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A HANDBOOK ON SAFEGUARD RULES FOR LEAST DEVELOPED COUNTRIES

Prepared by
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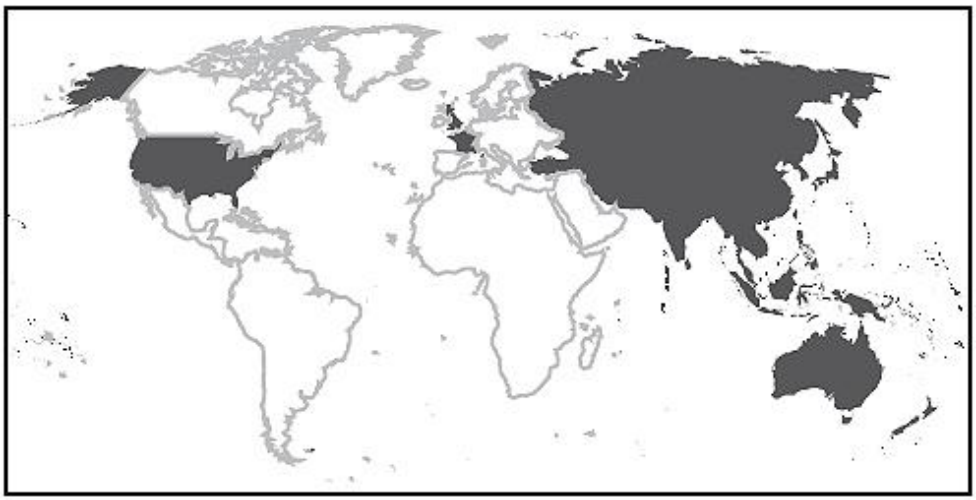

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This Handbook is grounded in, and extends the work done under the technical assistance provided to the Government of Myanmar related to drafting the country's first trade remedies legislation. The content of the Handbook has therefore been subject of the review and discussion with government officials and other stakeholders, including most importantly the private sector. The comments received by all those parties are highly appreciated. Any errors and omissions are solely those of ESCAP.

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Executive summary

Article XIX of GATT (Emergency Action) and the WTO Agreement on Safeguards (1994) allow member States to take safeguard measures to protect domestic producers from serious injury caused by increased imports. These measures can be in the form of an import duty exceeding the bound rate, import quotas (where allowed) or a combination of both as Tariff Rate Quotas. The measures can only be applied for a limited duration, initially lasting for up to four years, and can be extended to a maximum of eight years (10 years in the case of developing countries, including a least developed country) from the date of their initial imposition.

Safeguard measures can be applied only after an investigation has been conducted by a duly appointed competent investigating authority. The investigation must conclude that the domestic industry is facing serious injury, or the threat thereof, caused by increased imports of a product. Further, the investigators must recommend the imposition of safeguard measures to protect the domestic producers of like or directly competitive products. Safeguard measures cannot be applied without such a recommendation. The investigation needs to be made public and known to all interested parties, including domestic producers, importers, exporters and the Governments of the exporting countries.

The objective for using the safeguard measures is to provide the opportunity for domestic producers to become more efficient by protecting them from exposure to competition by increased imports. Domestic producers must provide fair rationale for needing support of protective

measures and must formulate an adjustment plan showing how they intent to become sufficiently competitive to face import competition during the period that measures are applied.

Transparency is an important requirement that must be met in the investigation and imposition of safeguard measures. Therefore, the WTO Agreement on Safeguards instructs that all the interested parties (importers, exporters, domestic producers, exporting countries, etc.) must be fully informed through public/trade notices and their views sought during investigation. At the same time, the country initiating the safeguard investigation is required to inform the WTO Committee on Safeguards of the initiation, the finding and the decision to apply or extend a safeguard measure. This manual explains the above-mentioned and other aspects of the imposition of safeguard measures, with a focus on a least developed country, by discussing the provisions of the WTO Agreement on Safeguards (1994) and the procedures to be followed in carrying out an investigation (as defined in Article 3 of the said Agreement).

Introduction

The ESCAP secretariat has been working to increase the capacity of member States' to develop and implement trade policies in support of sustainable development. While many of the Asia-Pacific economies continue to pursue export-led development relying on opening of market access of their own and partner's markets, the member States have become cognizant of adverse effects that trade liberalization may cause to domestic industry. However, the developing countries, and especially those least economically diversified, have frequently found themselves unprepared to react through appropriate policies and measures to such adverse developments.

Some of these member States have requested technical assistance by the ESCAP secretariat to help them understand the trade defence measures, as prescribed in the multilateral trading system of rules, and in drafting the safeguard law. The ESCAP secretariat began by providing technical assistance and capacity-building on using a specific form of trade remedies known as safeguards. This reference material is intended to help government officials in ESCAP member States to deepen and broaden their understanding of the WTO Agreement on Safeguards[1] as well as assist with improving their ability to effectively implement the safeguard measures which are compliant to their international obligations. Furthermore, since most of the bilateral or regional safeguard measures

[1] For brevity of exposition in the rest of the text this document will be often referred to as "the Agreement".

that are prescribed in preferential trade agreements (PTAs) are also based on the principles of WTO safeguard mechanisms, this manual can be a useful guide when considering use of (i.e., negotiation to use) safeguards under the PTAs.

1. Rationale behind the WTO Agreement on Safeguards

Safeguard provisions were first incorporated in the General Agreement on Tariffs and Trade (GATT) in 1947 through Article XIX, which dealt with emergency action on imports of particular products. The Article allowed for trade restrictions that were otherwise prohibited, subject to specific requirements. Largely because of GATT requirement that safeguard measures should be applied on a non-discriminatory basis, subsequently the discipline under Article XIX of GATT was undermined by bilaterally negotiating arrangements between importing countries and their trading partners such as voluntary export restraints (VERs) or orderly marketing arrangements (OMAs). Often, such arrangements were against the best interest of weaker trading partners because they were not able to exert sufficient negotiating pressure on the country imposing such measures or requesting these arrangements.

Under these arrangements, exporting countries with rising exports were required to restrain their exports within agreed limits by the importing countries. Although these were called “voluntary”, in reality they were not always so. The use of such measures by some developed countries, notably the United States and members of the European Union, kept on increasing over the years. The Governments of those countries had also, in certain cases, encouraged the initiatives by their industries to enter into voluntary export restraint arrangements with their counterparts in exporting countries.

In subsequent rounds of GATT negotiations, attempts were made to introduce a discriminatory provision for safeguard action, i.e., on a selective basis only against some of the exporting countries and not others. The developing country members of WTO, however, strongly supported continued application of Article XIX on a non-discriminatory basis. The main aim of the Uruguay Round negotiations on this issue was to ensure that these restrictive measures (in the forms of VERs and OMAs) conformed to GATT principles and rules of non-discrimination. Finally, the Agreement on Safeguards was adopted in the Uruguay Round, which mandated that these restrictive measures must be phased out within a period of four years, i.e., by 1 January 1999, thus enforcing the non-discriminatory provisions of GATT, which became part of the WTO Agreement on 1 January 1995.

In the Uruguay Round, member States committed to substantial tariff reductions and the removal of quantitative restrictions on trade in goods. Applicable tariffs on goods and their treatment at borders by customs authorities was made predictable and uniform for all members, who were not to be discriminated against and were required to be accorded Most Favoured Nation's (MFN) treatment.

Traditionally, it was developed countries that mostly used safeguards, but after the Uruguay Round it has been the developing countries which are using this measure more frequently. The Uruguay Round ensured freer market access to trade in goods by lowering tariffs and bringing in a new era of rule-based global trade flows (UNCTAD, 1994). Developed countries have cut their tariffs on imports of industrial products by 40 per cent,

bringing them down from 6.3 to 3.8 per cent on average, while the developing economies as a group reduced and bound MFN tariffs on nearly half their tariff lines (46 per cent), covering about one third of their industrial imports (GATT, 1994). The multilateral trade rules have also ensured that no prohibitions or restrictions other than duties, taxes or other charges become effective, including quotas, import or export licences and other measures. The greatest impact was felt in areas such as unfair trade practices adopted in international trade, standards and technical regulations where the absence of international consensus as well as operational rules and procedures had earlier frequently given rise to trade disputes and threatened to erode the multilateral trading system.

Freer flows of trade have, however, posed new challenges, both for domestic producers and for Governments in developed and developing economies. Domestic producers face the challenge of competition from more efficient foreign producers, who are selling their goods at lower prices. Often, these local producers have been able to survive only if Governments offer them protection and allow them to continue production, and with that to provide employment for the local labour force. Therefore, Governments need to be able to apply measures and policies to assist domestic producers who are challenged by import competition while still abiding by the WTO system of rules.

The trade remedies stipulated under the Agreement on Safeguards, the Agreement on Implementation of Article VI of GATT 1994 (Agreement on Anti-dumping) and the Agreement on Subsidies and Countervailing Measures all are aimed at encouraging WTO members to open up their

markets. The protection measures contained in those agreements are designed to give confidence to policymakers that, in situations threatening domestic producers, mechanisms are in place whereby the Governments can protect them. For example, the dumping and subsidization of exports, both of which are considered unfair trade practices, can be curtailed through anti-dumping and countervailing measures. However, if imports are found to have increased in such quantities that they cause serious injury to domestic producers by capturing an increasing market share from them and forcing them to downsize production and employment, Governments can impose safeguard measures. These safeguards are imposed against imports causing or threatening to cause serious injury to the domestic producers of a like or directly competitive product, even if no unfair practices are used by the exporters. Safeguard measures are a WTO-approved mechanism aimed at providing relief to domestic producers in such situations in order to give them an opportunity to adjust their operations and adapt to the new import competition situation.

As already mentioned, imposition of safeguard measures is governed by Article XIX of GATT 1994[2] and the Agreement on Safeguards. The WTO Appellate Body, which is the apex appellate forum of WTO, is empowered

[2] Article XIX: Emergency Action on Imports of Particular Products – 1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product 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.

to uphold, modify or reverse the legal findings and conclusion of a panel. Consequently, the Appellate Body reports must be accepted by the parties in the disputes once those reports have been adopted by the Dispute Settlement Body. The WTO Agreement makes the decision of the Appellate Body binding, unless it is rejected by consensus (WTO, 2014). For example, in the Argentina Footwear case it was concluded that 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 GATT 1994.[3]

Accordingly, a WTO member can resort to an effective remedy in an emergency situation if, in the judgment of that member, it is necessary to protect a domestic industry temporarily. Thus, there is a natural tension between defining the appropriate and legitimate scope of the right to apply safeguard measures and ensuring that safeguard measures are not applied against fair trade beyond what is necessary to provide extraordinary and temporary relief. A WTO member seeking to apply a safeguard measure will argue, correctly, that the right to apply such measures must be respected in order to maintain the domestic momentum and motivation for ongoing trade liberalization. In turn, a WTO member whose trade is affected by a safeguard measure will argue, also correctly, that the application of such measures must be limited in order to maintain the multilateral integrity of ongoing trade concessions. Guidance for WTO members in reconciling this natural tension in relation to safeguard

[2] Argentina Footwear case (WT/DS121/AB/R).

measures is provided in the provisions of the Agreement on Safeguards.[4]

The Agreement on Safeguards, which is one of the crucial accomplishments of the Uruguay Round, clarifies disciplines of GATT 1994, specifically those of Article XIX, for re-establishing multilateral control over safeguards and eliminating measures that escape such control.[5] The Agreement establishes rules for the application of safeguard measures, which will be understood to mean measures provided for in Article XIX of GATT 1994. Thus, the Agreement seeks to restore faith in the process of liberalization of trade, as any unwarranted development can be dealt with through the provisions of the Agreement.

It is important to note that safeguard measures are emergency actions; when properly utilized, they can legitimately provide an effective remedy for the domestic industry through import restrictions. (It should be noted that the WTO obliges its members not to impose any restriction on trade. However, Safeguard provisions allow temporary restrictions, which are otherwise prohibited). The legitimacy for safeguard rests on the fulfillment of two preconditions that:

(a) *imports have increased either in absolute terms or in comparison to domestic production*; and

(b) *such imports have caused or threatened to cause serious injury to*

[3] The Line Pipe case (WT/DS202/AB/R).

[5] Preamble to the Agreement on Safeguards: *"*Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control…"

domestic producers of like or directly competitive products.

The safeguard action can only be authorized after it has been established that there is a "*causal link between increased imports of the product concerned and serious injury or threat thereof*". Safeguard actions should not be authorized if the problems that the industry is encountering arise from factors other than increased imports (e.g., the domestic industry not able to produce due to a labour strike or lack of energy supply). Access to such recourse is reassuring to Governments as it provides a mechanism through which they can help domestic producers in emergency situations if, as a result of their commitment to open up their markets, imports start threatening the survival of domestic producers.

1.1. Economics of safeguards

In safeguard investigations, the focus is primarily on addressing the lack of cost competitiveness of domestic producers vis-à-vis efficient producers from other countries. In an open market economy with perfect competition and no externalities, the domestic producers should be able to compete with foreign producers unless they are less efficient. So, when a situation arises in which domestic producers cannot compete only because they lost the buffer of tariff or similar protection, it is accepted that they should be granted some temporary protection in order to work on boosting their efficiency and competitiveness. The safeguard measures allow them time to restructure and undertake necessary efficiency-boosting changes. During this period, imports are made costlier either by imposing safeguard duty or by restricting the quantity of imports. Alternatively, certain quantity

(quota) is allowed at a lesser safeguard duty, but when that quantity of imports is filled, further imports can enter by paying the full amount of safeguard duty (this instrument is known as the Tariff Rate Quota).

Price plays an important factor in the market. As mentioned above, where domestic producers are less efficient, the cost of production and hence the price of the domestic production in the market is higher when compared with the cost of the imported product that has been produced by a more efficient foreign producer, even after payment of a MFN import tariff. Therefore, the amount of safeguard duty (over and above or a regular MFN duty) becomes a key in making safeguards effective.

Since the safeguard duty is in addition to the MFN duty, it gives some scope for increasing the domestic price of that product. Similarly, by restricting the quantity of imported goods entering the domestic market (and presumably hiking the price of the imported products) an opportunity is created for the domestic producers to capture a higher market share. The margin provided by the rise in cost of imported products, due to the increase in the incidence of import duty or to restricting the import quantities, allows the domestic producers to cover for the higher costs and thus re-capture a market share. This should result in their improved balance sheet performance opening opportunities to invest in increasing competitiveness long term. This is the reason why it is believed that additional support to the domestic producers during the period in which they are making adjustments to meet the new competition coming from overseas will solve their problem, even if at the expense of domestic consumers.

In order to control a price rise in the domestic market by the safeguarded domestic producers (and the cost to consumers), the safeguard measure is made temporary. Safeguard measures can only be imposed after domestic producers have illustrated how they will become competitive within the specified time frame through their adjustment plans. If this cannot be illustrated successfully, no safeguard action can be taken. In safeguard cases, domestic producers are first required to analyse and identify the reasons for not being able to face competition from imports and then the ways in which they will improve their efficiency in order to become competitive. Well-intended safeguard measures envisage the resurrection of an injured domestic industry and their potential for making a positive contribution to economic activity in the domestic market. Benefits are not just accrued by the primary benefactors of safeguard measures, but also by the down-stream industries (suppliers of raw materials and other inputs). It should be kept in mind that while the domestic producers are expected to benefit from the imposition of safeguard measures, the burden of increased prices will be borne by the customers and users of the goods produced by safeguarded producers. Their interests are supposed to be taken care of by the temporary nature of safeguard duty and enforcing the domestic industry to undertake the adjustment plan which should result in long-term benefits for both domestic producers and consumers.

Ultimately, safeguard measures are beneficial only if their efficacy is such that it supports better utilization of domestic resources meeting the set public interests. Investigating authorities are, therefore, required to consider whether imposition of safeguard measures would be in the public's best interest, and whether the domestic industry has a viable

restructuring plan. Both these requirements focus on ensuring that scarce domestic resources are not deployed in grossly inefficient or unproductive endeavours that have no possibility of success, and that consumers are not made to suffer unnecessarily even for a short period.

1.2. Some statistics on the use of safeguard measures

There has been an upward trend in the use of safeguard measures in recent years. One reason for the increase of total safeguard initiation is the increase in the membership of WTO, thereby allowing more number of cases to come up for investigation. The second reason for the rise may be related to the fact that the developing countries have, in parallel to multilateral liberalization, also undertaken the autonomous route of tariff liberalization, thus resulting in a wider opening of their markets and pressure on the domestic producers to compete globally. In turn, these producers started to increasingly request protection, moving Governments towards using various remedies, including safeguards. When a Government has taken the route of autonomous liberalization, it does not want to raise the MFN duties to the bound rates as it expects similar pressures coming from other sectors by domestic producers.

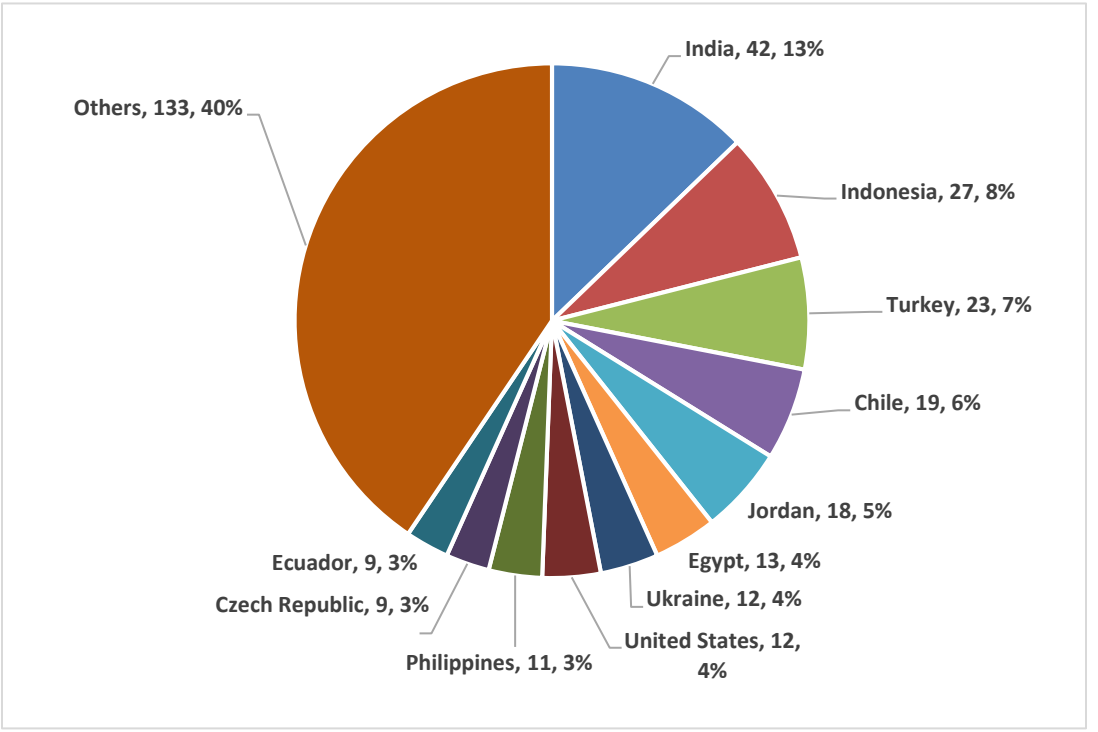
An explanation for the rise in the use of safeguards is that safeguard investigations focus on the domestic market situation, which is relatively easy to investigate. Unlike anti-dumping investigations, there is no need to ascertain normal value or conduct an investigation in exporting countries. Additionally, safeguard measures are more effective in providing relief to domestic producers because they are imposed on all imports of the

article(s) concerned on a non-discriminatory basis (except de minimis imports from developing countries) and, at the same time, forces the domestic industry to commit to an adjustment plan to become competitive, which is a better option than just raising the MFN duties. The preferential trade agreements also provide for use of safeguard measures in a surge in imports under preferential concessions; however, since most of the developing countries do not capture preferential trade data, both the investigation and consequent use of safeguards in the PTAs are negligible. It should be noted that PTAs may work towards reducing the use of safeguards and that in some PTAs the parties have agreed not to use any preferential safeguard measures (for example, ASEAN Trade in Goods Agreement, ATIGA).[6]

Figure 1 shows the number of WTO safeguard cases initiated between1995 and 30 June 2017 by some of the major users of safeguard measures. A total of 328 safeguard measures were initiated. Clearly, WTO compliant safeguard measures have been used more frequently by developing countries than by developed countries.

[6] See more details in Crawford and other (2016) or Mikic and Lee (2014).

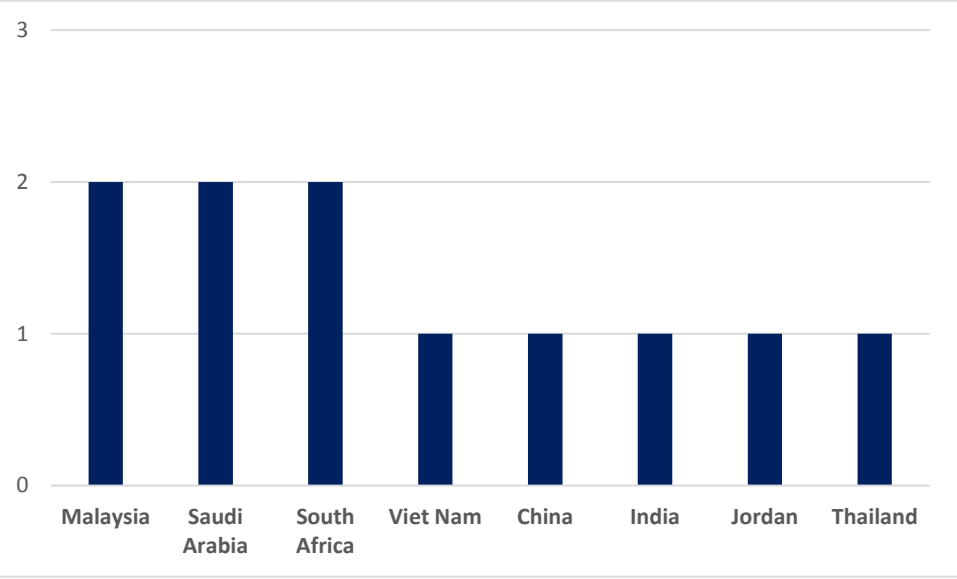
Figure 1. Top safeguard initiating countries (1 January 1995 – 30 June 2017)



Source: WTO, 2017 (accessed on 8.1.2018).
Note: the first number after the country name is the number of initiation cases and the second number is the percentage share of that country in the total number of initiations during the period.

The total number of safeguard measures taken by all countries has seen a decline after the year 2014 (23 cases). While 2015 saw initiation of 17 cases, 2016 observed initiation of 11 cases, and from 1 January 2017 to 30 June 2017 there were only 5 cases that were initiated. Figure 2 below gives the details of 11 cases that were initiated in 2016 by WTO members.

Figure 2. Safeguard initiators in 2016



Source: WTO, 2017 (accessed on 8.1.2018).

2. Step-by-step approach to a safeguard investigation

Safeguard measures are taken for the protection of an inefficient domestic industry. These measures act as a safety valve if increased imports create undue pressure on domestic producers. The domestic industry, however, should be vigilant and well-informed in order to make effective use of this protection instrument. If a domestic industry seeks protection by making a case for initiating safeguard investigation, the Government needs to follow the prescribed procedure for applying a safeguard measure.

The WTO Agreement on Safeguards establishes clear procedures for the initiation of safeguard measures. Paragraph 1 of Article 3 in the Agreement on Safeguards stipulates that a member may apply a safeguard measure only after an investigation by its competent authorities, pursuant to procedures previously established and made public in consonance with Article X of GATT 1994.[7]

In the context of safeguard measures, Article X of GATT 1994 requires that the safeguard laws, including any regulations, judicial decisions and

[7] Article 3 – Investigation: 1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member, pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

administrative rulings of general application, be published promptly in such a manner as to enable Governments, importers and exporters, and others to become acquainted with them. Therefore, it makes publication of such laws or regulations a precondition for taking any action. This will not only enable local traders (i.e., the importers, exporters, producers etc.) of the country to become acquainted with the related laws and regulations, but will also enable the Governments of the trading partners to examine their conformity with the WTO provisions. If they find that the laws and regulations are not in conformity with the WTO provisions, they can submit the matter to the WTO Committee on Safeguards for consultation and clarification, and take up the matter for a dispute settlement.

A safeguard investigation involves various steps, the first and foremost of which is the initiation of a safeguard investigation, as explained below.

2.1. Initiation of a safeguard investigation

In principle, a safeguard investigation is initiated on receipt of an application from domestic producers for imposition of safeguard measures. However, a safeguard investigation may also be initiated, *suo moto*, by the investigating authorities. The WTO Agreement on Safeguards does not necessarily require an application to be made by, or on behalf of the domestic industry for initiation of an investigation, nor does the Agreement require existence of any special circumstances for the authorities to initiate an investigation, *suo moto*. In practice, however, safeguard investigations are generally initiated on the request by domestic producers.

The Agreement does not require a level of “minimum support” for such an application, which is a prerequisite for the initiation of anti-dumping and anti-subsidy actions. An investigation in safeguard cases can, therefore, be initiated on the request of even a single producer who accounts for only a small fraction of the domestic production. However, for the purpose of finding serious injury or threat thereof, the authorities need to examine the impact of increased imports on the domestic industry (producers of like or directly competitive products as a whole, or those constituting a major proportion of the domestic production). Therefore, in practice, the authorities require an application for safeguard investigation to have industry support. The investigating authorities have to take a considered view of the desirability of initiating an investigation, keeping the nature of the domestic industry in mind, in cases where the production of the applicants is only a fraction of the total domestic production.

For example, in the case of agricultural products or goods produced by SMEs, not all the producers may be able to express their position because of their limited resources and limited access to information system; in addition, because of their location or size, many of them may not even be members of an association or trade and industry chambers through which the information may be collected or provided. Therefore, the investigating authorities may initiate an investigation in such cases even if the application is made by producers representing only a fraction of total domestic production. The investigating authorities can also initiate an investigation on their own if they are satisfied, on the basis of information received by them from appropriate sources, that a domestic industry is facing serious injury or threat thereof because of the increased imports of an article. They

would, however, be required to assess the serious injury or threat of serious injury in regard to the domestic industry, i.e., domestic producers as a whole or a major proportion of domestic producers. The injury determination in such cases cannot be confined to the applicant-producers who represent only a fraction of the total domestic production.

2.2. Application by domestic producers

In an application for initiation of a safeguard investigation, the domestic producers need to provide information on various matters. In particular, the application needs to include information on: (a) the production accounted for by the applicants and the total domestic production of the product(s) concerned; and (b) a description of the imported product(s) that contains the details of types, grades, uses, interchangeability of various grades, raw materials, process of manufacture and the customs classification. In addition, they should provide similar details with regard to domestically produced goods that are claimed to be like or directly competitive, including the names, addresses and other details of all known importers, exporters, users' associations etc., and details regarding the volume of imports of the product(s) concerned.

Attention should be given to whether there has been a significant increase in imports, both in absolute terms and relative to the production of like or directly competitive products by the domestic industry. Information should be provided based on both quantity and value, giving country-specific details. Further, the application should include the price of imports, and

whether there has been significant price undercutting by the imported products.

Details of serious injury or threat of serious injury caused to domestic producers by the increased imports, and the consequent impact on domestic producers as indicated by trends in economic factors listed below need to be provided in the application:

- Production;
- Capacity utilization;
- Stocks;
- Sales;
- Market share;
- Prices (i.e., depression of prices or prevention of price increases which would have normally occurred);
- Profits;
- Return on capital employed;
- Cash flow;
- Employment.

The domestic producers also need to spell out how the imposition of safeguard measures is likely to minimize or remove injury caused to them by increased imports. If a provisional safeguard duty is requested, details also need to be provided of critical circumstances in which a delay in the imposition of a safeguard duty will cause irreparable damage. Further, in cases where imposition of a safeguard measure is requested for more than one year, details of efforts on the part of the domestic producers to make a positive adjustment to the new competition offered by the increased imports

must also be given in the application. Data in the application need to account for the most recent three-year (or longer) period for which they are available.

2.3. Verification of information provided in the application

The investigating authorities, who generally function either under the Ministry of Trade or Ministry of Finance, need to verify the information provided in the application. This is of particular importance for data used to determine levels of imports, domestic production accounted for by the applicants, and injury. At the stage of initiation, however, this is only a preliminary verification. Import data can be verified from published statistical data while domestic production can be verified from the balance sheets of the domestic producers. Similarly, injury indicators can be preliminarily verified from balance sheets or other published information sources.

2.4. Public notice of the initiation of investigations and findings of the authority

The investigating authorities need to make their decision to initiate a safeguard investigation publicly known. This can be done by issuing a public notice, a copy of which needs to be sent to all known importers, exporters, domestic producers, Governments of the exporting countries and national trade associations. The investigating authorities need to set out in the public notice the essential facts used to determine that an

investigation is warranted to ascertain whether increased imports have caused or threatened to cause serious injury to domestic producers of a product. Details required to be mentioned in the notice of initiation include the name and description of the imported product, domestic producers of like and directly competitive products, import data, domestic production data, names and addresses of importers, exporters, exporting Governments, users' Associations and the factors used to determine the existence of serious injury or a threat thereof.

The WTO Committee on Safeguards also needs to be immediately notified of the initiation of any safeguard action. This is generally done by the concerned ministry. Therefore, a copy of the notice of initiation also needs to be sent to the concerned governmental agencies. If there is any administrative ministry concerned with the article under investigation, they need to be informed in order to enable them to participate in the investigation and express their views. (The core elements of such notice are given in annex 2).

2.5. Provisional safeguard duty

Investigating authorities can recommend the imposition of a provisional safeguard duty if, in their opinion, critical circumstances exist where any delay in the imposition of normal safeguard measures would cause damage to a domestic industry that would be difficult to repair. Provisional safeguard duties can be imposed at any stage of the investigation on the basis of a preliminary determination by the investigating authority, provided a notice of the initiation has been issued. This preliminary determination

does not require a detailed or thorough verification of information provided by interested parties or a detailed investigation.

2.6. Identification of interested parties

Since interested parties have various rights and obligations, they need to be identified. The WTO Agreement on Safeguards does not enumerate an exhaustive list of the interested parties; however, it mentions “importers, exporters and other interested parties” in Article 3. Generally, a safeguard investigation is initiated on the basis of an application filed by or on behalf of domestic producers.[8] Other parties that may be affected by the imposition of a safeguard measure include importers, exporters, the users/consumers and the exporting Governments. Therefore, the expression “interested parties” includes all persons or entities affected by the potential implementation of a safeguard measure. They have the right to access all relevant material that is not confidential, present evidence and their views, and respond to the presentations made by other parties. Furthermore, they have the obligation to cooperate in the investigation and to make available the information and data in their possession, provided it is not of a confidential nature. The applicants are generally asked to provide names and addresses of all known domestic producers, importers, exporters and the users/consumers’ Associations of the product concerned

[8] An advocate, trade association or similar bodies including a natural person can file an application for safeguard investigation.

so that the investigating authorities may inform them of the safeguard proceedings, and their participation in the investigation can be facilitated.

2.7. Seeking information through questionnaires

The investigating authorities can seek any information considered necessary by them from interested parties through questionnaires. These questionnaires are aimed at seeking supplementary information as required. The investigating authorities need to allow reasonable time to the concerned parties to respond to the questionnaires. Normally, this period is 30 days, excluding the time for postage, which may be considered as seven days.

2.8. Verification of information

The investigating authorities need to verify the information found in the application and questionnaires. At the stage of initiation, this verification only needs to be preliminary. The investigating authorities, however, need to carry out verification of all the information on which they wish to base their findings. Therefore, the subsequent investigation requires a thorough verification of all information, including the volume and price of imports, domestic production and factors related to injury. Data such as manufacturing costs need to be verified from the records maintained by producers. This is important as the injury determination requires a comparison of the landed price of the imported goods and the costs of production incurred by the domestic producers in order to ascertain the

extent of injury and consequential imposition of safeguard duty. Other factors, such as those detailed in the adjustment plan, also need to be analysed to ascertain whether the plans are realistic and viable.

2.9. Public files

The investigating authorities need to maintain public files wherein non-confidential documents/information submitted by the interested parties are available. This is to allow all interested parties to access information furnished by other parties, so that they can submit their own informed views. The public files need to be maintained in an orderly manner, with index and page numbering, to ensure an intelligent and efficient inspection by appointment.

2.10. Confidentiality

The WTO Agreement on Safeguards through Article 3 seeks to ensure that confidential information is not disclosed to other parties to an investigation in an unauthorized manner. Some information such as the names of the customers and costing data, by its nature is confidential since disclosure of such information may adversely affect the interest of the party concerned (i.e. the competitors may take advantage of an established market by winning over such customers). In respect of some other information, as well the parties concerned may claim confidentiality. If the concerned parties are able to satisfy the investigating authorities about the necessity to keep such information confidential, the authorities shall treat such information as

confidential and it would not be disclosed without the permission of the party submitting it.

The investigating authority may ask such parties to furnish non-confidential summaries of the confidential information and in case the parties indicate that such information cannot be summarized, they need to give 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.

One way of providing non-confidential summaries of confidential information is to provide it in generalized form by using indices or ratios etc., in a manner that it can reasonably be appreciated and understood. The investigating authorities can rely upon the confidential information when making their determination. There is no restriction that investigating authorities should base their findings only on non-confidential information.

2.11. Public hearings

Public hearings are held by the investigating authorities to enable interested parties to explain their viewpoint. It also allows the interested parties to be exposed to the viewpoint of opposing parties and to respond to or rebut their assumptions. Any oral submissions made by the parties need to be submitted in writing. Investigating authorities are not bound to

take into consideration any submission that is not provided in writing.

2.12. Reports by the investigating authorities

The reports and recommendations of the investigating authorities, including those related to preliminary or final findings, are required to be reasoned and explanatory by giving all the facts and the issue of the law involved, so as to enable the interested parties to understand the basis of the investigation. The report needs to be self-contained giving details of products under investigation, domestic producers, importers, exporters and users/consumers, findings on unforeseen developments, increased imports, serious injury or threat thereof, causal links between increased imports and the injury to the domestic industry, and whether the imposition of safeguard measure would be in public interest.

2.13. Notification to the WTO Committee on Safeguards

The WTO Committee on Safeguards needs to be notified:

(a) When the investigation process is initiated;

(b) At the time of making a finding; and

(c) At the time of making a decision to apply or extend a safeguard measure.

For notifications concerning a finding of serious injury or threat thereof, and notifications to apply or extend a safeguard measure, the concerned member is required to provide the Committee on Safeguards with all

pertinent information, including evidence of:

(a) Serious injury or threat thereof caused by increased imports
(b) A precise description of the product involved;
(c) The proposed measure;
(d) The proposed date of introduction, expected duration and timetable for progressive liberalization.

In the case of an extension of a measure, evidence that the industry concerned is adjusting must also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information where it is deemed necessary from the Member proposing to apply or extend the measure.

A notification also needs to be made to the Committee on Safeguards before taking a provisional safeguard measure. There is, however, no prescribed format for the notification. Therefore, Members may provide the requisite information to the WTO Committee on Safeguards in any manner they see fit. These notifications are generally made by a governmental agency (i.e., the concerned Ministry, rather than the investigating authorities).

3. Role of government agencies in implementing safeguard rules and precautions to be taken

In view of the WTO Agreement on Safeguards, a Government and its agencies play the following important functions:

(a) Appointment of an investigating authority, which is tasked with receiving and considering applications, investigate and make necessary findings for imposition of safeguard measures.

(b) To maintain an authentic import data base, which can provide information on the quantity and value of the imports of any product during any period.

(c) May designate an agency/committee which can express its views on the findings of investigating body on the desirability of granting safeguard protection to the producers of any product, which may be important from the industrial planning point of view. In some cases where the domestic producers or users/consumers are in the SME sector or if they are highly fragmented or scattered and, as a result, not able to adequately represent their views, the Government may represent their interests.

(d) Irrespective of agencies that are designated to perform above tasks, it is the overall responsibility of the Government to meet the WTO notifications requirements.[9] In most of the cases this

[9] Article 12: Notification and Consultation - 1. A Member shall immediately notify the Committee on Safeguards upon:

responsibility lies with the Ministry handling the WTO.

(e) The Government has to examine and consider the recommendations of the investigating authority which merely makes a recommendation. It is for the Government to accept or reject the recommendations. The Government can follow a particular course of action for various justifiable reasons, for example, if the Government does not wish to pay compensation by granting alternate concessions on some other product to the exporting countries, it may decline imposition of the safeguard measures or it may apply the measure for shorter duration or in some cases it may apply the measures at lesser levels than recommended. The Government, however, cannot impose any safeguard measure (provisional or final) without the recommendation of the investigating authority.

(f) The Government needs to examine whether it would be prudent to apply the safeguard measure in the wake of any compensation

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(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
(b) making a finding of serious injury or threat thereof caused by increased imports; and
(c) taking a decision to apply or extend a safeguard measure.

that may have to be paid by it to the exporting governments.[10, 11]

(g) It is the Government who has to enter into consultations if sought by exporting governments in accordance with the provisions of the Agreement of Safeguards.

[10] Article 8: Level of Concessions and Other Obligations – 1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

[11] There is only one instance in the history of WTO where the appellate body held that that the United States had acted inconsistently with its obligations under Article 8.1 of the Safeguards Agreement (Dispute DS166: United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Community.

4. Role of domestic industry in the process of investigation

Domestic industry[12] plays an important role in a safeguard investigation as it is, in principle, started at the industry's initiative. They need to keep the following in mind:

(a) The domestic industry has to take all necessary steps to protect itself from a surge of imports. The domestic industry, therefore, has to have detailed information about the domestic producers of the product. Some of the producers may be small or medium-sized enterprises (SMEs), and the information about their production and any injury caused to them may not be readily accessible. It will therefore be beneficial for domestic producers to form an association, which can represent them when going before the investigating authority;

(b) An application seeking the imposition of safeguard measures should be made as soon as possible. It is in the interest of domestic producers to seek a remedy at the earliest point possible against injury caused to them;

[12] Domestic industry is defined as the producers on the whole of like or directly competitive products operating within the territory of a Member, or producers who collectively account for a major proportion of the total domestic production of those products. This definition allows broader consideration of effects than in anti-dumping or countervail cases. Available from https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm.

(c) It is important for the domestic industry to collect authentic data on the quantity and value of imports during the past three to five years. Developing countries, at times, have difficulty in gathering this data through governmental efforts alone. This happens because data may not be maintained on a micro level for specific products. The data may include a bigger product group and, therefore, the domestic industry may have to provide data concerning specific products for which a safeguard measure is being sought. There is also potential for a delay between the collection and publication of governmental data, and such data may be incomplete. It is therefore in the domestic industry's interest to compile its own statistical database;

(d) Domestic producers should endeavour to seek a consensus among them, as the investigating authorities consider the state of affairs of the domestic producers as a whole. If the application for the imposition of a safeguard measure is not supported by a major proportion of the domestic producers, it may be rejected. Domestic producers face two types of competition; one among themselves whereby they try to capture the market share occupied by the other domestic producers, and the other where they face external competition, i.e., the competition offered by imports. It may happen that the internal competition among the domestic producers may pull them in different directions, in which case some domestic producers may not be willing to support the safeguard application in the hope that if some other

domestic producers are eliminated it would serve their interests. Such an approach may thwart the entire effort of the industry;

(e) Domestic producers need to identify the parameters of their injury clearly and they must be able to segregate those parameters that are caused by increased imports. Their adjustment plan must address these factors, with regard to how they would be able to overcome those factors. It must be remembered that safeguard measures are imposed for a short duration with the expectation that during that period the domestic industry will take the necessary steps to become competitive. If there is no hope for the revival of the domestic industry, the safeguard measure may not be imposed. It is not a requirement that all producers follow the same plan; different producers may have different plans, depending upon their individual size, manufacturing processes, sourcing of raw materials and infrastructural facilities;

(f) The domestic producers must cooperate with the investigating authorities and provide them with all the assistance required for the investigation. They should be ready for verification visits by the investigating authority;

(g) The domestic industry may request that the investigating authority treats information that is provided as confidential if it may adversely affect their business interests. They should,

however, fully cooperate with the investigating authority in submitting non-confidential summaries and getting such information verified;

(h) The domestic industry must endeavour to become competitive within the period for which a safeguard measure is imposed, because even if the safeguard measure is extended the extent of protection would be diminished as the progressive liberalization of measures is implemented. The re-application of a safeguard measure is not a simple process and would leave a gap in protection, as there are temporal restrictions for re-application contained in the Agreement.

(i) The domestic industry should only seek the imposition of safeguard measures for the length of time required for actual adjustment. The imposition of safeguard measures for longer periods may require the Government concerned to give concessions on other products to exporting Governments. As result, this may make the Government hesitant to impose the measure.

5. Precautions to be taken while imposing safeguard measures concerning WTO dispute mechanisms

The discipline to apply safeguard actions has evolved substantially since the inception of the WTO regime and the clarification of various issues by the WTO Panel and Appellate Body. As a result, certain precautions should to be taken while imposing safeguard measures, including:

(a) Any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX of GATT and the Agreement on Safeguards;

(b) A safeguard measure can be applied only if the increased imports resulted from "unforeseen developments". Therefore, the investigation report must specifically record such findings;

(c) Safeguard measures will be applied to a product being imported irrespective of its source. This excludes those from developing countries whose imports either (i) constitute less than 3% of total imports, or (ii) where the collective share of imports of more than one developing country, with each having a share of less than 3% of imports, does not exceed 9% of total imports;

(d) A safeguard measure can be applied only if the conditions to do so in a particular case are met and only to the extent necessary, i.e., the type of measure and its level and duration need to be

restricted to the extent necessary to remedy or prevent serious injury and allow for readjustment;

(e) The intervening trends of imports over the period of investigation, in terms of both the rate and the amount, need to be analysed by the investigating authorities. The term “rate” connotes both speed and direction. It means that the increase in imports must be judged in its full context, in particular with regard to the rate, amount and the changes in import levels – whether up or down – over the entire period of investigation, in order to determine whether there has been an increase in imports. In practical terms, the best way to assess the significance of any mixed trends in imports is by evaluating whether any downturn in imports is simply temporary, or if it reflects a longer-term change;

(f) It is necessary for the competent authorities to examine recent imports, not simply trends in imports during the past five years or, for that matter, during any other period of several years. The phrase “is being imported” implies that the increase in imports must have been recent, sudden, sharp and significant enough to cause or threaten to cause serious injury;

(g) The phrase “and under such conditions” used in Article 2.1 in the context of serious injury caused by a product imported “under such condition” relates both to the circumstances under which the products under investigation are imported, and to the

circumstances of the market into which products are imported. Both of these circumstances must be addressed by the investigating authority when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing like or directly competitive products. In this sense the phrase “under such conditions” refers more generally to the obligation for the investigating authority to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation;

(h) There are different ways in which products can compete. Sales prices are clearly one way; however, it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market. It is these types of factors that must be considered on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry;

(i) The investigating authorities must evaluate all factors specifically mentioned in the Agreement, including: (i) the rate and amount of the increase in imports of the product concerned in absolute and relative terms; (ii) the share of the domestic market taken by

increased imports; and (iii) changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. The investigating authorities must also evaluate all relevant factors of an objective and quantifiable nature that have a bearing on the situation of the domestic industry in arriving at a finding of serious injury or threat thereof. The published report concerning the investigation must set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. WTO jurisprudence requires that as part of serious injury analysis, the investigating authority must also reach a finding that the concerned domestic industry has undergone a "significant overall impairment";

(j) The investigating authorities cannot confine their evaluation only to the factors that the interested parties have raised as relevant and ignore the other factors, specifically mentioned in Article 4.2 of the Agreement. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the Agreement on Safeguards. In addition, Article 4.2(a) requires the competent authorities – and not the interested parties – to evaluate fully the relevance, if any, of "other factors". If the competent authorities consider that a particular "other factor" may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of

investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted and views expressed by the interested parties. Therefore, the competent authorities must undertake additional investigative steps when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors. However, the competent authorities do not have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant;

(k) In determining what would constitute "factors of an objective and quantifiable nature" within the meaning of Article 4.2(a), the requirement of objectivity and quantifiability applies, not only to factors but also to data, the evaluation of which would "enable the measurement and quantification of these factors." For data to be "objective and quantifiable," such data would have to be both sufficient and representative of the domestic industry;

(l) The focus of the investigative steps mentioned in Article 3.1 is on "interested parties", who must be notified of the investigation and who must be given an opportunity to submit "evidence" as well as their "views" to the competent authorities. The interested parties must also be given an opportunity to "respond to the presentations of other parties". The WTO Agreement on Safeguards, therefore, envisages that the interested parties will

play a central role in the investigation and that they will be a primary source of information for the competent authorities;

(m) The investigation report must include an explanation of the rationale for the determinations made as a result of the facts and data contained in the report;

(n) There is an obligation placed upon investigating authorities not to disclose – including in their published report – information that is "by nature confidential or which has been provided on a confidential basis" without permission of the party submitting it. The WTO Agreement on Safeguards does not define the term "confidential" nor does it contain any examples of the type of information that might qualify as "by nature confidential" or "information that is submitted on a confidential basis". In the absence of a detailed definition of the types of information that must be treated as confidential, the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as such;

(o) Competent authorities may rely on confidential data, even if the data are not disclosed to the public in their reports. Competent authorities are obliged to provide explanations to the fullest extent possible without disclosing confidential information. This implies that if there are ways of presenting data in a modified form (e.g., aggregation or indexing), which protects confidentiality; a competent authority is obliged to resort to these

options. If any authorities are unable to provide any data without disclosing confidential information, they are entitled to do so;

(p) In arriving at a determination of a threat of serious injury, it is to be based on facts and not merely on allegations, conjecture or remote possibilities. The word “clearly” relates to the factual demonstration of the existence of the “threat”. Thus, the phrase “clearly imminent” indicates that, as a matter of fact, it must be inevitable that the domestic industry is on the brink of suffering serious injury;

(q) In determining the scope of the domestic industry, identification of the products that are “like or directly competitive” with the imported product is the first step. Only when those products have been identified is it possible to identify the “producers” of those products;

(r) A safeguard measure can be applied “‘only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment”. This means that the safeguard measure may be applied only to the extent that it addresses serious injury attributed to increased imports;

(s) It must be noted that the WTO Agreement on Safeguards has a provision for compensation by way of reduction of the duty on such products that are of interest to those countries whose

exports have been affected by the safeguard measure. However, as per Article 8.3 of the Agreement, such compensation is not required to be offered for the first three years of the implementation of the measure. A member may have a bound rate on a product at a level higher than the applied level of MFN tariff on that product. In such a situation, the member has the policy space required to increase the level of ordinary customs duties to the bound level. When doing so, the member does not have to follow the provisions of Article XIX of GATT or those of the WTO Agreement on Safeguard, as such increases are within the bound level. If, however, the member wishes to increase the level of tariff by way of a safeguard measure, all the requirements for taking a safeguard measure would need to be fulfilled. In such a case, the increase in the rate of duties would not apply to imports from developing countries, provided their share is below the *de minimis* level.

6. WTO notification requirements

The WTO Agreement on Safeguards places great importance on maximum transparency being maintained when conducting a safeguard investigation, and requires notification of all safeguard actions to be given to WTO. For example, Article 12.1 of the Agreement on Safeguards requires that members immediately notify the WTO Committee on Safeguards*:*

(a) "Upon initiating an investigation process relating to serious injury or threat thereof and the reasons for it;
(b) When making a finding of serious injury or threat thereof caused by increased imports;
(c) When taking a decision to apply or extend a safeguard measure."

For notifications concerning a finding of serious injury, or threat thereof, and to apply or extend a safeguard measure, the concerned member is required to provide the Committee on Safeguards with all pertinent information including evidence of:

(a) Serious injury or threat thereof caused by increased imports;
(b) A precise description of the product involved;
(c) The proposed measure;
(d) The proposed date of introduction, expected duration and timetable for progressive liberalization.

If a measure is to be extended, evidence that the industry concerned is adjusting must also be provided. The Council for Trade in Goods or the Committee on Safeguards may request additional information that it considers necessary from the member proposing to apply or extend the measure.

A notification also needs to be made to the Committee on Safeguards before taking a provisional safeguard measure. There is, however, no prescribed format for the notification. Members may, therefore, provide the requisite information to the WTO Committee on Safeguards in any manner they see fit.

Annexes

Annex – I: Questions and answers to assist in understanding the concepts

1. What is the legal basis for imposing safeguard measures?

All WTO member countries, (signatories to the WTO Agreement), can impose safeguard measures in accordance with Article XIX of GATT and the Agreement on Safeguards, which is a part of the WTO Agreement. The Agreement on Safeguards provides for all the necessary elements required to impose safeguard measures. The process of ratification depends largely on the constitutional framework present domestically within member States. In some WTO member States, international treaties are directly applicable, meaning no additional legislation is required for them to take effect. In this case, the Agreement on Safeguards itself would provide the legal authority to take safeguard measures. However, in most countries, additional legislation that harmonizes provisions of Article XIX of GATT and the Agreement on Safeguards is required before the ratification process can be completed.

2. What is the meaning of "safeguard measures"?

"Safeguard measures" refer to those emergency measures applied to protect the domestic industry from serious injury, or threat of serious injury, caused by increased imports of any product. They are applied in accordance with Article XIX of GATT and the Agreement on Safeguards and enable a WTO member country to temporarily raise tariffs or impose

quantitative restrictions on imports of that product.

3. What is the main objective of safeguard measures?

The main objective of safeguard measures is to protect the domestic industry from serious injury, or threat of serious injury, caused by increased imports of like or directly competitive products. Imposition of a protection measure that raises the price of the imported product or restricts imported quantity, or both, should allow time for the domestic industry to adjust to the new competitive situation in their domestic market resulting from import liberalization.

4. How does the WTO Agreement on Safeguards help the domestic producers?

The WTO Agreement on Safeguards is specifically meant to provide confidence to the domestic producers that if the reduction of tariffs and removal of import quotas result in increased imports of any product, which threatens their survival, they may file an application seeking Government intervention by way of the imposition of safeguard measures to contain the onslaught of imports and give them time to face the new situation of competition offered by imports.

5. Why are Governments not able to independently raise tariffs or impose quantitative restrictions unless it is a safeguard measure?

In order to become a member of the WTO all countries were required to negotiate and bind their tariffs at rates reflected in their respective Schedules of Concessions, so as to ensure transparency and predictability.

The most-favoured nation treatment (MFN) imposes the condition that they charge uniform tariffs (except in the case of PTAs, where exception from MFN is allowed for lowering of duties and not going beyond the binding commitments) on imports from all other WTO member countries at rates not exceeding those rates; similarly, they undertook not to impose import restrictions (quotas). For example, Myanmar has bound its customs duty on "shorn wool" (Chapter Heading 510111) to 10%. Myanmar also committed, in general, not to impose quantitative restrictions on imports except in certain special circumstances, such as under balance of payment provisions found in Article XVIII of GATT. Myanmar cannot unilaterally withdraw or modify these obligations for raising the duties above 10%. Thus, under the normal circumstances, tariffs on "shorn wool" cannot be raised beyond 10%, nor can quantitative restrictions be imposed. One reason for a Government not to raise tariffs is to avoid the higher cost of locally-made products that would affect the domestic market eventually as well as reduce the opportunity to become part of global supply chains.

6. What are the necessary conditions for the imposition of safeguard measures?

A safeguard measure can be imposed if it complies with both Article XIX of GATT and the relevant provisions of the WTO Agreement on Safeguards.[13]

[13] In the Argentina Footwear case (WT/DS121/AB/R), the Appellate Body held that the GATT 1994 is not the GATT 1947. It is "legally distinct" from the GATT 1947. The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both "integral parts" of the same treaty, the WTO Agreement, that are "binding on all Members".
The Appellate Body saw nothing in the language of either Article 1 or Article 11.1

Article XIX of GATT requires that an increase in imports be the result of unforeseen developments. Article 2 of the WTO Agreement on Safeguards stipulates that a safeguard measure can be applied against imports of a product only if it has been determined, pursuant to the provisions set out in the Agreement, that such a product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions that cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

The essential conditions for application of safeguard measures, therefore, are:

(a) **Increased imports:** The product is being imported in increased quantities, absolute or relative to domestic production;

(b) **Unforeseen developments:** The increased imports must be the result of unforeseen developments and "of the effect of the obligations incurred" by the importing country;

(c) **Serious injury or threat of serious injury:** The imports must enter in such increased quantities, absolute or relative to

(a) of the Agreement on Safeguards that suggests an intention by the Uruguay Round negotiators to subsume the requirements of Article XIX of the GATT 1994 within the Agreement on Safeguards and thus to render those requirements no longer applicable.
The Appellate Body concluded that 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.

domestic production and “under such conditions” that cause or threaten to cause serious injury to domestic producers of like or directly competitive products. (Serious injury means “a significant overall impairment in the position of the domestic industry”.)

7. What does the term “increased imports” mean, and how is it to be ascertained?

An increase in imports is a prerequisite for the imposition of a safeguard measure. A safeguard action can only be taken if there are increased imports, absolute or relative to domestic production. An absolute increase in imports implies an increase in quantitative or value terms in the period under consideration (i.e., there is a positive growth in numerical terms in imports, for example 30% of imports’ value or the tonnage of imports). An increase in relative terms implies growth in imports as a percentage of domestic production.

In a growing market both the domestic production and the imports may increase but whether imports have grown higher than the domestic production can be judged by comparing imports as a percentage of the domestic production. For example, the domestic market may have grown by 20%, the domestic production by 18% but imports by 25%, indicating that the imports have captured some market share of the domestic production. The WTO Agreement on Safeguards, however, prescribes no definite measure to determine how much growth in imports is necessary to justify a finding of increased imports. Authorities, therefore, have to

objectively analyse all facts before making a determination. Further, while Article XIX of GATT requires an increase in imports either in absolute terms or relative to domestic production, paragraph 2 of Article 4 of the Agreement on Safeguards imposes a more stringent condition of requiring an evaluation of both.

The term “increased imports” would normally mean an increase in terms of quantity, e.g., number of units, weight etc., but at times it may be difficult to ascertain the total imports in terms of quantity, particularly when the goods may vary in shape, size etc. (for example, footwear, toys and clothes). The value of imports in such cases may provide a better basis for comparison to determine whether imports have increased.

It is, however, not necessary for imports to show a definite trend or a continuous increase. Authorities concerned will have to review all aspects concerning the increase in imports. Articles 2.1 and 4.2(a) of the Agreement on Safeguards in this regard require an analysis of the rate and amount of the increase in imports, both in absolute terms and as a percentage of domestic production.

The increase in imports is to be judged taking into account “all relevant factors”, as required by Article 4.2(a) of the WTO Agreement on Safeguards. In the Argentina Footwear case, the Appellate Body observed that an increase in imports should be recent, sudden, sharp and significant enough to cause or threaten serious injury. Additionally, Article 4.2(a) requires the investigating authorities to consider the trends in imports during the period of investigation, with particular regard to “the rate and

amount of the increase in imports, the share of the domestic market taken by increased imports concerned in absolute and relative terms, and changes in the level of sales, production, productivity, profits and losses, and employment". Article 2.1 of the WTO Agreement on Safeguards does not require that imports are increasing at the time of the determination. It is sufficient to demonstrate that imports have increased, and that the relevant products continue to be imported in such quantities.

8. Does the WTO Agreement on Safeguards specify the length of time to be considered when determining whether imports have increased?

Although the phrase "increased imports" implies a comparative increase in imports over a reference or base period, the WTO Agreement on Safeguards does not require any particular period to be taken as the base period. The data related to the most recent past provides the essential, and usually the most reliable, basis. It is pertinent to note that the term "recent past" has been pointed out by several panels. For example, the panel in United States – Line Pipe[14] found that "there is no need for a determination that imports are presently still increasing. Rather, imports could have 'increased' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the determination". In addition, the panel in Argentina – Preserved Peaches[15] indicated that the increase is not merely the product of a quantitative analysis; it must also be qualitative.

[14] United States – Line Pipe, WT/DS202/AB/R.
[15] Argentina – Preserved Peaches, WT/DS238/R.

Further, the findings cannot be based on any isolated transactions but need to be based on facts obtained during a reasonable period immediately preceding the date of initiation of investigation. Accordingly, length of the base period may vary from case to case, and it is left to the discretion of the investigating authorities concerned. Generally, investigating authorities consider the trends in the preceding three-to-fiveyear period, provided accurate data are available.

9. What constitutes an "unforeseen development" and "of the effect of obligations incurred" in the context of increased imports?

The basic objective of granting concessions under GATT 1994 is to reduce import duties and remove quantitative and other import restrictions, and to encourage free flow of trade. However, there can be situations when increased imports could threaten the survival of a domestic industry. Safeguard measures provide a kind of "safety valve" in such situations to temporarily stem the rise of imports and its impact on domestic producers, without requiring the member to attempt to renegotiate bound rates for tariffs or take some other extreme measures such as blocking imports through other means of non-tariff barriers or voluntary export restraints etc. Article XIX of GATT therefore requires safeguard measures to be taken only if increased imports are the result of unforeseen developments and are the effect of the obligations incurred by a contracting party under GATT. It should be noted that if the increased imports were not from the effect of the obligations incurred by a contracting party under GATT, the remedy would not lie in suspending the obligation or in withdrawing or modifying the concession granted under the aegis of WTO.

As to the meaning of "unforeseen developments," the dictionary definition of "unforeseen" – particularly as it relates to the word "developments" – is synonymous with "unexpected." "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated."[16] In the context of safeguard measures, 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 increased quantities and under such conditions that caused or threaten to cause serious injury to domestic producers must have been "unexpected." If the increase in imports is because of something that was expected, there is no justification for taking a safeguard measure because an increase in imports would occur naturally as a result of the opening up of markets. Therefore, in order for a safeguard measure to be imposed, there must be a "logical connection" linking the "unforeseen developments" with the increase in imports of the product that is causing or threatening to cause serious injury. Without a "logical connection," the right to apply a safeguard measure to that product would not arise.

The phrase "of the effect of the obligations incurred by a member under

[16] In the Argentina Footwear case (WT/DS121/AB/R), the Appellate Body looked first to the ordinary meaning of these words. As to the meaning of "unforeseen developments", it noted that the dictionary definition of "unforeseen", particularly as it relates to the word "developments", is synonymous with "unexpected". "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated". Thus, 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 increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected".

this Agreement, including tariff concessions," simply states 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 Schedules (Schedules of Concessions) annexed to the GATT 1994 are integral to Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994.As a result, any concession or commitment in a member's Schedule is subject to the obligations contained in Article II of the GATT 1994. Additionally, a commitment to remove all quantitative restrictions was also an obligation incurred under GATT 1994. Therefore, both a reduction in tariffs as well as unrestricted admittance of imports of any product would satisfy this requirement.

10. How is the "serious injury or threat of serious injury" to be ascertained?

Notwithstanding a finding of increased imports, no safeguard measure can be imposed on imports of a product unless such imports can be shown to have caused or threatened to cause serious injury to the domestic industry that produces like or directly competitive products. This is an essential requirement to be fulfilled for taking a safeguard action.

Article 4 of the WTO Agreement on Safeguards contains provisions for determination of serious injury or threat thereof. This Article defines "serious injury" for the purposes of the WTO Agreement on Safeguards as a significant overall impairment in the position of domestic industry. "Threat of serious injury" can be interpreted as any serious injury that is clearly imminent, in accordance with the provisions of paragraph 2 of that Article.

A finding of serious injury is a matter of judgment based on economic and social evaluation where adverse effects on the domestic industry need to be evaluated, keeping all circumstances in view including non-economic cost of production, loss of employment etc. Paragraph 2 of Article 4 provides that in an investigation to determine whether increased imports have caused or threatened to cause serious injury to a domestic industry, the competent authorities will evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In particular, this includes 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 employment. If the facts show that some degree of adverse effect has been caused or threatened, the authorities may well be justified in coming to the conclusion that a serious injury or threat has occurred.

11. Is it necessary to show that the cause of serious injury to domestic industry is from the 'increased imports'?

The existence of a causal link between increased imports of the product concerned and serious injury or threat thereof to the domestic producers of like or directly competitive products is an essential requirement, which must be demonstrated in an investigation on the basis of objective evidence.

At times, however, the domestic industry may face a situation where it may be hurt by increased imports while at the same time there may be other factors causing injury to the domestic producers. For example, the imports may have been dumped or subsidized. In such situations, the injury caused

to the domestic industry may be due to the increased imports of a product, which may or may not be entering at lower prices resulting from dumping or subsidization. The authorities, however, would need to evaluate injury caused to the domestic industry on the basis of "increased imports". If the injury caused to the domestic industry is not a result of the increased imports but of dumped or subsidized imports, then that cannot be the basis for the imposition of a safeguard measure. Paragraph 2(b) of Article 4 of the WTO Agreement on Safeguards specifically prohibits the use of safeguard measures to remedy injuries caused by factors other than increased imports. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury is not to be attributed to increased imports.

The contribution by increased imports must be sufficiently clear to establish the existence of "the causal link" required, but it is not necessary that the serious injury must be solely caused by the increased imports.[17] The injury

[17] The Appellate Body in the US-Lamb case (WT/DS 177 & 178/AB/R adopted 16 May 2001) reiterating its views in US-Wheat Gluten, observed that the term "the causal link" denoted a relationship of cause and effect such that increased imports contributed to "bringing about", "producing" or "inducing" the serious injury. Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does not suggest that increased imports be the sole cause of the serious injury, or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, even though other factors are also contributing "at the same time", to the situation of the domestic industry.
The Appellate Body also noted in that appeal the crucial significance of the second sentence of Article 4.2(b), which states that competent authorities "shall not ...attribute" to increased imports injury caused by other factors; the Appellate Body found that clearly the process of attributing "injury", envisaged by this sentence,

caused by increased imports and other factors must be properly attributed and the increased imports must have the effect of 'bringing about the serious injury.

12. What is meant by "domestic industry that produces like or directly competitive products"?

Under the WTO Agreement on Safeguards, producers of "like or directly competitive products" constitute the domestic industry, the expressions "like products" and "directly competitive products" have not been defined under the Agreement. As a result, the scope of the term "like and directly competitive products" can be interpreted very widely. It covers not only "like products" (i.e., a product alike or similar in all respects to the imported product in question) but also directly competitive products (i.e., products that functionally and commercially compete with the imported products and which can be considered as substitute products). Consumers' perception is also an important factor in this regard.

Nevertheless, considering Article III of GATT, which is known as 'the national treatment obligation' might help clarify what the "like" product is. The purpose of this article is to ensure that that an imported product is treated in the same way in terms of taxation and regulatory treatment as a "like" domestically produced good. Article III:4 provides that members shall

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can only be made following a separation of the "injury" that must then be properly "attributed". What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the "injury". The Appellate Body reversed the Panel's interpretation of Article 4.2(b) of the Agreement on Safeguards that increased imports "alone", "in and of themselves", or "per se", must be capable of causing injury that is "serious".

accord imported products treatment no less favourable than that accorded to “like products” of national origin (Tsai, 1999). The term “like product” was once discussed in Japan regarding customs duties, taxes and labelling practices on imported wines and alcoholic beverages.[18] The panel laid out some guidelines for determining the likeness between the imported product and domestic products that cover not only identical or equal products but also products with similar qualities. In addition, the scope of interpretation of this term should be on a case-by-case basis.

It is usually the domestic producers who have to take the initiative to apply for the imposition of safeguard measures; therefore, producers of like or directly competitive products need to be vigilant as to whether increased imports of any product are causing them serious injury or threat thereof. Under the WTO Agreement on Safeguards, a “domestic industry” for the purpose of determination of serious injury or threat thereof is to be understood to mean the producers as a whole of the like or directly competitive products, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of these products.

The term “major proportion” is not defined in the Agreement. It ordinarily means more than 50% of the total domestic production; however, the competent authorities may consider even less than 50% of the total domestic production to be a major proportion. This may well be justified as in some cases as data for all the domestic producers may not be available

[18] Report of the Panel adopted on 10 November 1987 (L/6216 - 34S/83).

or some of the domestic producers may not be willing to co-operate. However, in the findings of its investigation, the authority has to clearly state how it arrived at “major proportion”.

13. In what form can a safeguard measure be applied?

The safeguard measures are generally applied either in the form of safeguard duties, levied over and above the bound level of tariff, or in the form of import quotas. However, neither Article XIX of GATT 1994 nor the WTO Agreement on Safeguards restricts the application of safeguard measures only to duties or import quotas. Members can apply safeguard measures in any form, provided it is the most appropriate remedy in the circumstances of the case. A Tariff Rate Quota is a form of safeguard measures that is applied by some of the WTO members. A Tariff Rate Quota refers to a system whereby certain quantities of a product can be imported on payment of normal tariff i.e., without paying safeguard duty or on payment of a nominal safeguard duty. Imports beyond the quota quantities are not banned but such imports attract higher or the full safeguard duty.

Safeguard measures in the form of a Tariff Rate Quota appear to be a more efficient system than that provided by safeguard duties or import quotas. On the one hand, it provides the required protection to the affected domestic industry while on the other hand, it takes care of consumer interest by providing flexibility to the consumer to import the product in question on payment of safeguard duty. While the domestic industry may be able to exploit the import quota system by increasing their prices, it will

still face competition from imports if the prices are increased beyond the protected level.

14. Can a safeguard measure be applied immediately?

No safeguard measure can be applied without an investigation. Article 3 of the WTO Agreement on Safeguards requires a safeguard measure to be taken only after an investigation in accordance with the provisions of that Article. However, in certain cases a need may arise to impose safeguard measures immediately. Article 6 of the Agreement, which deals with Provisional Safeguard Measures, states that in critical circumstances where delay would cause damage that would be difficult to repair, a member may take a provisional safeguard measure. A provisional safeguard measure may, however, be taken only pursuant to a preliminary determination that there is a clear evidence that increased imports have caused or are threatening to cause serious injury. Thus, two conditions need to be satisfied before provisional safeguard measures can be applied:

(a) Existence of critical circumstances where delay would cause damage that would be difficult to repair;
(b) A preliminary determination, which must show there is clear evidence that increased imports have caused or are threatening to cause serious injury.

Additionally, the Article imposes restrictions on the form in which a provisional measure can be applied and on the total duration of provisional measures. It stipulates that the duration of the provisional measures will not exceed 200 days and that such measures should take the form of tariff

increases. Quota restrictions, therefore, cannot be imposed as provisional safeguard measures. It is also important to note that a preliminary determination can be made immediately following a preliminary verification of the information contained in the safeguard application. It does not necessarily involve a detailed verification at that stage.

15. What constitutes critical circumstances necessary for the imposition of provisional safeguards?

Critical circumstances imply the existence of such circumstances where delay in the imposition of safeguard measures would cause irreparable damage to the domestic industry. The WTO Agreement on Safeguards does not define critical circumstances more specifically or elaborately. The authorities therefore need to base their findings concerning critical circumstances on an objective evaluation of various factors affecting the state of the domestic industry. These factors may include loss of employment, loss in profitability of the domestic industry, building up of inventories, and other factors affecting economic viability of operation. Critical circumstances may be found to exist, both in cases of serious injury as well as in cases of threat of serious injury.

16. Is there a limit applied to the extent of a safeguard measure (e.g., upper limit of a tariff rate)?

Article 5 of the WTO Agreement on Safeguards deals with the application of safeguard measures. Paragraph 1 of this Article states that a member can apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. There is no upper limit for raising the tariffs. If, however, a quantitative restriction is used, such a

measure will not reduce the quantity of imports to a level below that of the average rate for the past three representative years for which statistics are available. An exception can be made if clear justification is given for why a different level is necessary to prevent or remedy serious injury.

In addition, members are required to choose measures most suitable for the achievement of these objectives. Thus, the Agreement permits a safeguard measure to be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment by the domestic industry. Furthermore, if the safeguard measure is applied in the form of import restrictions, the quantity allowed to be imported cannot be below the average level of imports in the past three representative years.

17. How long can a safeguard measure be applied?

Safeguard measures are emergency actions and therefore need to be applied for a limited period. Article 7 of the WTO Agreement on Safeguards requires that unless extended, the period will not exceed four years. This initial period of four years includes the period for which any provisional safeguard measures were taken. Measures can be extended in accordance with the provisions contained in paragraph 2 of Article 7, if it is shown that (a) the safeguard measures continue to be necessary to prevent or remedy serious injury, (b) there is evidence that the industry is adjusting and (c) there is compliance with provisions regarding levels of concession – i.e., the tariff concessions to the exporting countries (Article 8) – and other obligations, such as notification to be made at different stages of a safeguard investigation and consultation with the exporting

countries (Article 12) are complied with.

The total period of application of a safeguard measure, which includes the period during which a provisional safeguard measure, if any, were applied and the entire duration of the application of safeguard measures including the period of initial application and any extension thereof, cannot exceed eight years (ten years for developing countries) in accordance with the provision of paragraph 3 of Article 7.

The WTO Agreement on Safeguards further requires that no safeguard measure will be applied to the import of a product that has been subject to such a measure for a period equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years. For example, if a safeguard measure was in force for three years, then it cannot be reapplied to that product for the next three years; if the safeguard measure was in force for only 18 months, then it cannot be reapplied to that product for the next two years.

However, the Agreement allows for a measure to be applied to the import of a product if its duration was 180 days or less, subject to the conditions that at least one year has elapsed since the date of introduction of the safeguard measure, and that such a safeguard measure has not been applied to the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

18. What is meant by “adjustment by domestic industry”?

One of the principal objectives of safeguard measures is to enable the

domestic industry to adjust to the new competition caused by the increased imports. This is to be accomplished by domestic producers who are tasked with (a) determining the reasons for their lack of competitiveness and (b) formulating a plan for how they will become competitive within a stipulated period. This plan is referred to as the adjustment plan of the domestic industry.

Examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that authorities had considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment. To some extent, it would also meet the requirement that imposition of a safeguard measure should be in the public interest. This is because existence of a competitive domestic industry, in the long term, would be in the public interest.

19. Does the WTO Agreement on Safeguards require safeguard measures to be progressively liberalized?

The WTO Agreement on Safeguards envisages progressive liberalization of safeguard measures. This means that the protection of a safeguard measure granted to domestic producers would be reduced progressively to enable them to gradually meet the competition from imports by progressively adjusting to the new situation of import competition. The Agreement recognizes progressive liberalization of safeguard measures as a tool for expediting the process of adjustment. Some WTO members, therefore, require the domestic industry requesting safeguard measures to also submit a detailed adjustment plan.

Paragraph 4 of Article 7 of the Agreement on Safeguards states that in order to facilitate adjustment where the expected duration of a safeguard measure is more than one year, the member applying the measure progressively liberalizes it at regular intervals. The adjustment plan may help in determining the optimal pace of liberalization, since the quantification of the benefits derived from the adjustment plan can provide guidance.

20. Does the WTO Agreement on Safeguards require that safeguard measures be reviewed?

If the duration of safeguard measures exceeds three years, the Agreement requires the member applying such a measure to review the situation before the mid-point of the measure. For example, if a measure is applied for four years, a review needs to be conducted not later than two years following implementation. Further, when a safeguard measure exceeds the initial period of application, the Agreement requires that it should not be more restrictive than it was at the end of the initial period, that it be progressively liberalized at regular intervals, and that it be terminated when it is no longer necessary to remedy serious injury or to facilitate adjustment.

21. Does the WTO Agreement on Safeguards require public interest to be kept in view?

Yes, the Agreement on Safeguards stipulates an action to be taken only if it is in public interest. To meet this end, Article 3 of the Agreement requires that reasonable public notice be given to all interested parties. The Article also states that the investigation must include public hearings or other

appropriate means in which importers, exporters and other interested parties could present evidence and their views as to whether or not the application of a safeguard measure would be in the public interest. The term “public interest” is, however, not to be restricted to cover consumer interest alone. It is a much wider term that covers general social welfare, taking into account the larger community interest.

22. Why should safeguard measures not be applied for the full eight years (or 10 years in the case of developing countries), as permitted under the WTO Agreement on Safeguards?

Safeguard measures can, in the first instance, be applied for four years and, subject to fulfillment of the conditions necessary in this regard, may be extended beyond four years; however, the total period cannot exceed eight years (10 years for developing countries). The application of safeguard measures beyond three years, however, is not without a price.

The Agreement stipulates that if the duration of the safeguard measures is three years or longer, substantially equivalent level of concessions and other obligations need to be maintained by way of compensation to the exporting countries on some other products. The affected exporting countries can retaliate if the member taking safeguard action does not offer substantially equivalent alternative compensation.

Safeguard measures are not action against unfair trade practices (i.e., not dumped or subsidized). Thus, there is provision for compensation to those WTO members whose exports are adversely affected through no fault of their own. In view of this, and to encourage the domestic producers to become efficient and competitive as early as possible, the application of

safeguard measures is restricted to as short a period as necessary.

23. Is there any special or differential treatment for developing countries?

The WTO Agreement on Safeguards provides for special and differential treatment for developing countries. Under Article 9 of the Agreement, safeguard measures are not to be applied against any product originating in a developing country member as long as its share of imports of the product concerned in the importing member does not exceed 3%. In other words, as long as the share of the product originating from a particular developing country in the total imports of that product in the importing country (which is taking safeguard measures against imports of that product) does not exceed 3%t, safeguard measures cannot be applied on those imports.

There is, however, an exception to this non-application of safeguard measures on products originating in a developing country member. when there are imports of that product originating in many developing countries and such imports (imports of that product from developing countries individually account for less than 3% of the total imports) collectively account for more than 9% of the total imports of that product.

The other favourable treatment is that developing country members can extend the period of application of a safeguard measure for up to two years beyond the maximum period (i.e., 10 years instead of eight years). With regard to the reapplication of safeguard measures, developing country members can do so after a period equal to half that during which such a

measure has been previously applied, provided that the period of non-application is at least two years.

24. Is there any specific provision regarding imports from China?

Upon China acceding to WTO on 11 December, 2001, the Protocol of Accession of China and the Working Party Report gave certain flexibilities to the WTO member countries for the imposition of product-specific transitional safeguards against imports from China. These flexibilities ceased to exist as of December 2013.

25. If a country is a member of any preferential trade agreement, for example, an FTA, CU or others, how can it protect its domestic producers from injury caused by a surge of imports resulting from concessions granted under these agreements/arrangements?

A country may be a member of a preferential trade agreement (PTA) under which it may have granted concessions to imports from other member countries of the same agreement, which may result in a surge of imports from those countries. If this increase in imports is because of tariff concessions granted to imports from the other member countries of the PTA, and not because of the lowering of tariffs on an MFN basis under the WTO regime, safeguard measures therefore need to be imposed only on PTA members. On the other hand, the safeguard measures taken under the Agreement on Safeguards are imposed on all WTO members (multilaterally and not against any specific country). In case the surge in imports is the result of the concessions granted to members of a PTA, the remedy would need to be found in terms of the actual legal text of that trade agreement. For example, SAPTA provides for such an action to be taken

against imports from SAPTA members. Such protective measures are taken under, and in accordance with, the specific provisions of the particular PTA by restricting or withdrawing the concessions granted under the PTA. These measures, therefore, would apply only to imports from other member countries of the trade agreements and not against all imports, i.e., not against imports from third countries.

In another case, the ASEAN Trade in Goods Agreement (ATIGA) does not have any provision for preferential safeguard measures, meaning that no preferential safeguard action can be initiated if there is surge in imports due to tariff concessions under ATIGA. ATIGA only allows for safeguard action to be taken under the WTO Rules, i.e., on non-preferential imports and on a multilateral basis. In a scenario where a surge in imports that is causing injury to the domestic industry is due to ATIGA concessions, imposing a WTO safeguard action is also not desirable as it may lead to trade disputes.

26. Can a member country of a PTA exclude imports from other member countries of the PTA from safeguard measures taken under the WTO Agreement on Safeguards?

A member country of a PTA can exclude imports from other member countries of the PTA from the safeguard measures taken under the Agreement on Safeguards only if the imports from those member countries of the PTA were not included in injury determination under the Agreement on Safeguards. If all the imports (including the imports from member countries of the PTA) are considered for injury determination, safeguard measures would need to be applied against all imports, including the

imports from the member countries of the PTA.[19]

27. How can a Customs Union apply safeguard measures?

A Customs Union (for example, the European Union) may apply a safeguard measure as a single unit (i.e., on all its member States) or on behalf of an individual member State. When a Customs Union applies a safeguard measure as a single unit, all requirements for the determination of serious injury or threat thereof under the Agreement on Safeguards are required to be based on the conditions existing in the Customs Union as a whole. When a safeguard measure is applied on behalf of an individual member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member

[19] In the Wheat Gluten case, USITC excluded imports from Canada (a NAFTA partner) from the application of the measure, after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports). The Appellate Body in this case (WT/DS166/AB/R), inter alia, observed that…the same phrase "product being imported" appeared in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, it believed that it would be appropriate to ascribe the same meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a different meaning in Articles 2.1 and 2.2 of the Agreement on Safeguards. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources, which would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.'
(Gupta, 2003).

State and the measure shall be limited to that member State.

28. Does the WTO Agreement on Safeguards cover all products?

The WTO Agreement on Safeguards is a comprehensive agreement covering all products as envisaged in the Punta del Este Declaration. However, Special Safeguard Provisions have been envisaged for agricultural products under the Agreement on Agriculture. This generally includes all agricultural products, except fish and fish products, which are designated in its Schedule (member's Schedule of Concession) with the symbol "SSG". Article 11.1(c) of the Agreement on Safeguards states that: "This Agreement does not apply to measures sought, taken or maintained by a member pursuant to provisions of GATT 1994 other than Article XIX and Multilateral Trade Agreements in Annex 1 other than this Agreement, or protocols and agreements or arrangements concluded within the framework of GATT 1994." Thus, the provisions of the Agreement on Safeguards would not apply to Special Safeguard measures imposed on agricultural products under the Agreement on Agriculture.

Annex – II: Notice of initiation of safeguard investigation

The following content should be contained in the notice of initiation of safeguard investigation:

1. Subject

The rules and regulations under which the safeguard investigation is filed should be mentioned.

2. Request for investigation

The name and address of the complainant should be specified together with the provision of the law which allows the complainant to file such request.

3. Product concerned:

The name and classification of product for which an investigation is requesting should be provided in detail.

4. Increase in import of product under investigation:

A detailed summary of the increase of such product under investigation should be provided. The statistics of previous years would demonstrate the flow of imports into the jurisdiction.

5. Serious injury

A summary of serious injury incurred from imports of a product under investigation should be explained. The statistics of previous years in regard to the production and sales, capacity utilization and share of domestic producers in domestic consumption would provide further clarification.

6. Procedure

Based on the relevant regulations, the Commission would initiate the investigation if sufficient evidence is demonstrated.

7. Questionnaires

The questionnaires will be sent to the interested parties in order to obtain the information that is deemed necessary for the investigation.

8. Collection of information

All interested parties are invited to provide their views by answering the questionnaire. Generally, only the parties affected by the investigation results will be heard.

9. Time limits

The period for the interested parties to reply to the authority will be stipulated.

10. Submission of written information, questionnaire responses and correspondences

All submissions of information, questionnaire responses and other correspondence should be made in writing and submitted to the authority with clear indication of names, addresses, e-mail addresses, and telephone and facsimile numbers of the interested parties.

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