

**CRITICAL ISSUES IN WTO SAFEGUARD JURISPRUDENCE FOR THE
CONDUCT OF SAFEGUARD INVESTIGATIONS IN JAMAICA**

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INTRODUCTION

Safeguard measures, which refer to temporary import restriction measures such as quantitative restrictions and quotas, are employed to remedy or prevent serious injury to a domestic industry. These measures are now becoming increasingly significant as they allow countries to apply restrictions to imports, notwithstanding the countries' tariff concessions made during the Uruguay Round. Second, unlike the discipline in antidumping and countervailing duty investigations, the country applying the measure does not have to demonstrate any unfair trade practice on the part of the countries whose trade is affected by the imposition of the measure. Additionally, these measures are preferred because domestic petitioners are faced with virtually the same cost in filing a safeguard petition as with an antidumping or countervailing duty petition, but are likely to benefit more from a safeguard measure because it applies to all imports of the subject goods irrespective of its source, unlike antidumping or countervailing duties, which are applied to the imports of a particular country or even a specific firm in a particular country.

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Despite the advantages of safeguard measures over antidumping and countervailing duties, their application raises more controversy than other measures because more trade is often affected by their imposition. This often results in the measure being challenged before the WTO thereby allowing for just a temporary advantage for the domestic constituents in whose favour the measure is applied. For example, all safeguard measures challenged before the WTO to date have been struck down as having not been applied in conformity with the WTO Agreement on Safeguards.

Prior to the implementation of the Agreement on Safeguards in 1995 after the Uruguay Round, the discipline of Safeguards was governed by Article XIX of the General Agreement on Tariffs and Trade 1947 (GATT). Unlike, Article XIX, the Agreement on Safeguards sets out detailed requirements for the conduct of safeguard investigations and the imposition of safeguard measures. The attempt at a more detailed regime was aimed at removing some of the loopholes that attended countries' application of safeguard measures under the old regime. One such loophole was the use of so-called gray area measures such as Export Restraint Agreements (ERA) or Voluntary Restraint Agreements (VRA). Under these arrangements, export restraints are imposed by an exporting country on behalf of an importing country sometimes in the form of a government- to -government agreement or an agreement between a private exporting industry and a private domestic competing industry.

Following the passage of the Safeguards Act of 2001 and the Regulations thereto in 2003, Jamaica has now joined the list of the countries that have the institutional framework to

conduct safeguard investigations. This article is an attempt to examine some of the recent WTO jurisprudence on Safeguards and their implications for the conduct of safeguards investigations in Jamaica.

RELATIONSHIP BETWEEN ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS IN TERMS OF THE REQUIREMENT FOR PROOF OF ‘UNFORSEEN DEVELOPMENTS’

The Appellate Body in *Argentina- Safeguards Measures on Imports of Footwear (Argentina-Footwear)*¹ and *Korea Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea-Dairy Products)*² held that safeguard measures imposed after the entry into force of the WTO Agreement must comply with both the Agreement on Safeguards and Article XIX of GATT 1994.

Article XIX: 1(a) provides as follows:

“ 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

¹ Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000.

² Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000.

remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.”

On the other hand, Article 2.1 of the Agreement on Safeguards, excluding the requirement for proof of unforeseen developments, reads:

“ 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.”

In both *Korea-Dairy Products*³, and *Argentina -Footwear*⁴ the WTO Panel held that the unforeseen developments requirement in Article XIX did not constitute an additional criterion to be met for the application of safeguard measures, and that once the safeguard measure comports with the Agreement on Safeguards it also comports with Article XIX of GATT.

In reversing the Panel, the Appellate Body agreed that there is no inconsistency between the provisions for application of safeguard measures under the Article XIX and the Agreement on Safeguards, but disagreed with the Panel that ‘unforeseen developments’

³ WTO documents WT/DS98/R (Report of the Panel, dated 21 June 1999)

⁴ WTO documents WT/DS121/R (Report of the Panel, dated 21 June 1999)

need not be established for the application of a safeguard measure. For the Appellate Body, a Member proposing to apply a safeguard measure must demonstrate the ‘unforeseen developments’ as a matter of fact.⁵ A subsequent WTO Panel in *United States-Safeguards Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia (United States- Lamb Safeguard)* also agreed that investigating authorities must demonstrate proof of unforeseen developments by specifically addressing the issue in its report of the investigation.⁶ Therefore, as the WTO jurisprudence now stands, a Member must demonstrate that the increased imports are the result of certain developments that were not foreseen by that Member as a first step to determining whether a safeguard measure should be imposed.

There are several issues arising from these decisions that may present significant problems for investigating authorities. First, there is the conflict in jurisprudence on what must be demonstrated for a finding of unforeseen developments. In the GATT Panel case, *Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, concerning a United States Article XIX escape clause action regarding imports of hatters’ fur, the GATT Working Party reporting on the case considered the issue of ‘unforeseen developments.’ The Working Party report of 1951 stated that:

⁵ See note 2, above, para. 85;

⁶ Appellate Body Report, WT/DS177/AB/R, WT/DS/178/AB/R. At paragraph 76 the Appellate Body stated: “ As Article XIX: 1(a) of the GATT 1994 requires that ‘unforeseen developments’ must be demonstrated as a matter of fact, for a safeguard measure to be applied, the existence of unforeseen developments is in our view, a ‘pertinent issue of fact and law’, under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a ‘finding’ or ‘reasoned conclusion’ on ‘unforeseen developments.’”

“ the term unforeseen development’ should be interpreted to mean developments occurring after 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.”⁷

This test was endorsed by the Appellate Body in *Argentina-Footwear*⁸ and *Korea-Dairy*⁹ and by the Panel in *Argentina-Definitive Safeguard Measure on Imports of Preserved Peaches (Preserved Peaches)*.¹⁰ The test articulated in the Working Party report is that of what was not reasonably foreseeable at the time of the making of the concession by the negotiating country. On the other hand, the Appellate Body in *Korea –Dairy Products* regarded the terms ‘unforeseen’ and ‘unforeseeable’ as distinct and not to be confused with the other, thereby rejecting the approach of an objective test as the basis for determining when developments are unforeseen. The Panel in *United States-Lamb Safeguard* also adopted this approach, where the term ‘foreseen’ was held as implying a lesser threshold than ‘unforeseeable.’¹¹ This suggests that a subjective test is being endorsed: what the negotiating country did or did not foresee at the time of the making of the concession; not what the negotiating country could or could not have foreseen.

⁷ GATT/CP/106, report adopted on October 22 1951, GATT/CP.6/SR.19, sales No. GATT/1951-53 P. 10. para. 9

⁸ See para. 96.

⁹ See para. 89.

¹⁰ WT/DS238/R, para. 7.26.

¹¹ See, note 6, above. The Panel further stated at paragraph 7.22 that: “ That is, what may be unforeseen, as a matter of fact, within the meaning of unexpected by a particular individual or entity and in a particular situation, may nonetheless be foreseeable or predictable in the theoretical sense of capable of being anticipated from a general scientific perspective. We believe that a Panel’s review of a Member’s safeguard determination must be specific to the factual circumstances of the particular case at hand, that is, we must consider what was not actually “foreseen”, rather than what might or might not have been theoretically “foreseeable.”

Yet, proof of what a negotiating country foresaw as a matter of fact is difficult to determine because this would at the very least require the negotiating countries' having documented evidence of the rationale behind each specific tariff binding for particular goods. If there is no such evidence, or if there is no given specific rationale for each tariff binding, as might be the case with the negotiating teams from small economies with little input from the industries likely to be impacted by concessions, the proof of what the negotiating country foresaw may be limited to the assertion of the country concerned. Still, there is no indication from the cases of the type of evidence that the negotiating country should provide in its report to justify the finding that the developments giving rise to the surge in imports were unforeseen. This is particularly important since as at the time of writing no safeguard measure challenged before the WTO on the ground of no sufficient finding of unforeseen developments has been upheld by the Appellate Body as a sufficient demonstration of this criterion.

In some respect, the status of Panel and Appellate Body reports in the context of WTO jurisprudence presents difficulties for investigating authorities on the application of the Agreement on Safeguards. What is an investigating authority to do if it is faced with conflicting findings from an adopted Panel ruling and an Appellate Body ruling regarding the same agreement but involving different parties to a dispute?¹² The absence of a system of *stare decisis* in the WTO indicates that the investigating authority would have

¹² This is a real issue for investigating authorities given the fact that the WTO Panel in the case of *Argentina-Definitive Safeguard Measure on Imports of Preserved Peaches* WT/DS238/R at para. 7.24 disagreed with the Appellate Body in *Argentina-Footwear*, see note 1 above at para. 131, that the requirement for unforeseen developments can be satisfied by a finding on the question of whether “the increased quantities of imports should have been unforeseen or unexpected.” In other words, the investigating authority should not ask whether the increased quantities of imports were unforeseen or unexpected in addressing the requirement for a finding that the increased imports resulted from unforeseen developments.

the option of determining which of the two decisions to follow. However, prudent practice might suggest reliance on the Appellate Body ruling, although the situation gets murky if the Appellate Body ruling precedes the Panel ruling or the investigating authority makes a determination based on a recent Panel ruling where the parties to the Panel dispute indicate their intentions to appeal the ruling before the Appellate Body. The uncertainty is likely to remain given the fact that neither a Panel nor the Appellate Body has the jurisdiction to render binding authoritative interpretations of WTO agreements- a discretion reposed in the Ministerial Conference and the General Council with decisions taken by a three quarters majority of the members.¹³ Nor is the panel or Appellate Body in conducting their interpretive role empowered to fill gaps in existing WTO Agreements as seen from Article 3, Paragraph 2 of the Dispute Settlement Understanding providing that ‘Recommendations and Rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.’ This is not to suggest that Panels and the Appellate Body will necessarily eschew this role or will have their decisions overturned if this role is assumed as the history of panel interpretations under GATT 1947 bears out.¹⁴

¹³ Article IX: 2 of the WTO Agreement. See also Articles 3(2) of the DSU and 19:2 of the WTO Agreement. John Jackson adopts the observation made by some that often-times a quarter of the WTO membership is not at key meetings, so that the formal interpretation process is difficult to achieve, although decision on the basis of consensus is not so difficult to obtain. ‘Dispute Settlement and the WTO’, working paper dated November 5-6, at 10, presented at the Conference on Developing Countries and the New Round Multilateral of Trade Negotiations at the Centre for International Development, John F. Kennedy School of Government, Harvard University.

¹⁴ See, for example, Debra P. Steiger, ‘Afterword: The “Trade And...” Conundrum-A Commentary’, *Am J Int’l L*, vol. 96, no.1, at 135: She points to the Panel’s extension, as opposed to the Contracting Parties of GATT, of the Article III national treatment obligation in the GATT to *de facto* discrimination, even though this interpretive function that amounted to filling the gaps of the Article III went beyond their mandate. She points out further, that even though the Panel went beyond its mandate in this regard, it is now well accepted that the MFN and national treatment obligations in Articles I and III of the GATT 1994, as well as in Articles II and XVII of the General Agreement on Trade in Services, apply to both *de jure* and *de facto* discrimination.

THE EFFECT OF THE OBLIGATIONS INCURRED, INCLUDING TARIFF CONCESSIONS

Article XIX: 1(a) of GATT 1994 stipulates that the increase in imports for which safeguard protection is required must not only result from unforeseen developments but from the effects of the obligations of a contracting party including tariff concessions. The wording here suggests that there is a distinction between obligations per se, and tariff concessions, and that the increase in imports could possibly result from obligations other than or excluding tariff concessions. If this were the case, the obligation would certainly include the other multilateral agreements to which WTO Members became bound upon ratification of GATT 1994, and the ratified optional or plurilateral agreements. Taken further, this would mean that a safeguard investigation could be initiated where a WTO Member's obligation under a WTO multilateral agreement results in an increase in imports causing or threatening serious injury to a domestic industry. But more would be required, because Article XIX specifically mandates a consideration of tariff concessions as a part of the obligations assumed under GATT 1994 to be evaluated in the context of the determination of whether increased imports results from the WTO member's obligations.

What then would be the situation where the increase in imports results from general obligations, not including tariff concessions? This is likely to be the case where the increase in imports results from a particular agreement in circumstances where the importing WTO member's tariff concession in the form of a tariff binding is significantly above its applied tariff rate, and its applied rate has been maintained since the conclusion

of GATT 1994, notwithstanding that WTO member's tariff binding above this rate. Could a safeguard measure be maintained under these circumstances? The answer to this issue depends on whether support for a safeguard action *necessarily* involves a consideration of tariff concessions as part of the analysis of whether increased imports results from a WTO member's obligations, as would seemingly be implied by the context in which the words 'including tariff concessions' appear. The wording of Article XIX, however, suggests that consideration of the effect of tariff concessions on the question of an increase in imports is not merely permissive, but obligatory. If tariff concessions could be excluded from the analysis there would be no need for its express inclusion under the rubric of 'obligations' since this term is adequate for obligations in the form of tariff bindings. Yet, the wording of Article XIX may suggest, theoretically at least, that a safeguard measure could be supported where the increased imports results from the effect of obligations other than tariff concessions if one interprets Article XIX as distinguishing between, on the one hand, the effect of obligations per se, and, on the other hand, the effect of obligations in the form of tariff concessions.

There is no WTO decision on the Agreement on Safeguards which has specifically addressed this issue, and there is no substantial body of state practice from which one may derive a definitive answer.¹⁵ There are, however, cases that may be read as clarifying

¹⁵ While under the Vienna Convention on the Law of Treaties 1969, in particular, Article 31(3)(b), recourse may be had to state practice subsequent to a treaty to determine its meaning, this doctrine has so far not been relied on by the Panel or Appellate Body in the interpretation of the Agreement on Safeguards. For example, in the case of *Korea – Dairy*, the Appellate Body did not take cognizance of the fact that all the WTO notified Safeguards legislation up to the time of the case did not include the requirement of 'unforeseen developments' under GATT 1994 as part of the notifying countries' domestic legislation. Therefore, while Article 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) stipulates that the Dispute Settlement Body (DSB) is to clarify provisions under the WTO agreements 'in accordance with customary rules of interpretation of customary international law' (which

the term. In *Argentina-Footwear*, the Appellate Body clarified the term in the following terms:

‘With respect to the phrase “of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions”, we believe 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’.

The Appellate Body in *Korea-Dairy*¹⁶ also clarified the term in identical terms. More recently, the Panel further clarified the term in *United States-Definitive Safeguard Measures on Imports of Certain Steel Products (US-Steel Safeguard)*¹⁷ in the following terms:

‘The Appellate Body in *Korea-Dairy* and *Argentina-Footwear* (EC) stated:

“With respect to the phrase of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions”, we believe 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’. Here we note that the schedules annexed to the GATT 1994 are made an integral part of Part 1 of that Agreement, pursuant to paragraph 7 of

includes the 1969 Vienna Convention on the Law of Treaties), this stipulation remains unutilized in so far as consideration of the development of a custom by WTO Members with respect to their interpretation of WTO agreements is concerned.

¹⁶ WT/DS98/AB/R. Para. 84.

¹⁷ WT/DS248-254, 258-259.

Article 2 of the GATT 1994. Therefore any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994”

It seems to us that when the Appellate Body wrote “this phrase simply means” it was interpreting “as a result of tariff concessions...” to mean that the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.’¹⁸

This clarification indicates that there is no need for a demonstration of a causal link between the obligations assumed and the increase in imports, provided there is a demonstration that tariff concessions were made. The WTO's approach on this issue is problematic because it results in an interpretation that disregards the clear meaning of the words in Article XIX. Its approach also conflicts with its mandate to invoke the rules of interpretation of treaties as a source to clarify the WTO Agreements. Article 3.2 of the Dispute Settlement Understanding (DSU) provides that the WTO Agreements are to be interpreted in accordance with customary rules of interpretation of international law. The 1969 Vienna Convention on the Law of Treaties is regarded as establishing customary international law rules on treaty interpretation.¹⁹ Article 31 of the Vienna Convention provides that:

¹⁸ This clarification was made in the context of the argument raised by the European Communities, Switzerland, Norway and New Zealand, to the effect that Article XIX: 1(a) requires that the increase in imports results from unforeseen developments and tariff concessions. See paras. 7.134-7.139. See also, paras. 10.139-10.141.

¹⁹ This means that its principles are binding on WTO Members who are not parties to the Convention. The Appellate Body in *Japan-Taxes* also recognized the customary nature of these principles by declaring same to be a codification of customary international law and therefore binding on all States. The Appellate Body

“ a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose”

The Appellate Body in *Beef-Hormones* also recognized that “ a Treaty interpreter is not entitled to assume that... usage of words was merely inadvertent on the part of the Members who negotiated and wrote the Agreement”.²⁰ The WTO’s current clarification of the term “ of the effect of the obligations...” is therefore counter-intuitive.

However, it is clear that not all increases of imports resulting from obligations under other agreements can be taken into account in addressing the question of whether the requirements for the imposition of a safeguard measure under Article XIX of GATT 1994 are met. For example, some multilateral agreements such as the Agreement on Agriculture and the Agreement on Textiles and Clothing have their own special safeguard provisions for dealing with a certain trigger level in imports. Other agreements without special safeguard provisions and which do not deal specifically with particular goods, unlike the Agreement on Textiles and Clothing for example, may cause an increase in imports, though not because of a reduction in tariff rates. These may be considered on the issue of whether increased imports resulted from a WTO member’s obligation per se. But a finding of increase under such an agreement would not be sufficient to support a

relied on the *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994) I.C.J Reports 6(International Court of Justice)

²⁰ *EC Measures Concerning Meat and Meat Products (Beef -Hormones)*, WT/DS26/AB/R, para. 164.

safeguard measure because the wording of Article XIX indicates that obligations relating to tariff concessions must be considered as well.

INCREASED IMPORTS

Under Article 2.1 of the Agreement on Safeguards, a Member is authorized to apply a safeguard measure to a product if the product is being imported into its territory “*in such increased quantities, absolute or relative to domestic production...as to cause or threaten to cause serious injury to the domestic industry*”.²¹ Article 4.2(a) of the Agreement on Safeguards requires that “the rate and amount of the increase of imports...in absolute and relative terms” must be examined. In *Argentina- Footwear*, the Appellate Body held that the text of Article 2.1 requires that investigating authorities go beyond evaluating trends in imports over a historical period and to examine recent imports as well to demonstrate that the increase in imports is sudden and recent.²² According to the Appellate Body, the increase in imports must be recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively to cause or threaten to cause serious injury.²³

The ruling suggests that the increase if it is to be sharp and significant must be of a certain magnitude, although this is not specified; that the increase if it is to be deemed sudden must have occurred within a relatively short period of time, although no guidance is provided on the time span; and that the increase in imports if it is to be deemed as

²¹ My Emphasis.

²² See note 1, above, para. 130-131.

²³ Id., at para. 131.

recent must relate a short time span, although again no particular time period is specified for recent, except that a five year period is considered as being too long.²⁴ The ruling might be seen as understandable from the standpoint that a safeguard measure is designed to address what is characterized as an emergency situation. However, there are implications of the ruling that could affect a country's freedom to apply a safeguard measure even when there is a genuine increase in imports that is causing serious injury to a domestic producer. For example, while WTO Members have the discretion to determine the investigating period (IP) for the application of a safeguard measure, the ruling limits this right by requiring that the starting period of the IP (or the base year) be such that if that is changed to another year or there is a change to another year in the end point of the IP, there should be no change in a finding of an increase in imports. To illustrate, assume in 1998 imports of product P was 10 tonnes; in 1999, 16 tonnes; in 2000, 15 tonnes; in 2001, 14 tonnes; in 2002, 13 tonnes, 2002 being the end of the IP period. Here, there is clearly an increase in imports when the base year and the end of the IP are compared. However, if the base year is changed to 1999 the result would be a decrease in imports when compared with the end of the IP. In addition, the trends of the imports for the period 1998 to 2002 show a decline in imports beginning in 1999, although imports have increased consistently beyond what it was in the base year. A change in the base year to 1999 would result in a finding of no increase in imports and no safeguard measure being imposed where there might very well be injury if, in our hypothetical, we assume that the domestic market for product P is 9000 tonnes at a given price by the domestic industry.

²⁴ Id., at para. 130.

In the foregoing example a finding of an absolute increase in imports would cover an increase in imports beyond the base year at an increasing rate and an increase at a decreasing rate, but not an increase above the base year figure if there are decreases in subsequent periods where the imports in each subsequent year is less than the period preceding it. The question of whether decreases in imports over the base period (though an increase in fact when the beginning and end point of the IP are compared) constitute an increase in imports for the purpose of the application of a safeguard measure depends on whether the decreasing trend is temporary or permanent.²⁵ There is no sufficient guidance on this from the WTO's jurisprudence, but the Panel in *Argentina-Footwear* found that a 38% decline in imports over the last three years of a five year investigation period was a long term reversal of the initial increasing trend in imports, and the Panel in *United States: Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Pipe From Korea (US-Line Pipe)*²⁶ held that a decrease in imports over the last

²⁵ The Panel took this position in *Argentina- Footwear* stating that:

“ 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. In practical terms, we consider that the best way to assess the significance of any such mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or instead reflects a longer-term change.” Panel Report, para. 8.159.

The Appellate Body upheld this statement of the Panel (See *Argentina-Footwear*, AB, para.129), stating that: “...the specific provisions of Article 4.2(a) require that ‘the rate and amount of the increase in imports...in absolute and relative terms’ must be evaluated. Thus, we do not dispute the Panel’s view and ultimate conclusion that the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a). As a result, we agree with the Panel’s conclusion that ‘Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.’”

²⁶ WT/DS202/R, para. 7.214.

year of a five and a half-year IP did not impugn a finding that imports had increased in accordance with Article 2.1 of the Agreement on Safeguards.

However, where imports are decreasing from year to year, although representing an increase over a base figure, there might be a finding of not absolute, but a *relative* increase in imports. This typically occurs where imports may remain constant or may even be decreasing in a situation where there is a reduction in domestic production from a base year (possibly because of a change in tastes or other demand or supply altering factors) that results in an apparent increase in imports relative to the domestic production when compared to the base year.

One issue that arises with a finding only of relative increase in imports is how to make the causal link to serious injury to a domestic producer since it would be difficult to argue that the imports are the cause of the injury in such circumstances. The injury would arguably be the result of factors reducing domestic production such as change of taste, general economic decline, increase in consumer interest rates, inflation, and the like. This would more likely be the case if the finding of relative increase occurs in a situation where imports have actually decreased and domestic production decreased at a faster or more significant rate than the decrease in imports.

Beyond this, there is the more serious question of whether the requirement that an increase in imports must be recent enough, sudden enough, sharp enough, and significant enough, is an example of judicial overreaching from the Appellate Body due to the

absence of such qualifying words from Article 2.1 of the Agreement on Safeguards. John Greenwald, for example, argues that the Appellate Body's ruling in this respect amounts to judicial legislation because the Agreement on Safeguards 'does not specify a time frame for the required increase in imports and does not prescribe the type of increases in imports (for example 'sudden', 'sharp', or 'significant') needed to support a safeguard measure.'²⁷ This would also seem to be the view of countries such as the United States judging from their submission in the *US Steel Safeguard* case.²⁸ If this is true, WTO Members would need not abide by the ruling since the Dispute Settlement Body (DSB) can only issue recommendations and adopt rulings of the panel or Appellate Body, but is enjoined from adding to or diminishing the rights and obligations of the parties under the WTO Agreement.

SERIOUS INJURY AND THREAT OF SERIOUS INJURY

For a safeguard measure to be applied the increased imports must have caused or threatened to cause serious injury to the domestic industry. Article 4.1 of the Agreement on Safeguards defines serious injury as "a significant overall impairment in the position of the domestic industry" and lists similar factors to aid in this determination as are contained in the WTO Antidumping Agreement. The factors include: 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,

²⁷ John Greenwald, 'WTO Dispute Settlement: An exercise in Trade Legislation?' in *Journal of International Economic Law* (2003) 114.

²⁸ See para. 7.511, reference being made to US' First Written Submission. Here the US argued that the Agreement on Safeguards does not set any standard for how recent, sudden, sharp and significant an increase in imports must be, and does not contain any of these descriptive terms.

production, productivity, capacity utilization, profits and losses, and employment. The standard of serious injury is, however, higher than the material injury standard in the Antidumping Agreement.²⁹

One issue that has arisen is whether the consideration of all of the factors listed is necessary. The Panel in *Korea-Dairy* clarified that all the factors listed must be considered although the investigating authority may eventually later disregard some as irrelevant.³⁰ Each factor must, therefore, be considered before the investigating authority determines their relevance in a particular investigation.³¹ In addition, an investigating authority must show whether, in light of a consideration of the injury factors, there is “a significant overall impairment in the position of a domestic industry” or the threat thereof.

The requirement of a causal link between increased imports and serious injury to a domestic industry mandates the investigating authority to discount the impact of factors other than the increase in imports that may be causing injury. What is not clear, however, is whether there may still be a finding of causation where the impact of such other factors is minor and not readily discernible for their contribution to injury to be clearly separated. Also unclear is whether there can still be a finding of causation where the increase in imports is a factor in the injury being caused though not the predominant factor. The Panel in *US-Wheat Gluten* clarified that the increase in imports need not be the sole

²⁹ *United States –Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, para.124.

³⁰ Para. 7.55.

³¹ This approach is also confirmed by the Appellate Body in *Argentina-Footwear* at para. 136

causal factor, but must be sufficient to cause injury that achieves the threshold of serious injury.³²

Regarding threat of injury, Article 4 of the Agreement on Safeguards requires that this must be clearly imminent, and the Appellate Body has clarified this to mean “ on the verge of occurring.”³³ Additionally, the analysis on threat of injury must be based on facts and “not merely an allegation, conjecture or remote possibility.”³⁴ These requirements are, however, difficult to satisfy because the threat analysis is future oriented and some amount of conjecture is involved as the Appellate Body observed in *United States Lamb-Safeguard*.³⁵ The term clearly imminent is also elusive notwithstanding clarifications like on the verge of occurring. Is excess capacity in an exporting country coupled with product shifting capabilities, to satisfy consumer preferences for a subject product in the importing country, sufficient to satisfy this test? And if not, what else is necessary? Must the investigating authority demonstrate that there are pending orders for imports from the exporting country? If there are no pending orders but the price in the exporting country is sufficiently low to prompt exports is that sufficient for a finding of threat of injury or is this merely an indication of a threat of an increase in imports, in the first instance? These questions are not easily resolved by the text of the Agreement on Safeguards and have not yet been resolved by the cases thus far.

LIKE OR DIRECTLY COMPETITIVE PRODUCTS

³² *United States-Definitive Safeguard Measure on Import of Wheat Gluten from the European Communities (US –Wheat Gluten)*, WT/DS166/R, adopted January 19, 2001.

³³ *United States-Lamb Safeguard*, supra, note 6 para. 136-139.

³⁴ Article 4.1(b) of the WTO Agreement on Safeguards

³⁵ Appellate Body Report, para. 136-139.

The terms like and directly competitive are not defined in the Agreement on Safeguards. The word ‘like’ has long plagued the WTO with its ambiguity and no seemingly clear definition of its meaning. As the Appellate Body noted in the *Japan –Alcoholic Beverages* case:

there can be no precise and absolute definition of what is ‘like’. The concept of ‘likeness’ is a relative one and evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply”³⁶.

Under the Agreement on Safeguards the factors that are usually examined for a determination of the likeness of products include physical characteristics of the product, similarity of distribution channels between the products, and the end uses of the product. Input products can only be included if they are like the end product, whether or not there is, for example, a continuous line of production between the input product and the end product, or that there is no use for the input product other than as an input for the particular end product.³⁷

³⁶ *Japan-Taxes on Alcoholic Beverages*, WT/DS8/ABR, WT/DS10/AB/R, WT/DS11/AB/R, p.20

³⁷ *United States –Lamb Safeguard*, supra, note 6, paras 86-91. Here the Appellate Body rejected the United States contention that producers of the like product lamb meat included growers and feeders of live lambs because, inter- alia, there is a continuous line of production from the raw product, live lambs, to the end product, lamb meat.

However, input products and end products may be included in the scope of an investigation if they are directly competitive. The issue of directly competitive essentially refers to the substitutability of products based on perceptions in the market. Therefore, where input products can only be used to produce the end product, and has no additional independent use, these two products would not be directly competitive.

APPLICATION OF A SAFEGUARD MEASURE

One of the first requirements for the application of a safeguard measure is that it must be applied to imports ‘irrespective of their source’,³⁸ that is, on a most favoured nation (MFN) basis. However, this requirement is questionable in the case of the application of safeguard measures to exclude the imports from countries within a Free Trade Area (FTA)³⁹ or a Customs Union (CU)⁴⁰ of which the importing country is a part. That Article XXIV of the GATT 1994 allows exceptions to GATT provisions, like MFN, in the case of Customs Unions or a Free Trade Area, gives rise to the view that MFN deviations are also permissible in the application of safeguard measures to imports from a Customs Union or Free Trade Area.⁴¹ In *Argentina-Footwear*, the Panel concluded that a safeguard measure imposed only on countries outside of a customs union cannot be justified on the basis of an investigation that found serious injury or threat thereof caused

³⁸ Article 2.2 of the Agreement on Safeguards.

³⁹ A Free Trade Area typically involves countries coming together in a loose union in which customs duties and other trade restrictions are eliminated on essentially all trade for the participating countries, while the participating countries’ individual custom duties and trade policies are maintained against third countries.

⁴⁰ In a Customs Union customs duties and other trade restrictions are eliminated on essentially all trade with the members, while a common trade policy and customs duty is applied to the products of non-members.

⁴¹ This argument was advanced by Argentina in the *Argentina-Footwear* case. See, for example, Panel decision at para. 8.84.

by imports from all sources of supply within and outside of the customs union.⁴² The Appellate Body agreed with the Panel on the point, although it recognized that its views were merely *obiter* since it disagreed with the Panel that it was dealing with a safeguard measure applied by a customs union on behalf of a member state.⁴³ The Appellate Body, however, was more direct on this issue in *US-Wheat Gluten*⁴⁴ holding that imports included in the determination of an increase in imports causing or threatening serious injury must correspond to the imports included in the application of the safeguard measure.⁴⁵

Interestingly enough, the Appellate Body's ruling while apparently settling the question has done quite the opposite when one considers the requirement of parallelism and the permissible exceptions to that requirement. The principle of parallelism maintains that the scope of a safeguard measure should correspond to the scope of imports that were investigated and in respect of which the requirements for the imposition of a measure were met. Therefore, if the imports investigated were found to have increased and caused or threatened serious injury to a domestic producer, those imports have to be subject to the application of the safeguard measure.

One exception to this principle is Article 9 of the Agreement on Safeguards excluding the imports of developing countries from the application of a safeguard measure if its share

⁴² See para. 8.102.

⁴³ The Appellate Body was, in fact emphatic on the point of not wanting to be seen as making any ruling on this point. See, para. 8.102.

⁴⁴ *United States-Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities*, WT/DS/166/AB/R adopted January 19, 2001.

⁴⁵ See, par.96.

of imports of the product concerned in the importing country does not exceed 3%; and second, where the imports of the excluded source are so negligible as not to affect the finding of an increase in imports causing or threatening serious injury.

A less certain, but arguably permissible exception, is where the sources of imports to be excluded are those which initially evinced an increase, and even perhaps actual or threatened serious injury, but not an increase in the context of the requirement that a finding of an increase in imports must be ‘recent enough, sudden enough, sharp enough, and significant enough’, because, for example, there is no evidence of an increase in imports for the most recent POI of three years. While the initial increase might be considered on the question of an absolute or relative increase in imports, if this increase is unable to meet the ‘recent enough...’ requirement, there is in fact and law no increase under the Agreement on Safeguards, and no safeguard measure could be applied if one were relying on the initial increase as the basis for the application of the measure.

Another requirement for the application of a safeguard measure is that set out in Article 5.1 of the Agreement on Safeguards; that is, a safeguard measure is to be applied only to the extent necessary to prevent or remedy serious injury to a domestic industry and to facilitate its adjustment.⁴⁶ The WTO panel has interpreted Article 5.1 as not requiring that an investigating authority show that the safeguard measure is necessary, provided

⁴⁶ Article 5.1 of the Agreement on Safeguards. This Article provides: “ A Member shall apply a safeguard measure only to the extent necessary to prevent or remedy serious injury and facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be 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. Members should choose measures most suitable for the achievement of these objectives.”

that the requirements for the application of the safeguard measure are met.⁴⁷ The Appellate Body went further in this case, clarifying Article 5.1 as not requiring an investigating authority to justify a safeguard measure in all cases.⁴⁸ According to the Appellate Body, a demonstration of the necessity of a safeguard measure only applies to a safeguard measure in the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years, and not to one which is consistent with the average of imports in the last three representative years for which statistics are available.⁴⁹ On this basis, it would seem that a safeguard measure in the form of a tariff need not be justified as necessary.

However, the Appellate Body's interpretation of article 5.1 raises certain questions as regards the use of tariffs as a safeguard measure. If the only circumstance for the requirement that investigating authorities justify the necessity of a safeguard measure is when the safeguard measure is a quantitative restriction reducing the quantity of imports below the average of imports in the last three representative years, what if the rate of the tariff to be applied is likely to have the same effect or worse? Notwithstanding the Appellate Body's clarification above, it is submitted that the answer to this question depends on the interpretation given to the first sentence of Article 5.1: "A Member shall apply safeguard measures *only to the extent necessary* to remedy or prevent serious injury

⁴⁷ *Korea- Dairy Products*, para. 7.99.

⁴⁸ *Korea-Dairy*, Appellate Body decision, para. 99.

⁴⁹ *Id.*; See also *US-Line Pipe* at para. 233. Here the Appellate Body stated that Article 5.1 (not including quantitative restrictions) "does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied to the extent necessary".

and to facilitate adjustment.”⁵⁰ The question would be whether the tariff to be applied is to be applied at a rate no more than necessary to remedy or prevent serious injury. There is no requirement in Article 5.1 that the effect of the tariff, if a tariff is to be applied as a safeguard measure, must be equivalent to the effect that a quantitative restriction would have in the sense that it should not reduce imports below the average of imports for the last three representative years for which statistics are available. How does one determine if the tariff to be applied is more than is necessary? This cannot be done with any pinpoint accuracy, and different methodologies may yield different results; indeed the same methodology may yield different results based on the assumptions of the model. The Appellate Body has not stipulated any particular methodology to determine if and when the tariff to be applied is “only to the extent necessary” to remedy the injury, or the extent of the accuracy required.⁵¹ For example, an economic study might show that a price increase of 8% is required to remedy serious injury and that a tariff rate of 10% would achieve this result, but the tariff rate required may also be higher depending on the assumptions of the model.

There is also the distinction to be made between demonstrating the necessity of a measure as opposed to demonstrating that the measure is no more than what is required to remedy serious injury. The former presupposes that the particular measure chosen is what is required for effective redress or that there is no other measure to remedy the injury but

⁵⁰ My emphasis. The Appellate Body in *Korea-Dairy* did not address the question of whether an investigating authority would have to justify the necessity of a tariff measure, or the circumstances under which a tariff would be consistent with Article 5.1 of the Agreement on Safeguards.

⁵¹ Indeed the Appellate Body, in *Korea- Dairy* (para. 96), seems to have recognized the uncertainty surrounding this issue by noting that Article 5.1 requires that a safeguard measure be “commensurate with-not equivalent or equal to-“ the goals of preventing or remedying serious injury and facilitating adjustment”

the one being applied, and the latter presupposes a continuum of applicable measures that may differ in effectiveness up to some notional effective measure beyond which the investigating authority may not tread. It is only in the former sense that one may comprehend the cases cited earlier on the clarification of Article 5.1 that there need not be a demonstration by the investigating authority that the measure being applied is necessary.

CONFIDENTIALITY

Under Article 3 of the Agreement on Safeguards confidential information is protected against disclosure, unless the person submitting the information agree to its disclosure. The term confidential is not defined and no examples are provided as to what information is by nature confidential. However, confidential information may be, and usually is, accompanied by non-confidential summaries, unless the information is not capable of being summarized, in which event, the reasons for this must be submitted. Where there is disagreement between the person submitting the information and the investigating authority as to whether the characterisation of the information as confidential is justified, and the person submitting the information refuses to make the information public or to authorize its disclosure by way of a summary, the investigating cannot decide to treat the information as non-confidential. Rather, it can only disregard the information unless it can be certain, through its investigation into other sources, that the information submitted is correct. Therefore, the investigating authority's determination that information submitted is not confidential does not change the characterization of the information by

the party submitting it, unless the party submitting it agrees to that characterization. The party submitting the information would also not be bound by the investigating authority's determination of non-confidentiality in the sense of being legally obligated to treat the information as confidential following the investigating authority's determination. That party, however, risks its information not being used in the investigation, if there is no independent means of verifying it.

The issue of confidentiality may also arise in judicial review proceedings where a party may apply for discovery of information submitted to an investigating authority to determine whether the investigating authority's findings should be reviewed. At the time of writing, there is yet no indication as to how such an issue would be resolved before our local court. However, in the context of WTO dispute settlement, Members are encouraged under Article 13.1⁵² of the DSU to make confidential information available to the Panel to assist in its review of the determinations of investigating authorities. For safeguard investigations, the obligation of investigating authorities to maintain the confidentiality of submissions under Article 3.2 of the Agreement on Safeguards may conflict with the provisions of Article 13 of the DSU. In *US-Wheat Gluten*, for example, while the Panel considered that having certain confidential information used by the United States International Trade Commission (USITC) would facilitate its assessment of the facts of the case, the US refused to submit the information requested on its reliance on

⁵² Article 13.1 states: " Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a Panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a Panel for such information as the Panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

Article 3.2 of the Agreement on Safeguards.⁵³ The US proposed instead to divulge the confidential information to the Panel *in camera* provided it would not be made available to the EC, but the EC objected to this approach as being in conflict with Article 18.1 of the DSU, that is, the prohibition on ex-parte communications with the Panel.

There seems, however, to be little basis for the view that a conflict exists between Article 3.2 of the Agreement on Safeguards and Article 13 of the DSU. Article 3.2 sets out the obligation of investigating authorities with respect to their treatment of confidential information submitted to them by interested parties⁵⁴, and Article 13.1 of the DSU permits the Panel to seek confidential information without laying down an obligation for such information to be provided either by the party whose confidential information it requests or the Member of the individual from whom the information is requested. This means that an individual from whom the Panel requests information may refuse to supply same; so too, a Member may not provide such information, particularly where it has not received permission to do so. However, the Appellate Body in *US-Wheat Gluten* emphasized the duty of a Member under Article 13.1 of the DSU to respond promptly and fully to Panel requests for information and deplored the conduct of the US in not providing the information requested by the Panel. In context, prompt and full response by

⁵³ Article 3.2 states: “ Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct”.

⁵⁴ The investigating authority is enjoined from disclosing the information submitted to it unless the party submitting it grants permission.

a Member to a Panel's request for information cannot mean that the confidential information must be provided. This would undoubtedly affect the Panels ability to objectively review determinations by an investigating authority. It is submitted, that the same defect would also accompany a local court's ability to review the determinations of the investigating authority under the Safeguard Act of 2001. Article 3.2 of the Agreement on Safeguards, however, is not replicated verbatim in the Safeguards Act of 2001.⁵⁵ There are no clear words indicating an obligation on the investigating authority not to divulge confidential information to the court even if requested to do so in the absence of permission by the person submitting the information, unlike what appears to be the case with an individual or Member requested by the Panel to provide confidential information to review determinations by an investigating authority. However, to the extent that the context of section 12 of the Safeguard Act suggests that confidential information the investigating authority receives can be divulged with the permission of the person submitting same, it seems that this would be the only basis on which a court could obtain the information, unless the investigating authority is compelled by the court to provide same.

⁵⁵ For example, section 12 of the Act does not state clearly that the investigating authority cannot divulge confidential information submitted to it unless the party submitting it agrees, unlike Article 3.2 of the Agreement on Safeguards. This, however, may be unnecessary since the context of section 12 indicates that the information can be divulged if permission is granted. Section 12 of the Act states: (1) "A person who, pursuant to the provisions of this Act, provides the Investigating Authority with information, the whole or part of which he desires to be kept confidential, shall submit, at the time the information is provided, a written statement identifying the information which is to be kept confidential and the reasons therefore. (2) A statement submitted pursuant to subsection (1) shall be accompanied by a summary of the information to which the statement relates in sufficient detail so as to facilitate a reasonable understanding of the information. (3) If, on examination of the information, the Investigating Authority is satisfied that a request for confidentiality is not justified and the person who provided the information is not willing to withdraw the request for confidentiality, the Investigating Authority shall treat that information as confidential. (4) *Information which is treated as confidential under this section shall not be disclosed by any person who received the information otherwise than in the discharge of his functions under this Act.*"

COMPENSATION AND POSSIBLE RETALIATION FOR A SAFEGUARD MEASURE

A WTO Member applying a safeguard measure must endeavour to maintain an equivalent level of concessions under GATT 1994 between it and the exporting member whose trade is affected as a trade-off for its imposition of the safeguard measure. Article 8.3 of the Agreement on Safeguards disallows retaliation for the first three years that a safeguard measure is applied provided that the safeguard measure is taken as a result of absolute increase in imports and that the measure conforms to the provision of the Agreement on Safeguards. This suggests that retaliation is possible where there is a finding of a relative increase in imports as opposed to absolute increase in imports, provided the Council for Trade in Goods does not disapprove.⁵⁶ A further implication is that the right of suspension can be exercised after the first three years of the measure if the measure is in effect for four years, for example. However, despite the wording of Article 8.3, Article 8.2 stipulates that the retaliatory measure is not to take place later than ninety days after the measure has been put into effect. This suggest that retaliation will more likely be available after the initial application of the safeguard measure, unless it can be put into effect during the first ninety days of the initial application of the measure. This of-course presumes that the safeguard measure was based on a finding of absolute increase and that the provisions of the Agreement on Safeguards were met before the application of the measure.

⁵⁶ Article 8.2 of the WTO Agreement on Safeguards

One question arising is whether retaliation may still be possible later than ninety days after the measure is in effect and before the end of the initial application of the safeguard measure where there is, for example, a dispute submitted for settlement on whether the investigating authority should have found relative increase on the facts or that some other provision of the Agreement was breached? The text of Article 8.3 suggests that this is possible where the matter is resolved by dispute settlement procedures before the expiration of the initial application of the measure. A further limitation to the exercise of this right is that retaliation is to be effected not later than ninety days after the measure is in effect. However, if there is disagreement as to whether the safeguard measure conforms to the requirements of the Agreement on Safeguards, the country whose trade is affected is not permitted to unilaterally suspend concessions, but must submit the matter to dispute settlement.

CONCLUSION

Safeguard measures have become a preferred trade remedy for domestic industries because of its perceived benefits over other trade remedies like antidumping and countervailing duties. Despite these perceived advantages, there are several ambiguities in the WTO Agreement on Safeguards that present challenges to investigating authorities for the application of these measures. After several WTO cases clarifying some of the provisions of this Agreement, there is still some uncertainty on several provisions including how investigating authorities should demonstrate the requirement that increased imports results from unforeseen developments, whether a causal link between

the increase in imports and the obligations assumed by a Member needs to be established, how to demonstrate a finding of causation where factors other than the increased imports are causing injury but whose contribution to injury may be minor, and the provision of a non-elusive standard for the determination of a threat of serious injury.

The increasing challenge to domestic safeguard measures before the WTO requires greater certainty on the application of these rules, especially for developing countries that lack the resources to face WTO challenges to their measures. Further judicial decisions are needed for clarification of existing ambiguities, but these should also be resolved by the Ministerial Conference and General Council to ensure greater certainty in the application of these rules, absent clarification expected from subsequent trade rounds.