



**Agency for International Trade Information
and Cooperation**

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**AITIC - ILI Session
Flying Below the Radar: Developing Country Safeguards**

WTO Public Forum

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Abstract

AITIC–ILI session sought to shed light on several aspects of the use safeguards (SGs) during the present financial and economic crisis. Given the increased use of safeguards by developing countries, the session focussed on the following three issues:

- 1) the rationale behind the use of safeguards by developing countries in the absence of either the necessary legislation or the means to apply cumbersome and costly antidumping (AD) or countervailing (CV) measures;
- 2) whether there is a need for special and differential treatment concerning their application by developing countries, and
- 3) more accessible procedures in the Safeguards Agreement to scrutinise the WTO consistency of developing country safeguards primarily affecting other developing countries

Dr Esperanza Durán, Executive Director, AITIC, and Mr Charles Verrill, President of the International Law Institute (and partner, Wiley Rein LLP, Washington, DC) made opening statements regarding the practical and legal issues raised by safeguards. Mr Pablo Klein, Counsellor, Permanent Mission of Mexico to the WTO introduced the economics of safeguards vs. antidumping duties in developing countries. Mr Mathias Francke, First Secretary, Permanent Mission of Chile to the WTO explained the application process of safeguards in Chile. Mr Serdar Baskin, Trade Counsellor, Permanent Mission of Turkey to the WTO, explained why safeguards are important to Turkey. Mr Krishna Gupta, Counsellor, Permanent

Mission of India to the WTO, presented his country's experience with safeguards and antidumping duties. Mr Verrill read the statement of Mr Charles Julien, Counsellor, Ministry of Foreign Trade and Industry, the Arab Republic of Egypt.

The discussion that followed answered the participants' questions regarding the use of trade remedies in various contexts, such as agriculture special safeguards, Regional Trade Agreements (RTAs), and supply chain processes.

Introduction

Dr Esperanza Durán, Executive Director, AITIC

1. Safeguards have always been an integral part of the multilateral trading system (MTS). First, under the GATT 1947, regulations of these measures were incorporated by Article 19. Later, the Article 19 obligations were elaborated in the Uruguay Round negotiations, which adopted the Safeguards Agreement that contains principles, disciplines a variety of so-called "grey area" measures and sets time limits on all safeguard actions.
2. The use of SGs peaked with 34 initiations reported by WTO members in 2002, and then shrank to only 5 in the year ending November 2008. However, the pace accelerated in 2009 with India reporting 12 initiations. The most frequent initiators are developing countries (Chile, India, Jordan and Turkey lead the list). However, this trend could accelerate in the face of the economic crisis and protectionist measures.
3. The SG Agreement requires notifications of legislation and SG measures, which has not been taken as seriously as it should by all WTO members, especially by developing and least-developed countries. More efforts should be invested in notifying SGs regulations and legislation, as well as application of SG measures. In the light of the previous, some questions are: should the Secretariat's TPR report have noted this? And, should the TPR, a transparency mechanism *par excellence*, mention the lack of notifications to improve transparency?

Mr Charles Verrill, President, ILI

4. Contrary to CV and AD measures, SGs do not require evidence of unfair actions. They are in principle applied on a most-favoured-nation basis, although Article 9 of the WTO Agreement on Safeguards provides that such measures shall not be applied against developing countries as long as their share of imports does not exceed 3 per cent and all developing countries with less than 3 per cent not collectively account for more than 9 per cent of the imports involved. In addition, "special safeguards" can be applicable to imports from individual countries. For instance, the SG that the Obama Administration recently imposed on imports of Chinese tyres under US legislation, which implemented a provision of the Chinese Protocol of Accession to the WTO.

5. SGs are difficult to justify under the interpretation of Article XIX of GATT 1994 by the Appellate Body in the decision on the U.S. special SG. The decision reinstated the requirement that there be a demonstration that the increased imports were the result of unforeseen circumstances and that the increased imports caused or threatened to cause serious injury to the domestic industry. The unforeseen development and requirement of GATT Article XIX was not included in the SG Agreement. This represents a significant legal hurdle and is why developed countries seldom rely on safeguards and instead look to the antidumping and countervailing duty remedies.

6. Despite the growing number of SG actions by developing countries against other developing countries, these countries have generally not resorted to the Dispute Settlement Body (DSB) when safeguards are applied. Reasons for staying away from formal dispute resolution may include 1) high cost of DSB action in light of the amount of trade involved; 2) the possible existence of an understanding amongst the countries involved, and 3) the typically short duration of a safeguard.

I. The Economics of Safeguards vs. Antidumping Duties in Developing Countries, Mr Pablo Klein, Permanent Mission of Mexico

7. Some general observations in the use of SG include: 1) fewer SGs than AD being applied of late – 29 SG in 2002 down to 17 in 2007, 22 in 2008 and 25 in 2009—the impact of the former may be greater; 2) most SGs take the form of specific duties and quantitative restrictions, and 3) SGs almost always expire within the first four years of application and before the full allowed term. This may be due to the political pressure by other members, combined with the fact that in SGs cases the complainant generally wins.

8. The proponents of SGs argue that these buy time to allow certain industries to adjust slowly and orderly – which should make up one of the core objectives of the Safeguards Agreement – they allow for a temporary protection whereby the affected industries actually become "winners" (e.g. US automobiles in the 1980s), and they are less resource intensive than anti-dumping.

9. On the other hand, SGs require institutional capabilities beyond those of WTO members that are LDCs. They are not the only possible way of providing "cheap" protection. Governments are getting increasingly creative in circumventing WTO disciplines. Ideally, the creation of a carefully designed "escape valve" that effectively disciplines protectionism, which is transparent, strictly limited in duration, and has very clear triggers and phase-out provisions would be a fundamental piece of a successful trading system.

II. The Application of Safeguards in Chile, Mr Mathias Francke, Permanent Mission of Chile to the WTO

10. In Chile, the regulatory framework with regards to SGs is governed by the Decree of the Ministry of Finance No. 99 (1999) and other Regulations for the application of SGs in conformity with the Marrakesh Agreement. The procedure is launched with a written application addressed to the Technical Secretariat within the Investigating Authority body, whose main functions are to receive requests, conduct the investigation and recommend the application of measures. A Public Hearing is held before adopting a definitive decision by the President of the Republic who in turn, has the power to reduce, reject or accept the tariff proposed by the National Commission on Price Distortions.

11. Over the past ten years, Chile is one of the top 5 countries in this area; Chile initiated 11 SGs measures, 7 of which were on agricultural products, which is contrary to the general assumption that SGs are most commonly applied to manufactured products, ceramics, etc. It was noticed that AD measures contain a much broader spectrum of countries—despite the fact that most measures are concentrated in India, the European Communities and the United States—the main targets countries being China, Chinese Taipei and Korea.

12. Along the lines of whether rules should be relaxed for developing countries, a concrete proposal on Special and Differential Treatment (S&D) was tabled by the African, Caribbean and Pacific Group of States (ACP) and the African Group in February 2008. Its main elements encompassed 1) facilitating initiation (i.e. through increased assistance by Governments in collecting evidence); 3) “new remedies” (i.e. longer timeframes for answering questionnaires, lesser duties, etc); 4) technical assistance and 5) a proposed review 3 years later. All in all, while the use of AD measures in the developing world should not be encouraged, efforts to institutional and capacity building to impose measures, when justified, should be encouraged.

III. Why Safeguards are Important to Turkey, Mr Serdar Baskin, Permanent Mission of Turkey to the WTO

13. CV and AD measures differ from SGs in that the first two demand proving “unfair trade” practices and are country-based and company specific, while the latter do not required proving the existence of “unfair” practices of another member and are non-discriminatory. Moreover, SGs are permitted if an investigative authority finds clear evidence that 1) there is a sudden increase in imports of a specific product; 2) that no. 1 is due to *unforeseen development*¹; 3) that no.1 has caused or is threatening to cause *serious injury*², and 4) a causal link between no. 1 and 3. For a CV and AD to be imposed, an investigation needs to establish the

¹ Some of the criticisms of *unforeseen developments* as established in Article XIX of the GATT, are 1) its inconsistency with the intent of the negotiators in the Uruguay Round and 2) its ambiguous nature to be an objective legal requirement.

² The procedure for the determination of *serious injury* is described in Article 4.2 of the Agreement on Safeguards

existence of 1) dumped-on subsidised imports; 2) *injury*³ to the domestic industry, and 3) a causal link between no. 1 and 2.

14. There is an overall preference in the use of SGs over ADs since they are 1) quicker responded to; 2) non-selective; 3) easier to apply, and 4) they do not represent a risk of trade diversion or of anti-circumvention. Turkey's own experience from 1995-2008, shows a predominant imposition of ADs, and a progressive application of SGs starting in 2004. The percentage for the trade remedies currently in force are AD, 89; SGs, 10; ad CV, 1 per cent respectively.

15. Despite the fact that the Agreement on Safeguards is not part of the Doha negotiations, there remain challenging issues that need to be addressed, namely, 1) the procedures relating to *serious injury* and *unforeseen development*; 2) Trade liberalisation, and 3) the review of measures.

IV. India's Experience with Safeguards and Antidumping Duties, Mr Krishna Gupta, Permanent Mission of India to the WTO

16. In India, the investigative authority at the federal level is the Directorate General of SGs. This authority reports its findings and makes recommendations to the Board on Safeguards—which is chaired by Secretary of the Department of Commerce—who generally accepts the recommendations of the DG but is not bound to do so. In recent times, India has resorted to the use of safeguards, mostly on metal and chemical products.

17. Traditionally, India has been a large user of AD actions. On the other hand, it is one of the WTO members most frequently challenged through CV measures. In light of the previous, India does not find a substitution effect between AD and SG measures

18. Developing countries face capacity constraints in resorting to AD and CVD measures since these measures require elaborate investigation protocols and evidence collection. Two elements that could be improved in the area of SG are 1) the notification procedure—which is a rather scattered process—could be improved through enhanced technical assistance to developing countries, and 2) the analysis of the effects of SGs on the trade value of a WTO member in comparison to the number of SG imposed by this country.

V. Defending Safeguard Actions against Developing Countries, Mr Charles Julien, Counsellor, Ministry of Foreign Trade and Industry, the Arab Republic of Egypt (read by Mr Charles Verrill)

19. A written statement was read on behalf of Mr Julien by Mr Charles Verrill, which highlights the following salient points: In the framework of the Doha negotiations it is essential that all members be in a position to enforce their right and comply with their obligations. Within the S&D provisions, developing country

³ The procedure for the determination of *injury* is described in Article 3.4 of the Agreement on Implementation of Article VI of the GATT 1994

members must be provided with the required technical assistance to implement the AD and SCM Agreements. To this end, members must have the necessary expertise and resources – which is rarely the case in the developing world. While a number of members may have a regulatory framework in place in Africa, they are not in a position to conduct AD or CV investigations because of the lack of sufficient resources (with the exception of Egypt and South Africa, there are no regular users of the AD or CV measures).

20. The SG instrument should be used as a one-size-fits-all solution when a domestic industry is being negatively affected by imports. It is stated that the main problem results from implementation of the provisions of the Agreement on Safeguards – and not with the provisions as such. Although Egypt has never resorted to the mechanism provided for in Article 13.1(b)⁴ of the Agreement on Safeguards, recourse to this mechanism could be envisaged by Egypt if warranted by the circumstances.

21. In respect to the notifications⁵ procedure, which represents the primary source of information to exporting members, the main problem constitutes not respecting the deadlines given by Article 12 of the abovementioned agreement. Moreover, unless the exports to the Member imposing the safeguard measure are significant, for Egypt, the cost of bringing a dispute under the WTO dispute settlement is a deterrent.

VI. Open Debate

22. A discussion followed the presentations above, during which the issue of excessive dairy and meat products in Mexico along the United States border was raised. As a result of the previous, Mexico has resorted to a special SG. In fact, as a rather active user of the AD measures, Mexico has applied the SG instrument only once since 1995 (i.e. on plywood imports). It was highlighted that a more appropriate SG mechanism to address the bilateral issue of dairy and meat products, is available through the North American Free Trade Agreement (NAFTA).

23. As to the link between SGs and global supply chains, it was stated that only in cases where these actions are taken on manufactured products, one can find a correlation between the two (e.g. this does not apply to the case of Chile whose most SG actions correspond to chemicals and raw materials).

24. It was acknowledged that the non-discriminatory nature of SG at the WTO level could come into conflict with RTA provisions amongst regional partners.

⁴ Article 13.1 (b) only requires the Committee on Safeguards to find “*whether or not the procedural requirements*” have been complied with. The Committee on Safeguards is therefore not required to look at substantive conditions.

⁵ Article 12 of the Safeguards Agreement requires notification to the WTO Committee on Safeguards whenever a safeguard investigation is initiated.