finding the measure incompatible.⁸³

⁸² *Certain WTO Members have notified their agreement to postpone the 90-day deadline applicable in a particular case. In practice, this means that the Member affected by a safeguard measure renounces to carry out Article 8.2's authorization procedure, and thus enforcement of its right, until a later date. While it is unclear from the text of Article 8.2 that such deadline may be derogated by agreements among some or all the Members concerned by a safeguard measure, it is clear that such “agreements” are not “covered agreements” within the meaning of Article 1.1 of the DSU. Accordingly, in case of violation they are not enforceable through dispute settlement procedures.*

⁸³ *See Doc. G/L/251, G/SG/N/12/EEC/1, 3 August 1998, p. 2.*

4.7 Formal Requirements of the Imposition of Safeguard Measures

Article 8 and 12 SA

The various activities in connexion with the application of the SA are subject to transparency requirements in the form of notifications and consultations. These are primarily regulated in Articles 12 and 8 of the SA.

The initiation of safeguard investigations, the making of a finding that the domestic industry has suffered or is threatened with serious injury caused by increased imports, and the decision to apply or extend safeguard measures (including provisional measures) are all subject to an obligation of immediate notification to the Committee on Safeguards (Articles 12.1 and 12.4 of the SA) [infra, section 6.3].

To facilitate the discharge of this duty, special forms and guidelines have been drawn up by the Committee on Safeguards, and a Technical Cooperation Handbook on Notification Requirements has also been prepared by the WTO Secretariat.⁸⁴

The notifications concerning the injury findings and the measure proposed must supply “all pertinent information”, including evidence of serious injury or threat, product description and details of the proposed measure (entry into force, duration, timetable for progressive liberalization). In the case of an extension, evidence of adjustment of the domestic industry must additionally be provided.

Prior to imposing safeguard measures, WTO Members must also offer the exporting Members adequate opportunity for consultation (Article 12.3 of the SA). The consultations must cover all the matters to be addressed in the notifications (including the measure proposed), as well as the possible ways, for the importing Member, to maintain the balance of its concessions vis-à-vis the exporting Members, in accordance with Article 8.1 of the SA. It would appear that, for provisional measures, consultations may still be held immediately after adoption of the measures, as provided for in Article XIX:2 of the GATT 1994.

The result of consultations pursuant to Article 12, Article 8 the proposed suspension of substantially equivalent concessions under Article 8.2 and, the results of mid-term reviews under Article 7.4, are also subject to notification, pursuant to Article 12.5 of the SA.

4.8 Test Your Understanding

- 1. A WTO Member takes a provisional measure in the form of a tariff quota. Is this allowed?**

⁸⁴ See Docs. G/SG/1, 1 July 1996 and WT/TC/NOTIF/SG/1, 15 October 1996.

2. **A provisional measure is not confirmed within the 200 days of its duration. Must duties levied be refunded?**
3. **A developing country imposes a safeguard measure for five years. Is this allowed?**
4. **A WTO Member notifies a safeguard measure it proposes to take. After that, a measure is eventually taken and it differs from the one which had been notified. Is the notification obligation complied with?**
5. **A WTO Member initiates an investigation against widgets. In the course of the investigation it realizes that its domestic industry is particularly affected by very low priced imports of widgets from one particular WTO Member, whereas the rest of the imports of widgets, coming from three other WTO Members, are in very small quantities and at prices comparable to those charged by the domestic industry. Can it focus its safeguard measure on the low priced imports from one particular Member?**

5. THE DOMESTIC PROCEDURES

The adoption of a safeguard measure by a WTO Member is premised on the carrying out, by its competent authorities, of an investigation to assess whether the relevant conditions and WTO requirements are met. The following sections review the main obligations imposed on the domestic authorities and the rights conferred on the interested parties in this connexion.

5.1 Overview of Articles 3, 6 and 12SA

The SA contains far fewer procedural rules than the other two WTO texts regulating the use of trade defence instruments - the Anti-Dumping Agreement and the Subsidies and Countervailing Measures Agreement. For example, the SA contains no indication or limitation as to who has standing to request the initiation of a safeguard investigation - a choice that is left to the several domestic safeguard regulations. Unlike in the area of anti-dumping measures (and indeed of countervailing measures), the SA is the first text developing the basic GATT provision. This is presumably one reason why procedural obligations are very little developed. Essentially, they are contained in Articles 3, 6 and 12 of the SA.

The SA first provides that the investigations have to be conducted in accordance with procedures previously established and published. These must also be notified to the Committee on Safeguards (Article 12.6), the body established to oversee the functioning of the SA [infra, section 6.3].

Furthermore, initiation of safeguard investigations must be the subject of public notice (Article 3.1).

Third, during the investigation interested parties must be given an opportunity to present evidence and arguments and to respond to the evidence and arguments presented by other parties.

Fourth, if, in the course of an investigation, the competent authorities receive information, which is confidential by its nature or is provided on a confidential basis, they cannot disclose it without permission of the party submitting it, provided certain conditions are met (Article 3.2).

Fifth, a detailed report setting forth the domestic authorities' findings and reasoned conclusions on all pertinent issues of fact and law must be published at the end of the safeguard investigation (Article 3.1).

For provisional measures, at least a preliminary affirmative determination that there is clear evidence of serious injury caused by increased imports and that there are "critical circumstances" must be provided (Article 6).

Finally, it may be added that the SA provides that initiation of investigations, findings of serious injury/threat of serious injury and decisions to apply or extend safeguard measures must be notified to the Committee on Safeguards (Article 12.1).

5.2 Obligation to State Reasons

Article 3.1 SA

The obligation to state the reasons for taking a safeguard measure is set out in general terms in Article 3.1 of the SA:

...The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Article 3.1SA

This rather sweeping language also covers, for example, the “other factors” which the domestic authorities have or should have examined when assessing serious injury or threat of serious injury [supra, section 3.4], or other information not specifically referred to in the SA but which the domestic authorities nonetheless found relevant. Likewise, if additional or different information from that originally set out in a published report is actually retained as the basis for a safeguard measure, this additional information and alternative justifications must be stated.⁸⁵

Also, if contrary facts or arguments to those retained by the domestic authorities as the basis for their decision have been brought to their attention, they are required to address these possible additional explanations and state the reasons why they are not sufficiently strong to warrant a different conclusion.⁸⁶

In addition to the general obligation set out in Article 3.1, Article 4.2(c) of the SA specifies, in respect of serious injury, that the competent authorities shall publish promptly a detailed analysis of the case under investigation as well as a demonstration of the relevance of the “factors” examined.

Failure to state reasons is relevant in two ways. First, it results in a formal defect of the measure, regardless of whether such measure is objectively justified by the facts before the domestic authorities, or which the domestic authorities should have investigated. This amounts to a violation of Article 3.1 of the SA.

Furthermore, failure by the domestic authorities to address some of the SA requirements in the reasoning of a measure or in separate published reports amounts to failure to show that these requirements were met. It therefore warrants a finding of a violation of such requirements. In other words, the reasoning in the safeguard measure and in the additional reports containing the findings of the domestic authorities also provide the benchmark to review compliance with the obligations in e.g. Article 2 or 4 of the SA.

⁸⁵ Appellate Body Report, *US - Wheat Gluten*, para. 55.

⁸⁶ Appellate Body Report, *US - Lamb*, paras. 159-161.

Not only does the foregoing apply to the conditions set out in the SA, it also applies to those in Article XIX of the GATT 1994, since that provision and the SA are to be applied together. Thus, for example, in *US - Lamb* the Appellate Body found, in respect of the requirement of “unforeseen developments”, a violation of Article XIX:1 of the GATT 1994 because the relevant investigation report did not discuss, demonstrate or even explain how such requirement was met.⁸⁷ In addition, it noted that Article 3.1 of the SA, by requiring the domestic authorities to set forth their findings and reasoned conclusions on all pertinent issues of fact and law, also requires such authorities to include a finding or reasoned conclusion on “unforeseen developments”.⁸⁸

5.3 Procedural Rights - Confidential Information

“due process rights”

The procedural rights (sometimes also referred to as “due process rights”) of the parties to a safeguard investigation are summarily set out in Article 3.1 and include:

- the right to be informed, through public notice, of the initiation of an investigation
- the right to be heard or to be provided other appropriate means to present evidence and views on the case (including the opportunity to respond to the presentations of other parties and to submit views on whether the application of a measure would be in the public interest).

Article 3.1 confers these rights on “all interested parties”. The parties most directly “interested” in an investigation are the domestic producers, foreign producers (exporters) and domestic importers, and indeed, importers and exporters are expressly referred to in Article 3.1. However, the term “interested parties” is sufficiently broad to be interpreted as covering exporting WTO Members and possibly industry associations, unions and consumer associations. Who will be considered “interested parties” in a given case is left to the domestic rules and procedures of the several WTO Members.

As for the treatment of confidential information, pursuant to Article 3.2 of the SA, the competent domestic authorities cannot disclose information which is confidential by its nature or is provided on a confidential basis without permission of the party submitting it, provided two conditions are met. On the one hand, confidential treatment must be genuinely justified. On the other hand, parties providing confidential information may be requested to provide a non-confidential summary of such information, or explanation why the information cannot be summarized.

If confidential treatment is not justified in the view of the domestic authorities and the parties supplying the relevant information refuse disclosure in a non-confidential form, the domestic authorities may disregard such information

⁸⁷ Appellate Body Report, *US - Lamb*, paras. 72-73.

⁸⁸ Appellate Body Report, *US - Lamb*, para. 76.

unless its veracity and correctness is demonstrated through sources other than the confidential one.

The provisions protecting confidential information in domestic safeguard procedures are intended to balance different interests and needs. On the one hand, both private parties primarily concerned (the complaining domestic producers and the exporters/importers) cannot risk that their business secrets or other sensitive commercial information be disclosed to their competitors as a result of their cooperating in a safeguard investigation. On the other hand, a thorough investigation of the facts of the case, which is ultimately in the interest of all players, may necessitate access to such sensitive information and some form of refutation and adversarial process in connexion with it.

Reconciling these different needs is a difficult exercise. In addition, the balance struck domestically by a WTO Member for the purpose of its domestic proceedings may be questioned if a measure adopted on the basis of confidential information is challenged in dispute settlement proceedings. In particular, the WTO Member whose measure is challenged may face the dilemma of either supplying in dispute settlement proceedings information that it treated as confidential at domestic level, or not to be able to justify its measure. In this connexion, it should be recalled that confidentiality of dispute settlement proceedings is ensured by a specific obligation imposed on the parties to the dispute by Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). Furthermore, under the same provision, panels can request the parties to supply information they consider relevant to their assessment of the facts, and the parties are therefore under a duty to cooperate to this end.

The Appellate Body has had a chance to criticize a Member's almost complete refusal to supply in dispute settlement proceeding information which it had treated as confidential in its domestic proceeding according to its domestic standards.⁸⁹

In that specific case, the Member concerned had refused to supply information (which it had treated as confidential in domestic procedures, in spite of the panel's offer to devise additional procedures to deal with this information, so as to render the obligation in Article 13 of the DSU more specific and stringent). The refusal to provide the information requested by the panel was held to undermine seriously the panel's ability to make an objective assessment of the facts, that is, to discharge its mandate under Article 11 of the DSU [infra, section 6.2].⁹⁰

More recently, a panel considered to be sufficient to its objective assessment of the facts the provision in indexed, aggregated or weighted average form (rather than in full) of data treated as confidential in domestic proceedings.⁹¹

⁸⁹ *Appellate Body Report, US - Wheat Gluten, para. 171.*

⁹⁰ *Appellate Body Report, US - Wheat Gluten, para. 171; Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft (Canada - Aircraft), WT/DS70/AB/R, adopted 20 August 1999, para. 187.*

⁹¹ *Panel Report, US - Line Pipe, paras. 7.8-7.10.*

5.4 Test Your Understanding

- 1. Assume that an investigation on safeguards is initiated in Country X, and that the authorities publish an investigation report. The report lists the factors that have been affected by the increase in imports. The report does not mention factors such as the domestic industries' productivity or capacity utilization during the investigation period. Could this be considered a violation of the SA?**
- 2. Assume that in case 1, productivity and capacity utilization are briefly mentioned but not analyzed in depth. The authorities justify this by stating that the factors do not demonstrate any injury, and they have therefore been excluded. Is this sufficient for the requirement of “state of reason”?**
- 3. Can a WTO Member request to be treated as an interested party so as to take part of the evidence in the course of the investigation?**
- 4. If a WTO Member is challenged within the DSU, is it obliged to furnish the Panel with all information, including the information, which during the domestic procedure, has been classified as confidential?**

6. THE WTO PROCEDURES

The following Sections examine two sets of procedures and procedural requirements relating to the safeguards. On the one hand, reference is made to the procedural requirements imposed by the SA in connexion with the various phases of application of its rules. On the other hand, the specific features of dispute settlement procedures when addressing safeguard measures are reviewed.

6.1 The Role of the Committee on Safeguards

Article 13 SA

Other procedures and procedural obligations in connexion with safeguard matters are set out in Article 13 of the SA. This provides for the establishment of the Committee on Safeguards, under the authority of the Council for Trade in Goods, to oversee the implementation of the Agreement. This Committee is open to representatives from all WTO Members and its main functions can be outlined as follows.

The Committee is the addressee of all the notifications (including on initiation of investigations, injury findings, provisional or definitive measures, extensions, results of consultations prior to the imposition of a measure, compensation, mid-term reviews) that WTO Members must make in accordance with the SA. Besides providing a forum for discussing such notifications, the Committee must report to the Council for Trade in Goods on them (Article 13.1(f) of the SA). To assist the Members in making such notifications, suggested formats have been drawn up (although neither are they legally binding, nor does following their suggestions guarantee that the relevant legal requirements in the SA are fulfilled).

Furthermore, at the request of a Member taking a safeguard measure, the Committee reviews whether proposals to suspend concessions or other obligations are “substantially equivalent” to those suspended through the safeguard measure, and reports as appropriate to the Council for Trade in Goods (Article 13.1(e)).

The Committee also finds, upon request of an affected Member, whether or not the procedural requirements of the SA have been complied with in connexion with a safeguard measure (also reporting its findings to the Council for Trade in Goods) (Article 13.1(b)).

The Committee also assists Members in their consultations under the provisions of this Agreement (Article 13.1(c)) - a supporting activity which may prove particularly valuable for those Members with more limited experience in the sector.

In addition, the Committee has general monitoring functions on the implementation of the Agreement on Safeguards (Article 13.1(a)). This results in the preparation of an annual report to the Council for Trade in Goods, inter alia recording the measures taken by Members.

6.2 Dispute Settlement Procedures

Article 14 SA

Pursuant to Article 14 of the SA, review of WTO Members' safeguard action through dispute settlement proceedings is based on the generally applicable provisions in Articles XXII-XXIII of the GATT 1994 (consultations and dispute settlement), and Articles 4 and 6 of the DSU. This section outlines some issues arising in dispute settlement proceedings concerning safeguard measures.

6.2.1 Standard of Review

The standard of review of safeguard measures by panels is the same as generally laid down in Article 11 of the DSU. Accordingly, panels are called upon to make “an objective assessment of the facts” submitted to their review by a Member. Unlike in the case of review of anti-dumping measures, panels are not instructed to defer to the interpretation chosen by the domestic authorities if it is amongst the permissible ones.⁹²

The issue has however arisen as to what facts and arguments panels can hear, compared to those heard and reviewed by the competent authorities in the domestic proceedings leading to the measure under review. Building on its previous pronouncements, the Appellate Body reviewed this issue extensively in *US - Lamb*, and the relevant findings can be summarized as follows:

- The applicable standard is neither “de novo” review (that is, a complete re-examination and re-evaluation of the facts), nor “total deference”, but rather the “objective assessment of the facts”.⁹³
- When review concerns compliance with Article 4 requirements (and presumably also other substantive requirements), a panel must examine whether, as required by Article 4 of the SA, the domestic authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.⁹⁴
- An “objective assessment” of a claim under Article 4.2(a) of the SA has two elements, a formal one and a substantive one. The formal aspect that a panel must review is whether the competent authorities have evaluated all relevant factors. The substantive aspect that a panel must review is whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. A claim under Article 4.2(a) might

⁹² *AD Agreement, Article 17.6.*

⁹³ *Appellate Body Report, US - Lamb, para. 102.*

⁹⁴ *Appellate Body Report, US - Lamb, para. 102; Appellate Body Report, Argentina - Footwear (EC), para. 121.*

not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.⁹⁵

- In examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate, only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.⁹⁶

6.2.2 'New' Claims Compared to those Raised in Domestic Proceedings

This issue was addressed by the Appellate Body in *US - Lamb*, together with that of the standard of review. The Appellate Body clearly found that:

- In arguing claims in dispute settlement, a WTO Member is not confined merely to rehearsing arguments that were made to the competent authorities by the interested parties during the domestic investigation, even if the WTO Member was itself an interested party in that investigation.
- Likewise, panels are not obliged to determine, and confine themselves to, the nature and character of the arguments made by the interested parties to the competent authorities. Arguments before national competent authorities may be influenced by, and focused on, the requirements of the national laws, regulations and procedures. On the other hand, dispute settlement proceedings brought under the DSU concerning safeguard measures imposed under the Agreement on Safeguards may involve arguments that were not submitted to the competent authorities by the interested parties.⁹⁷

6.2.3 Treatment of Confidential Information

A further procedural issue which has been discussed in dispute settlement proceedings concerning safeguard measures is the disclosure of confidential

⁹⁵ Appellate Body Report, *US - Lamb*, para. 103.

⁹⁶ Appellate Body Report, *US - Lamb*, para. 106.

⁹⁷ Appellate Body Report, *US - Lamb*, para. 113.

information to panel and other WTO Members, which has been addressed above, in section 5.3.

6.3 Test Your Understanding

- 1. A Member wishes to apply safeguard measures and thereby suspend concessions. Is the Member obliged to consult the Committee on Safeguards on whether the proposed measures offers a “substantially equivalent” level of concession to the Members that would be affected by the measure?**
- 2. A Member fears it will be gravely affected by another Member's proposed safeguard measure and has limited experience in practical proceedings. Can the Member request assistance from the Committee on Safeguards in verifying that the procedural requirements have been met? What about consultation procedure?**
- 3. If a Panel is established to review a Member's safeguard measure, is it bound by the interpretation method that the domestic authorities have used in assessing the facts?**
- 4. What are the two elements a Panel can assess when reviewing a claim under Article 4.2 (a)?**
- 5. Can a Panel, when assessing a dispute, regard arguments that were not submitted to the competent authorities by the interested parties in the course of the domestic procedure?**

7. DEVELOPING COUNTRY MEMBERS

7.1 Article 9.1 of the SA

“de minimis”

Article 9.1 of the SA mandates that safeguard measures should not be applied against a product originating in a developing country Member as long as its share of imports of the product in the importing country member does not exceed three per cent, provided that developing country Members with less than three per cent import share collectively account for not more than nine per cent of total imports of the product. This is sometimes referred to as a “de minimis” rule in favour of developing countries.

7.2 Article 9.1, Panel Interpretation

In US-Line Pipe, the Panel ruled that the Article 9.1 requires the express exclusion of developing countries from the application of safeguard measures, as long as the stipulated conditions are met. The Panel concluded that, since the line pipe measure imposed by the United States applies to all developing countries in principle, the United States has failed in its obligation under Article 9.1, regardless of the fact that the line pipe measure may not have any actual impact on developing countries.

Panel Report, US - Line Pipe

Article 9.1 is clear in its mandate that a safeguard measure “shall not be applied” to imports of developing countries accounting for not more than 3 per cent of total imports ... if a measure is not to apply to certain countries, it is reasonable to expect an express exclusion of those countries from the measure.⁹⁸ ... there is a clear difference between an obligation that a measure not affect imports from certain developing countries and an obligation that a measure not be applied to imports from certain developing countries⁹⁹

The Appellate Body confirmed and strengthened this finding. Its conclusions can be summarized as follows:¹⁰⁰

- A specific list of the WTO Members, which are either included in the measure or excluded from it, is not required to comply with Article 9.1 of the SA (though it would help by providing transparency).
- Calculation of the percentages mentioned in Article 9.1 should be done on the basis of the latest available data at the time the measure takes effect.
- The WTO Member imposing the measure must take all reasonable steps it can to make certain that developing countries exporting

⁹⁸ Panel Report, US-Line Pipe, paras 7.175.

⁹⁹ Panel Report, US-Line Pipe, paras 7.181

¹⁰⁰ Appellate Body Report, US - Line Pipe, paras. 128-132.

less than the percentages indicated in Article 9.1 are excluded from the measure.

7.3 Other Rights of Developing Countries in the Application of the SA

In addition to providing for the so called “de minimis” rule, as already mentioned [supra, section 4.3], Article 9.2 allows developing country Members, as users of safeguard measures, additional flexibility.

Developing countries enjoy special rights in connexion with dispute settlement procedures, which are also relevant when safeguard measures are under review. These are the right to have a panelist selected amongst nationals of developing countries (Article 8.10 of the DSU), special deadlines for panel proceedings (Article 3.12, 12.10 of the DSU), special consideration of their interests during dispute settlement consultations (Article 4.10), legal assistance (Article 27), as well as some special rights in connexion with the implementation of reports (Article 21, paras. 2, 7, 8).

7.4 Developing Countries and the Application of the SA

Similarly to what happened for anti-dumping measures, developing countries have not been great users of safeguard measures under GATT 1947.¹⁰¹ Conversely, they appear to be primary users of the safeguard instrument under the WTO.¹⁰²

¹⁰¹ See *Analytical Index to the GATT, Vol. 1, 1995, pp. 539 ff.*, recording five measures taken by developing countries (Nigeria, Peru, Chile), out of a total of 139.

¹⁰² Based on the annual reports of the Committee on Safeguards.

DEVELOPING COUNTRIES	DEVELOPED COUNTRIES
Argentina I. Footwear (1997) II. Peaches (2001) III. Motorcycles (2001) → 3	Czech Republic IV. sugar (1999) V. isoglucose (2001) → 2
Brazil VI. Toys (1997) → 1	Republic of Korea VII. dairy products (1997) VIII. garlic (2000) → 2
Chile IX. wheat (2000) X. milk (2001) → 2	Latvia XI. swine meat (1999) → 1
Egypt XII. safety matches (1999) XIII. fluorescent lamps (2000) XIV. powdered milk (2001) → 3	Slovak Republic XV. sugar (2001) XVI. 1
India XVII. acetylene black (1998) XVIII. carbon black (1999) XIX. slabstock polyol (1998) XX. propylene glycol (1998) XXI. phenol (1999) XXII. acetone (2000) → 6	United States XXIII. brooms (1996) XXIV. wheat gluten (1998) XXV. lamb meat (1999) XXVI. steel wire rod (2000) XXVII. line pipe (2000) XXVIII. 5
Jordan XXIX. biscuits (2001) → 1	
Morocco XXX. bananas (2001) → 1	
TOTAL – 17	TOTAL – 11

7.5 Test Your Understanding

1. Assuming that for a certain good, developing countries represent 0.5 per cent, 0.75 per cent and 3.5 per cent of total

imports. If safeguard measures were to be applied, will the de minimis rule be applied to all three countries?

- 2. Does a Member imposing a safeguard measure have to expressly list the countries that are included or excluded from the measure?**
- 3. List three of the specific rights that the SA grants developing countries.**

8. CASE STUDY

Country A, a WTO Member has recently transformed its economy and opened up to international trade. Since that time, the country has increased exports within several industrial sectors. At the same time increasing imports in other sectors are gradually taking over parts of the domestic market. Country A is a large producer of porcelain and ceramics, of which 55 per cent goes for export and the rest is sold domestically. Domestic producers have traditionally held 80 per cent of the market share on the domestic market. One of the main export markets is country D, a country that is in serious economic crisis. Last year exports to country D fell and finally two of the main porcelain and ceramics producers in country A went bankrupt and closed down their production. Imports during this period have increased only marginally. However, the market share of the domestic producers fell. The remaining domestic producers are very concerned about the situation, and call for government protection.

- a) Would this situation signify “increased imports”, which could justify safeguard measures under the SA?

Assuming that the government of country A starts investigating the possibility of safeguard measures.

- b) To whom and when should the authorities notify the initiation of the investigation?
- c) Is country A entitled to impose provisional safeguard measures? Which is the specific requirement?
- d) When determining the scope of the domestic industry potentially suffering injury, could the investigation treat porcelain and ceramic products as one group, or do they have to be separated?
- e) In the assessment of injury, which factors should be examined? Could another factor than increased imports be causing the injury?

Assume that country A does impose safeguard measures.

- f) Can a developing country be excluded from the investigation and/or application of the safeguard measure and if so, under which conditions?
- g) How about a free trade partner?

9. FURTHER READING

- **Beviglia Zampetti, A.**, The Uruguay Round Agreement on Safeguards: a competition-oriented perspective, *World Competition*, 19, No. 2, 1995/96, pp. 146-158.
- **Bourrinet, J.**, L'accord relatif aux sauvegardes. La Communauté européenne et le GATT: évaluation des accords du cycle d'Uruguay, Rennes, 1995, pp. 85-93.
- **Bronckers, M.C.E.J.**, WTO implementation in the European Community: antidumping, safeguards and intellectual property, *Journal of World Trade*, Vol. 29, No. 5, 1995, pp. 73-95.
- **Didier, P.**, WTO trade instruments in EU law: commercial policy instruments: dumping, subsidies, safeguards, public procurement, London, Cameron May, 1999, pp. 1-844.
- **Flory, T.**, The Agreement on Safeguards. The Uruguay Round Results: a European lawyers' perspective, Brussels, European Interuniversity Press, 1995, pp. 265-271.
- **Holliday, G.D.**, The Uruguay Round's Agreement on Safeguards, *Journal of World Trade*, Vol. 29, No. 3, 1995, pp. 155-160.
- **Kleen, P.**, The safeguard issue in the Uruguay Round: a comprehensive approach, *Journal of World Trade*, Vol. 23, No. 5, 1989, pp. 73-92.
- **Lee, Y.S.**, Critical issues in the application of the WTO rules on safeguards: in the light of the recent Panel reports and the Appellate Body decisions, *Journal of World Trade*, Vol. 34, No. 2, 2000, pp. 131-147.
- **Lee, Y.S.**, Review of the first WTO Panel case on the Agreement on Safeguards: Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products and its implications for the application of the Agreement, *Journal of World Trade*, Vol. 33, No. 6, 1999, pp. 27-46.
- Lee, Y.S. and Mah, J.S., Reflections on the Agreement on Safeguards in the WTO, *World Competition*, 21, No. 6, 1999, pp. 25-31.
- **Mah, J.S.**, Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO, *Journal of World Trade*, Vol. 33, No. 5, 1999, pp. 197-204.
- **Nuzum, J.A.**, The Agreement on Safeguards (eds): U.S. law leads revitalization of the escape clause, *The World Trade Organization: the multilateral trade framework for the 21st century and U.S. implementation legislation*, Washington, D.C., pp. 407-437.
- **Schwartz, W.F. and Sykes, A.O.**, Toward a positive theory of the most favored nation obligation and its exceptions in the WTO/GATT system, *International Review of Law and Economics*, 16, 1996, pp. 27-51.
- **Steger, D.**, Appellate Body Jurisprudence Relating to Trade Remedies, *Journal of World Trade*, Vol. 35, No. 5, 2001, pp. 799-823.

- **Stewart, T.P. and Brilliant M.A.**, Safeguards, The GATT Uruguay Round: negotiating history (1986-1992), Vol. II, Deventer, 1993, pp. 1711-1820.
- **United Nations Conference on Trade and Development**, The Outcome of the Uruguay Round: an initial assessment: supporting papers to the trade and development report, 1994/UNO, UNCTAD, Trade and Development Report 1994, New York: UNO, 1994, pp. i-xii, 1-247.

9.1 Official Documents

- **Official WTO documents** can be obtained by searching for the document number on the search facility of the WTO's online document database, available at: <http://docsonline.wto.org/>

9.2 List of Relevant Panel and Appellate Body Reports

9.2.1 Appellate Body Reports

- **Appellate Body Report**, Chile - Price Band System and Safeguard Measures relating to Certain Agricultural Products, (Chile - Price Band System) WT/DS207/AB/R, issued 23 September 2002.
- **Appellate Body Report**, United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe), WT/DS202/AB/R, WT/DS178/AB/R adopted 8 March 2002
- **Appellate Body Report**, United States - Safeguard Measures on imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US-Lamb), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
- **Appellate Body Report**, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US-Wheat Gluten), WT/DS166/AB/R, adopted 19 January 2001
- **Appellate Body Report**, Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products (Korea - Dairy), WT/DS98/AB/R, adopted 12 January 2000
- **Appellate Body Report**, Argentina - Safeguard Measures on Imports of Footwear (Argentina-Footwear (EC)), WT/DS121/AB/R, adopted 12 January 2000

9.3 Panel Reports

- **Panel Report**, Chile - Price Band System and Safeguard Measures relating to Certain Agricultural Products, (Chile - Price Band System) WT/DS207/R, as modified by the Appellate Body Report, WT/DS207/AB/R issued 23 September 2002.

- **Panel Report**, United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe), WT/DS202/R, WT/DS178/R, adopted 8 March 2002, as modified by the Appellate Body Report WT/DS202/AB/R, WT/DS178/AB/R
- **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, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R
- **Appellate Body Report**, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US-Wheat Gluten), WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R
- **Appellate Body Report**, Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products (Korea - Dairy), WT/DS98/R, and Corr. 1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS/AB/R
- **Appellate Body Report**, Argentina - Safeguard Measures on Imports of Footwear (Argentina-Footwear (EC)), WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
- **Panel Report**, Norway - Restrictions on imports of certain textile products, adopted 18 June 1980 L/4959, BISD 27S/119
- **Working Party Report**, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement of Tariffs and Trade, (Hatter's Fur) 27 March 1951, CP 106, adopted October 1951