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US Steel Duties and Safeguard Actions under the WTO

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1. Introduction

Safeguards are one of three trade protection instruments (or trade remedies) that are permitted under WTO rules. Each allows the adoption of import measures in specific circumstances.

Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement – Authorises anti-dumping duties or price undertakings in situations of discriminatory pricing (i.e. where export price is below domestic price).

Article VI of the GATT 1994 and the WTO Subsidies & Countervailing Measures Agreement - Authorises countervailing duties or price undertakings where countervailable subsidies are found.

Article XIX of the GATT 1994 and the Agreement on Safeguards – Authorises adoption of safeguard measures where there is a surge of imports. Measures can take the form of additional duties or quotas.

Whereas anti-dumping and countervailing duties deal with problems perceived to be "unfair", safeguard measures are taken against imports that are fairly traded but which cause serious problems through sheer volume.

2. Recent trends in use of safeguards

Prior to the creation of the WTO, safeguards were rarely used. In the last few years, however, the incidence of safeguards has dramatically increased. Trade protection measures are usually measured by the number of cases initiated. Whilst measures are not adopted in all cases, the initiation of investigations often itself has an effect on trade. Thus, the number of investigations initiated provides the best single indicator of the overall level of safeguard activity.

Safeguard Investigations Initiated 1995-2001[2]

Year	1995	1996	1997	1998	1999	2000	2001
No of cases	2	5	3	10	15	26	53

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[2] All data in this paper is calculated from WTO documents and members notifications to the WTO.

We must note the significant impact that the US steel safeguard investigations have had on the figures for 2001. In this context, it is interesting to observe that the US steel safeguards are often referred to in the singular (i.e. as if they should be counted in the statistics as only one investigation). However, the different products investigated are not all like or directly competitive and therefore they cannot be counted as a single safeguard investigation. The US International Trade Commission made injury determinations on 33 products and this is how the US steel safeguards have been calculated in the above figures.

Only three countries have initiated a significant number of safeguard investigations during this period. The US with 42 initiations now leads the way. Chile and India, with 16 and 11 respectively, are the next two most significant users. Whilst these three countries have been by far the most active in terms of safeguard investigations during this period, 18 other countries have initiated safeguard investigations[3], indicating that the use of such instruments is increasingly widespread.

Until 2002 (see section 5.2 below), the EU had not initiated any safeguard investigations against WTO members. Likewise, Canada has not initiated any cases and Australia has only initiated one such investigation. Thus, apart from the US, the new users of safeguards have not been the traditional anti-dumping users.

It can be noted that the number of safeguard cases still remains low in relation to the use of anti-dumping, use of which reached record levels in 2001.

Anti-Dumping Investigations Initiated 1995-2001

Year	1995	1996	1997	1998	1999	2000	2001
No of Cases	156	221	242	232	339	251	348

Note, however, that a safeguard is more restrictive than anti-dumping duties. The latter are taken against individual countries, whereas the former must be taken against imports of the product in question from all sources. The anti-dumping statistics traditionally measure the number of countries targeted in anti-dumping investigations rather than the number of products. This means that an investigation into the same product from 5 different countries counts as 5 cases in anti-dumping statistics. In fact, of the 251 cases initiated in 2000, 120 products were involved. Thus, it is clear that the number of safeguard investigations is significantly increasing even in relation to anti-dumping.

One might ask why there has been such a significant increase in the use of such trade protection instruments? One of the principal reasons for the increase, which is a phenomenon seen in both developed and developing countries, is liberalisation. The fact that use of trade protection instruments has increased is in fact a sign of how successful the Uruguay Round was in leading to genuine trade liberalisation. The fact that domestic industries are turning to such instruments is a clear indication that they are facing increased competition from imports, thus proving that liberalisation has been successful. Some would go further and argue that such provisions are a crucial safety valve that "channels" protectionism into narrowly defined instruments that at least have the merit of being relatively transparent (as opposed to less transparent non-tariff barriers). Those supporting this line of argument would say that this is a "price" worth paying in order to obtain the significant liberalisation gains that all countries are experiencing.

A second reason for growth in the number of countries using such measures is, perhaps, a domino effect. The use of trade protection instruments by developing countries may have been prompted, and has certainly been legitimised, by the significant use of such instruments by large developed economies such as the US, EU, Canada and Australia.

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[3] Argentina, Australia, Brazil, Chile, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, India, Japan, Jordan, Korea, Latvia, Morocco, Phillippines, Poland, Slovak Republic, Slovenia, US, and Venezuela.

3. WTO Rules on Safeguards

A safeguard provision has existed since the GATT was created. Article XIX of the GATT 1947 allowed for "emergency action on imports of particular products".

This allowed safeguard measures to be adopted where a product is imported in such increased quantities and under such conditions as to cause or threaten serious injury to like or directly competing products. Two further conditions were that the increase in imports must have been a) the result of unforeseen developments and b) the effect of obligations incurred under the agreement (e.g. reduced tariffs).

WTO members concluded to an agreement on safeguards for the first time as part of the Uruguay Round Agreements. In addition, Article XIX of the GATT 1994 was maintained. The safeguards agreement, whilst adopting similar substantive conditions to Article XIX, provides more detailed guidance and interpretation both on the substance and procedure of safeguard investigations.

The main provisions of the safeguards agreement are as follows:

Substance

- As in Article XIX, safeguard measures can only be applied where imports are in "such increased quantities" as to "cause or threaten to cause serious injury" to "like or directly competitive" products. (Article 2.1)
- Unlike Article XIX, however, the Safeguards Agreement explicitly states that safeguard measures cannot be aimed at specific countries. They must be applied to all imports irrespective of source. (Article 2.2). This is different to anti-dumping duties and countervailing duties, both of which can be adopted against individual countries.
- In order to assess whether serious injury has occurred, all relevant factors should be evaluated (Article 4.2a).
- In establishing the existence of a causal link, injury caused by other factors should not be attributed to the increased imports (Article 4.2b).

Procedure

- An investigation must be conducted and the opportunity to make views known must be offered to interested parties, including views on whether any proposed safeguard measures would be in the public interest. (Article 3).
- Although not explicitly stated, it is implicit in Article 5 that safeguard measures can take the form of either a tariff or quota. In addition, measures should only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.
- Provisional measures can be adopted in critical circumstances where delay would cause damage difficult to repair. (Article 6).
- Measures should have a maximum 4 year duration, with the possibility to extentd them by a further 4 years. (Article 7).
- When adopting safeguard measures, members should attempt to maintain an equivalent overall level of concessions. In this regard, members may agree on compensation to its trading partners affected by the adoption of a safeguard (expected to be in the form of reduced tariffs). If no compensation can be agreed, equivalent concessions can be adopted by other WTO members, but not usually for 3 years. In other words, if no compensation is agreed, other members can "retaliate" by increasing tariffs on products from the country in question. (Article 8).
- Developing countries should be excluded from safeguard measures if they account for less then 3% of total imports. There is no equivalent de minimis provision for developed countries. When adopting their own safeguard measures, developing countries can adopt measures for an additional two years than normally envisaged by the agreement. (Article 9).

4. WTO Jurisprudence

In addition to the agreement on safeguards, a considerable body of WTO jurisprudence has now been created on safeguards. The cases, listed below, are extremely helpful in clarifying and putting some flesh on certain provisions of the safeguards agreement.

Korea	Dairy Products (WT/DS98)
Argentina	Footwear (WT/DS121)
United States	Wheat Gluten (WT/DS166)
United States	Lamb Meat (WT/DS177 & DS178)
United States	Circular welded carbon quality line pipe (WT/DS202)[4]

All of the panel decisions in these cases were appealed. The fact that the Appellate Body has made rulings in all of these cases has been of great assistance in interpreting the provisions of the safeguards agreement. In some respects, the thinking and substance has developed in each Panel and Appellate Body report. The most recent Appellate Body decision regarding the US safeguard on line pipe is, therefore, perhaps the most useful in that it clearly brings together a number of strands developed in earlier decisions and provides clear and unambiguous guidance to governments intending to use safeguards. It can be noted that all of these safeguard measures, including that on line pipe, were found to be WTO inconsistent, thus proving that the agreement on safeguards establishes high standards for the use of these provisions.

A detailed review of all of the detailed points arising out of these cases is beyond the scope of this short paper. However, the key points that have emerged are as follows:

- The increase in imports must be "recent", "sudden" and "sharp".
- Despite the fact that "unforeseen circumstances" are not mentioned in the Agreement on Safeguards, the requirement of Article XIX is relevant. The fact that imports increase as a result of a reduction in tariffs (arising from WTO obligations) cannot per se be used to apply safeguard measures as this can foreseen.
- Injury caused by other factors must be "distinguished" and "separated" from that caused by imports. The Appellate Body has recognised that this may be a difficult task but nevertheless has confirmed that the safeguards agreement sets this high standard of economic analysis.
- The fact that measures can only be applied to the extent necessary to prevent or remedy serious injury means that safeguard measures must only prevent or remedy injury attributed to the imports. That is, injury caused by other factors (which must have been distinguished and separated) should not be remedied by the measures.

It is also interesting to note certain general comments made by the Appellate Body in its report on line pipe:

> *... safeguard measures are extraordinary remedies to be taken only in emergency situations.*
>
> *... safeguard measures are ... remedies imposed in the form of imports restrictions in the absence of any allegation of unfair trade practice.*
>
> *... safeguard measures may ... be imposed on the fair trade of other WTO members and, by restricting their imports, will prevent those WTO members from enjoying the full benfit of trade concessions under the WTO agreement.*

These comments indicate the context within which the Appellate Body is making its decision and are helpful in establishing the underlying principles of safeguard measures. The stress on the emergency and extraordinary nature of such measures is in line with the traditional perception of safeguard measures and appears to be inconsistent with the dramatic growth that we have seen in the use of safeguards.

All of these issues have critical importance in the use of safeguards and all safeguard actions must meet such standards (in addition to other provisions not highlighted here).

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[4] All of these Panel and Appellate Body reports can be downloaded from the WTO website.

5. Recent Developments

5.1. The US Steel Safeguard Action

The US action was initiated on 28 June 2001. In October 2001, the US International Trade Commission determined that steel imports have been a substantial cause of serious injury, or threat thereof, to the US steel industry[5]. The level of measures was recommended by the ITC in December 2001 and President Bush decided to adopt the measures in the form of increased tariffs ranging from 8% to 30% (levels generally higher than those recommended by the ITC but below that requested by the US industry) in March 2002[6].

As required by the safeguards agreement, developing countries accounting for less than 3% of US imports of each of the products have been excluded from the measures. Thus, except for a small number of exceptions on a few particular products, developing countries are generally excluded from the safeguard measure. Nevertheless, the US is likely to monitor the situation closely and may impose measures where products from excluded developing countries surge following the introduction of the measures.

5.2. EU Reaction to the US Safeguard Measures

Whilst various trading partners of the US have reacted to the US steel safeguard measures, the most comprehensive response has come from the EU which has in itself raised several interesting issues worthy of comment.

Firstly, the EU has requested consultations with the US as the first step towards a full WTO challenge on the measures. This has unanimous support, both from the EU member states and other trading partners of the US. The consultations are not likely to result in the measures being removed and therefore the EU is highly likely to request a panel on the measures.

There is a high expectation that the US measures will be found to be WTO inconsistent. One reason for this is that in some respects they appear to have similar problems that were found in the three earlier safeguard challenges against the US. In addition, there are also potential problems with the US determinations that the increase in imports has been sudden, sharp and recent. For some products, it is clear that the most recent trend in imports has been downward.

Secondly, the EU has adopted its own provisional safeguard measures in response to the US safeguards. In principal, these are different in nature to the US measures. The US measures are aimed at reducing imports below their current levels. The EU measures are supposed to be aimed at preventing a future surge in imports in the EU as a result of the US market being closed.

The measures will apply for six months while the Commission conducts a full investigation. The EU measures are in the form of a tariff quota (i.e. up to a certain quantity threshold, no measure is applied and above the threshold an additional duty comes into effect). The measures have been presented by the Commission as allowing imports to continue at current levels, + a 10% leeway to allow for growth, free of any measure. However, the thresholds have been calculated on the basis of an average of the level of imports in 1999-2001. Imports of a number of the products covered by the safeguards increased significantly throughout these three years. In such cases, the average level of imports for the 3 years is actually significantly below that of 2001. Thus, the measures are potentially restrictive (i.e. reducing imports) at least in some products.

The impact of the EU measures, to the extent that they are restrictive, will worsen the negative impact of the US measures on the rest of the world.

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[5] The USITC injury findings are principally summarised in 3 reports (Volume I – Commissioners' Determinations/ Volumes II & III – Staff Reports) totalling more than 1100 pages. These can be downloaded from the USITC website at www.usitc.gov/steel

[6] Details of the products covered by the measures can be found in the document notifying the US measures to the WTO (G/SG/N/10/USA6) which can be downloaded from the WTO website

The provisional measures have all been adopted on the grounds of threat of material injury. Whilst logically this may make sense if there is a threat of a surge in steel imports as a result of trade diversion, it may be credibly argued that that there is a threat of serious injury to the EU industry. However, this is not what the EU has argued. The reason for this is that Article 2.1 of the safeguards agreement states that a member may apply a safeguard measure when it is:

> "being imported ... in such increased quantities ... as to cause or threaten to cause serious injury".

The use of the present tense (i.e "is being imported") clearly suggests that the increase has already happened. Thus, while the imports may not yet have caused serious injury (and thus might be classified as threatening to cause serious injury), measures cannot be adopted on the basis of the threat of an increase in imports.

Thus, the EU measures have been adopted on the basis of a threat of serious injury as a result of import increases that have already occurred, despite the fact that it is really the fear of future surges in imports that has motivated the measures.

In some cases it is clear that there has been a sudden, sharp and recent increase in imports. It is also clear, looking at the injury indicators, that an argument could be made that serious injury has already been caused. Thus, measures could perhaps have been adopted on that basis for such products. However, this has not been the case. For no product is a current injury finding made. The emphasis is all on future injury that is likely to be caused.

There are a number of possible problems with the EU measures. Firstly, for some products it is not clear that there has been a sudden, sharp and recent increase. In such cases, only when the increase has actually happened could safeguard measures be justified. Secondly, for products currently suffering from injury, the case for threat of injury must involve establishing that the existing injury is likely to worsen (which may be difficult to do if the increase in imports has already caused serious injury).

Thirdly, the EU has requested compensation from the US under Article 8.2 of the safeguard agreement. However, one of the most controversial issues is under what circumstances the EU can unilaterally suspend concessions against the US if compensation cannot be agreed. Article 8.2 provides that members affected by a safeguard can suspend substantially equivalent concessions against the country imposing the safeguard measures. Article 8.3 postpones this possibility for three years, subject to the condition that the measure "has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement".

As noted above, it would appear that not all of the products covered by the US safeguards have seen a recent absolute increase in imports (although it all depends on what constitutes "recent"). Further, there are a number of serious question marks over the extent to which the US action conforms to the safeguard agreement's provisions. Thus, read literally, this provision would appear to authorise such "retaliation" in the form of increased duties on other products. However, there are a number of uncertainties about this provision. Perhaps the most significant is how the level of retaliation is authorised? One would expect that the WTO has to sanction the level of retaliation. Perhaps an arbitrator has to be appointed but no procedure is provided for this. A further issue is the timing of the retaliation. Read literally, it appears that Article 8.2 requires the retaliation to be imposed within 90 days of the measure being applied. However, it is not logical that there is an incentive to adopt retaliation quickly. The EU is interpreting this provision as meaning that the deadline must be respected for notifying the retaliation to the WTO but then suspending the application of the retaliatory measures until a future date. However, this remains an open question.

There are other ambiguities in Article 8.2. For example, the suspension can only be imposed if the Council for Trade in Goods does not disapprove. However, no explanation of what would constitute a disapproval is provided. All in all this is a controversial provision that has never been used. It can be noted that this provision existed in the original Article XIX and it appears to have been "cut and pasted" into the safeguards agreement without adequate consideration.

At the time of writing, the European Commission has notified to the WTO a list of US products against which retaliatory measures might be applied by EU member states. However, whether the EU will proceed and actually impose such retaliatory measures remains to be seen.

6. Implications of the Increased Use of Safeguards for Developing Countries

6.1. The US steel safeguard and steel exporters

From a general perspective, those companies exporting to the US from countries that are not excluded from the measures will find it harder (if not impossible) to sell in the US market at the higher prices implied by the tariff increases.

Given that most developing countries are excluded from most of the US steel measures, developing countries that produce steel may find the US market very attractive due to reduced import competition and likely higher prices. Such opportunities should not be neglected but care should be taken if the US puts an anti-surge mechanism in place.

On the other hand, steel that would have gone to the US may now have to find other markets in which it can be sold. It is the fear of such trade diversion that is resulting in other countries taking certain defensive actions (see 6.2 below).

If significant quantities of steel previously exported to the US are shut out of that market, certain products will be subject to over-supply in the global market. Where such volumes are substantial this will have a downward effect on steel prices and will have an impact on developing country markets.

6.2. Steel importing countries

Domestic industries in steel importing countries are greatly concerned about diversion of exports to the US into their markets. Thus, the EU has already adopted provisional measures on 15 steel products to prevent a sudden surge of imports into the EU market. Likewise, Chile has initiated a safeguard investigation in December 2001 (presumably in anticipation of the likely US measures) and Canada likewise in March 2002. This "domino effect" may spread even further, as each new safeguard investigation initiated increases the concern of domestic industries in markets that remain open.

Most developing countries are steel importers and therefore should benefit to the extent that global steel prices fall as a result of excess stocks as mentioned above.

6.3. Implications for the Doha Development Round

The controversy surrounding the US safeguards obviously raises the question of whether the safeguard regulation should be changed. Whilst the AD and SCM agreements were both mentioned as negotiating issues in the Doha Ministerial Declaration, safeguards was not mentioned. However, this does not mean that it could not be part of the negotiations if members agreed that it was necessary.

Does the safeguards agreement need to be amended? At one level the answer to this is no. The panel and Appellate Body reports mentioned above have clarified the substantive and procedural elements of the existing agreement and the high standards set are satisfactory and desirable.

The safeguards agreement has proven to be ambiguous in the area of suspending concessions against the country imposing the safeguard measures where agreement cannot be reached on compensation (under Article 8.3). As pointed out in section 5.2, clarification of this provision would be desirable.

A more radical suggestion for consideration relates to the possibility of retroactive remedies and dispute settlement. In the case of temporary safeguards, there are cases where the safeguard measure is likely to be removed by the time that any WTO dispute would have been completed. This allows cynical use of safeguard measures in a WTO inconsistent way in the knowledge that, as long as the offending measure is brought into conformity with WTO obligations by the time that the dispute process has ended, there are no sanctions that can be taken against the offending country. Perhaps this is one area where members should consider the possibility of retroactive compensation if a safeguard measure is found to be inconsistent.

Certain WTO member states, not least the US, would be likely to resist any discussion on safeguards in the round. Nonetheless, the issues raised above are important and further consideration would be justified.

Apart from specific considerations regarding the safeguards agreement itself, the US action may have broader implications for the round. The US action has been perceived so negatively by a large number of its trading partners that the atmosphere within the negotiations may change. This may in fact weaken the US position in the negotiations which, in turn, may actually create more general problems for progress towards a conclusion of the round.

6.4. Increased use of safeguards

As recorded in section 2, we are already seeing a dramatic increase in the use of safeguard measures. The widespread use of safeguard measures to protect steel industries across such a broad range of products may encourage other countries to do the same. Safeguard measures have the apparent advantage – in the view of many – of being an easier tool to use than anti-dumping or countervailing measures. The latter both require detailed analysis of whether dumping is occurring or if subsidies exist. A safeguard investigation, on the face it, is much simpler, requiring only an analysis of the imports and the injurious situation of the domestic industry.

This may be a significant issue for developing countries with few resources to set up anti-dumping adminstrations.

On the other hand, the growing number of WTO inconsistent safeguards does highlight the high standards required by countries planning on imposing safeguards. If the US measures are found to WTO inconsistent (on top of the previous measures already found to be inconsistent), this may serve as a deterrent to other countries' using such measures.

In this regard, if should be noted that a developing country choosing to have an active safeguard policy will be restricted to act in fewer situations than would have been the case with anti-dumping.

Overall, there is a fear that the increasing numbers of countries that have already started to use safeguards will result in even more countries tempted to do so. The more that countries such as the US continue to adopt WTO inconsistent measures (as they have in the 3 previous cases and may have in the steel cases), the weaker the deterrent of the high WTO standards becomes.

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