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The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance

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In this article the author explores in detail the “unforeseen developments” requirement in the Agreement on Safeguards under the WTO. The author seeks to answer questions such as whether the requirement (i.e., unforeseen developments must be demonstrated in order for safeguard measures to be justified) is an integral part of the Agreement on Safeguards, and how the subjectivity associated with this requirement contributes to the difficulty of constructing a reasoned and adequate account of the causal chain. The article also includes within its scope a brief analysis of larger issues such as the political and economic rationale behind safeguard measures, and how ambiguities in the Agreement on Safeguards can destabilize the discipline of safeguards and defeat one of its major purposes – to help countries nurture their infant industries. Finally, the article reflects upon how India, being one of the leading users of safeguard measures as of 2008, is likely to be affected by unclear areas in the present legislation such as the unforeseen developments clause.

Keywords: India, international trade, safeguards, unforeseen developments, WTO

Introduction

It is one of the foundational principles of the international trading system under the World Trade Organization that member countries are bound by their negotiated concessions for imports, unless these concessions are modified according to the existing rules. The essentiality of this principle for the stabilization of the international trading system as well as for further promotion of trade cannot be overemphasized. It may, therefore, appear to pose a fascinating paradox that the same agreement that seeks to promote international trade allows WTO members to backtrack and place restrictions on imports in the form of safeguard measures in the case of an increase in such imports.¹

The justifications for safeguard measures that WTO members have come up with from time to time have attracted controversy. These measures are at their core meant to be instruments for use in times of emergency, and have been identified as such in the General Agreement on Tariffs and Trade (GATT) 1947. Safeguards are temporary in nature, explicitly designed to slow imports in order to enable a particular domestic industry to adjust to heightened competition from foreign suppliers.² The term “safeguards” is generally used to denote government actions in response to imports that are deemed to harm the importing country’s economy or domestic competing industries. These mechanisms often assume import-restraining forms, whether they are increased tariffs, quantitative restrictions, or other measures.³ Article XIX of the GATT and the Agreement on Safeguards (AS) authorize members to impose import restrictions, in the form of either tariffs or quotas, to prevent or remedy serious injury to domestic industry when such injury is caused by an increase in imports.⁴ Safeguard measures, unlike other measures such as those relating to antidumping, have to be imposed on the basis of the most-favoured nation (MFN) principle.⁵

In this context, mention must be made of the two distinct motives suggested by Hoekman and Kostecki for including safeguard measures in the GATT/WTO system, viz. as insurance and as a safety valve. The insurance motive reflects that without such provisions, governments may be reluctant to sign trade agreements leading to substantial liberalization. The inclusion of an escape clause in said agreements may thus facilitate liberalization of trade by encouraging negotiators to be bolder while making their offers of concessions. The safety valve motive, on the other hand, portends that governments may at a subsequent point in time feel pressure to renege on certain negotiated liberalization commitments. By legalizing some backsliding under carefully specified circumstances, an escape clause can thus be instrumental in protecting the integrity of the remainder of the agreement and therefore improve the overall durability of a liberal trade regime.⁶

Since the inception of the AS, the number of safeguard measures adopted by member countries has seen a rather steep rise.⁷ Prior to the AS, countries mainly used measures other than safeguards to accord protection that would have been otherwise inconsistent with the GATT. For instance, while developing countries often used balance-of-payments to impose protection and could also refer to the infant industry argument, developed countries, at the other end of the spectrum, used “grey-area measures” such as voluntary export restraints (VERs) to restrict imports. The use of tariff renegotiations was also another prominent way of protecting domestic industries prior to 1995. Therefore, Article XIX protection in the pre-1995 era tended to affect only a negligible amount of world trade in relatively minor product categories.⁸ While Trebilcock and Howse have identified that most safeguard measures are imposed by the developed countries, which are able to flex their muscles in the global trading arena,⁹ the latest reports from the WTO Safeguards Committee suggest changes in the scenario, with developing countries being at the helm of the majority of safeguard initiations.¹⁰ In fact, India has become a leading user of safeguard initiations, with 15 to its credit already as of mid-2008.¹¹

There is no dearth of explanations that can be put forward to account for this shift. It is possible that the industries of developed countries, facing the fiercest of competition, have either become more efficient or simply disappeared and therefore no longer require safeguards. Another explanation, which is tinged with a deeper political hue, is that consumers in developed countries, who are negatively affected by safeguards, have become better organized at opposing safeguard requests from domestic industry. As regards the rise in the use of safeguards by developing countries, one idea is that these countries and their domestic industries have reached the desired level of technical proficiency so as to enable them to wield the tools of the WTO for imposition of safeguards. Since the number of developing nations easily exceeds that of the developed ones, therefore, all other factors being equal, it is expected that there would more safeguards imposed by developing countries than those imposed by the developed ones.¹²

However, despite this increase in the use of safeguard measures, what is thought provoking is that, to date, every single safeguard measure challenged before the WTO Appellate Body has been struck down for failing to meet the necessary requirements. A host of reasons have been put forward as possible explanations. While some argue that the AS itself is a flawed document, with very complex concepts that need review, others feel that it is not the AS but rather the Appellate Body’s interpretation of the AS that has rendered validation of a safeguard measure virtually impossible. Yet others are of the view that countries are applying safeguard measures irresponsibly and as a

means of protectionism, which is why such measures cannot hope to achieve sustainability. Provided one assumes that the Appellate Body's aversion to safeguard measures is not entirely the fault of the applying state, there appears to be considerable cause for worry, more so because if the present framework renders it technically impossible for a country to impose safeguards, then the very purpose of allowing an "escape clause" stands defeated.¹³

This article seeks to concentrate on one major hindrance to the imposition of safeguard measures, viz. the "unforeseen developments" clause. The language in which the words of Article XIX of the GATT and the AS are couched is fraught with ambiguity. First, the text of the AS imposes no requirement whatsoever for members to demonstrate the existence of unforeseen developments. Further, though the Appellate Body has revived the unforeseen developments requirement, it has yet to state clearly how a causal link should be drawn between unforeseen developments and injury to the domestic industry.¹⁴ The unforeseen developments clause is undoubtedly a cause for concern, more so because this requirement has not been met in any case under the WTO Agreement on Safeguards.

Unforeseen Developments: Article XIX and the Agreement on Safeguards

The origin of safeguard measures can be traced to the "escape clause" of the United States Reciprocal Trade Agreement of 1942 with Mexico.¹⁵ Today, the heart of the escape clause is the first provision in Article XIX of the GATT. Paragraph 1(a) of the said article states,

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary, to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Article XIX of the GATT therefore addresses circumstances in which unforeseen developments and the effect of GATT obligations result in increased quantities of imports, thereby either causing or threatening to cause serious injury. This is commonly referred to as the "unforeseen developments" clause. One cannot deny that

this requirement was quite comprehensible in the early days of the GATT; concessions hitherto unknown had been made in 1947 and there was an obvious possibility that such concessions might result in an unexpected import surge. Article XIX was designed to address those unforeseen and at times politically awkward consequences of the original GATT bargain.

Nonetheless, the interpretation of the requirements of Article XIX, especially after the passage of so many years, attracts challenges. For instance, if one takes the example of an import surge decades after GATT had entered into force, could any such surge have been foreseen given the passage of so much time? By whom and at what time could it have been foreseen? With ongoing GATT negotiations and initiation of a new negotiating round every decade or so, does each round reset the clock on what is foreseen? The term “unforeseen developments” can thus no longer boast of a straightforward interpretation in an agreement that has lasted for decades rather than a few years and has been characterized by ever-changing commitments.¹⁶

The requirement that a GATT member using safeguard measures has to demonstrate unforeseen developments as well as the effect of GATT obligations used to be taken seriously in the early days of the GATT. Both these issues have been discussed in considerable detail in the *Hatters' Fur* case,¹⁷ which is a leading precedent on safeguards in the early days of the GATT. However, over the course of time GATT practice evolved to the point that members no longer paid much attention to textual requirements. In this context, one can refer to the example put forward by Sykes of the U.S. statute authorizing safeguard measures under domestic law, making no mention whatsoever of these issues, and the United States International Trade Commission (USITC), which administers the law, ignoring the same in the course of its safeguard investigations. There has been a notable dearth of GATT members ever bringing a complaint in this regard.¹⁸

By the time the Uruguay Round of negotiations had taken place, the unforeseen developments clause requirement posited by Article XIX had become little more than dead letters in GATT practice, which is evident from its conspicuous absence from the WTO Agreement on Safeguards. The text corresponding to Article XIX (1)(a) in the AS is Article 2.1, which simply states,

A Member may apply a safeguard measure to a product only if that Member determined, pursuant to provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Therefore, although Article 2.1 of the AS reiterates all other conditions of Article XIX, it makes no mention of the first part of paragraph 1 of Article XIX, that is, the unforeseen developments clause and the “effect of obligations incurred” requirement. Such omission from the otherwise parallel text hints that the Uruguay Round negotiators were content with them remaining little more than dead letters. However, the AS does not supplant Article XIX. On the contrary, at the conclusion of the Uruguay Round, GATT members withdrew from the old GATT treaty and the old GATT provisions were incorporated into Annex 1A of the WTO Agreement as “GATT 1994”. This incorporation signifies that the rules of the GATT comprise part of the WTO disciplines to the extent that there is no conflict with the new rules agreed in the Uruguay Round.¹⁹

Given such a scenario, the problem pertaining to the unforeseen developments clause appears to be two-fold. First, Article XIX of GATT 1994 requires that in order to adopt a safeguard measure, the competent national authority must demonstrate that an increase in imports has taken place due to unforeseen developments. In contrast, Article 2.1 of the AS makes no mention of unforeseen developments. If unforeseen developments create a condition for imposing a safeguard remedy, the two provisions are apparently in conflict. Second, no guidance has been provided as to what exactly constitutes an unforeseen development. This clause is not further elaborated or illustrated by examples either in Article XIX of GATT 1994 or in the AS. Its broad language is presumably meant to cover a wide range of unexpected circumstances, which by definition are difficult to anticipate precisely.

Revival of the Unforeseen Developments Clause

One of the first cases to raise the question of unforeseen developments before the WTO Dispute Settlement Body (DSB) was brought by the European Communities in 1997 against measures taken in the Korean dairy industry.²⁰ In 1998, the EC lodged another complaint against proceedings in the Argentine footwear industry.²¹ A common question raised in both these cases was whether the unforeseen developments clause, which was specifically omitted from the AS, constitutes a legal requirement for the application of a safeguard measure.

In the first case, the EC argued that the clause in question requires members to establish the existence of unforeseen developments that led to an increase in imports, although that clause is not found in the AS.²² According to the EC, omission of the unforeseen developments clause from the AS was immaterial because the AS and Article XIX should be read cumulatively. The EC’s arguments, however, faced the objection that omission of the clause from the AS was intentional. Korea asserted that

there is a conflict between the provisions of Article XIX and the AS, in which case the latter should prevail.²³ The panel, however, found that Article XIX:1 is still generally applicable, and there is no formal conflict between the provisions of Article XIX:1 and Article 2.1 of the AS.²⁴ However, it rejected the argument that the unforeseen developments clause creates any legal obligation, instead choosing to consider the clause to be an explanation of why a measure under Article XIX may be needed.²⁵

In the Argentina – Footwear case, the EC came up with similar arguments and Argentina’s first line of response, like Korea, was to argue that the omission of the unforeseen developments requirement from the AS creates a conflict between the AS and Article XIX. In this case, the panel emphasized the express omission of the unforeseen developments requirement from the AS,²⁶ the fact that it was ignored in GATT practice, and that it would be unrealistic to assume that the practice of non-enforcement of the unforeseen developments condition was unknown to the drafters of the AS.²⁷ Thus, the panel concluded that compliance with the requirements of the AS regarding the prerequisites for safeguard measures should also be deemed to have satisfied the requirement of compliance with Article XIX.

The EC chose to appeal both the panel decisions. The Appellate Body rulings in the two cases were given on the same day and are almost identical on the issue of unforeseen developments. It was held that the text of GATT 1994 is part of the Uruguay Round package and is binding on all members. Furthermore, Article 11 of the AS states that no member may take safeguard measures “as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.” From this text, the Appellate Body inferred that the drafters of the AS had specifically affirmed the continuing vitality of Article XIX, and therefore Article XIX and the AS were to be read cumulatively. Moreover, it was also iterated that a treaty must give meaning and effect to all the terms of the treaty and an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.²⁸ In the view of the Appellate Body, the panel decisions had the effect of reading the text of the first clause of Article XIX out of existence, which stood in violation of this principle. Moreover, as to the suggestion of the panel in Argentina – Footwear that the express omission of unforeseen developments from the AS supported an inference that the drafters wished to eliminate it, the Appellate Body concluded that if the drafters intended to omit this clause the agreement would have expressly said so.²⁹

The aforesaid decisions were instrumental in the complete revival of the first clause of Article XIX by the Appellate Body.³⁰ In the five safeguard disputes that have resulted in a decision to date, complainants have argued that the national authorities

failed to comply with the unforeseen developments requirement. Their stand has prevailed on the issue in four of five cases,³¹ and in the remaining one matter the issue was not reached for reasons of judicial economy.³²

Unforeseen Developments: Its Meaning

To date, little guidance has been given as to what exactly constitutes an unforeseen development. So far, the only case where the unforeseen developments requirement was held to have been satisfied is the U.S. – Hatters’ Fur case, which concerned a measure taken by the United States against imports of women’s fur felt hats and hat bodies, challenged by Czechoslovakia.³³

The Hatters’ Fur Case

In October 1950, on the eve of the fifth session of the GATT in Torquay, England, the United States announced that it would be taking action pursuant to Article XIX of the GATT to protect domestic producers of women’s fur felt hats and bodies. The United States argued that, due to significant tariff reductions granted on these products by the United States in Geneva (1947), there had been a substantial increase in imports, which had caused injury to domestic producers. As a result, it chose to withdraw the tariff concessions made in Geneva and restore the level of protection previously available to domestic producers of the products in question. In effect, this resulted in imports being subjected to an import duty at an *ad valorem* rate between 67.80 percent and 73.65 percent instead of between 25.3 percent and 41.8 percent.³⁴ Pursuant to its obligations under Article XIX, the United States entered into consultations with several contracting parties who were affected by this course of action and managed to reach an agreement with each of these, with the sole exception of Czechoslovakia. At the Torquay meeting the Czechoslovakian delegation lodged a protest against the U.S. action, claiming that certain conditions of Article XIX had not been complied with. The complaint was referred to a specially appointed working party that deliberated on the matter and presented its report on March 27, 1951.

In its argument, the United States had claimed that the change in hats’ fashion that had led to the increase in import of felt hats and hat bodies was “unforeseen”, particularly in view of its magnitude. The working party found for the United States. They concluded that “the fact that hat styles had changed did not constitute an ‘unforeseen development’ within the meaning of Article XIX.”³⁵ However, they also concluded that “the effects of the circumstances indicated in the above, and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947.”³⁶

In an attempt to resolve the matter of the nature of such developments, it was also observed by the working party that

... the term “unforeseen development” should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated³⁷

It has since been oft-argued that the aforesaid definition of “unforeseen development”, as mentioned in this case, is a mixture of subjective and objective factors. The term “reasonable” suggests that an objectively reasonable person could not have expected the negotiators of the country concerned to foresee the development at the time the negotiation had taken place. However, the fact that the phrase “negotiators of the country making the concession” has been spelled out suggests this objectively reasonable person must put him or herself in the position of the negotiators of the country concerned and see matters from their unique perspective.³⁸

Unforeseen Developments – Later Cases

The issue of unforeseen developments arose once again in the WTO cases Korea – Dairy Products and Argentina – Footwear. In both these cases, the Appellate Body chose to reverse the panels’ decisions and affirmed that Article XIX of the GATT was in no conflict with the AS, since they applied cumulatively and were all provisions of one treaty, viz. the WTO Agreement.³⁹ While holding so, the Appellate Body also put forward some initial thoughts on the meaning of “unforeseen developments”, saying that the words should be examined in their ordinary meaning, in their context, and in light of the object and purpose of Article XIX. The literal meaning of the word “unforeseen” is synonymous with “unexpected”. Therefore, the phrase “as a result of unforeseen developments” requires that the developments that led to a product being imported in increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been unexpected.⁴⁰ Furthermore, the Appellate Body did not find that the unforeseen developments clause in Article XIX of the GATT established any independent condition for the application of a safeguard measure; on the contrary, it was determined that the said clause describes certain circumstances that must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with the provisions of Article XIX of GATT 1994.⁴¹

Nonetheless, it remains ambiguous from the Appellate Body's decision as to what distinguishes an "independent condition" from "circumstances which must be demonstrated as a matter of fact". In this respect, one could agree with Sykes that the rationale for this peculiar distinction between "conditions" and "circumstances" could be due to the title of Article 2 of the AS – which reads "Conditions". The Appellate Body did not wish to suggest that unforeseen developments constituted a condition, since the list of conditions in Article 2 made no mention of them. However, since they are required to be demonstrated "as a matter of fact", they ought to be considered as a condition for the use of safeguard measures for all practical purposes.⁴²

Further, mention should be made of a distinction that has been made between the terms "unforeseen" and "unforeseeable". In the Korea – Dairy Products case, the Appellate Body found that the latter term could be construed to imply a less stringent threshold than the former.⁴³ Subsequently, in the U.S. – Lamb case, the panel agreed with the Appellate Body's reasoning.⁴⁴ Another debate that persists is whether the increase in imports themselves has to be unforeseen, or should the said increase be able to be attributed due to unforeseen developments. Although the Appellate Body in the Argentina – Footwear case said that "increased quantities of imports should have been unforeseen or unexpected", no concrete commitment seems to have been made to the proposition that the extent of increase itself should have been unforeseen (especially because the Appellate Body subsequently went on to define "in such increased quantities").

In the view of the author, the determination of whether the requirement of imports "in such increased quantities" has been met with is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just any increased quantities of imports will suffice. There must be "such increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994, according to the author, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.⁴⁵

Again, in the case of Argentina – Preserved Peaches,⁴⁶ the issue was whether the increase in world production was an unforeseen development. In this case, it was shown that world production in 1999-2000 was less than one percent higher than that in 1992-1993, which was the season of the Uruguay Round. In response to the panel's

query as to why the Argentine negotiators could not foresee or rather notice this development, Argentina argued that what escaped the foresight of its negotiators was that this increase in world production would become a rule rather than an exception. However, the report of the competent authority did not have any mention that the increased level of world production had become a rule rather than an exception. Therefore, the panel had little choice other than to hold that Argentina had not met its obligation under Article XIX:1(a).⁴⁷

Demonstration of Unforeseen Developments

While the decisions in the Argentina – Footwear and Korea – Dairy Products cases demonstrated that the AS “clarified and reinforced” Article XIX of GATT, these decisions, significantly, did not examine when, where, or how the demonstration of unforeseen developments should occur. In fact, in the U.S. – Wheat Gluten case, in the interest of judicial economy the panel saw no need at all to deal with the unforeseen developments clause.⁴⁸

In the U.S. – Lamb Meat case, the United States devised a new argument against the requirement that there ought to be a showing of unforeseen developments under Article XIX in order to apply safeguard measures. The United States argued that it was unnecessary for the competent authority to reach a specific conclusion finding unforeseen developments; as long as the said authority has developed a factual basis demonstrating unforeseen developments, as was the situation in that particular case, the conclusion does not have to be presented in the report. The author, in this respect, would like to point out that the obvious rationale for such an approach seems to be as follows: at the time of the determination, the respective panels and Appellate Body in the Argentina – Footwear and Korea – Dairy Products cases had not reintroduced the unforeseen developments pre-condition for safeguards measures, which had been dormant for at least three decades.⁴⁹ The United States, relying on the 1951 Hatters’ Fur GATT panel decision,⁵⁰ suggested that specific developments in the marketplace leading to an injurious import surge will not normally be “foreseen” by negotiators at the time of making tariff concessions. Once the competent authority has provided a factual basis for a finding of unforeseen developments, the complaining parties have the burden of proving that the factual basis is insufficient, and here they had failed to do so.

In the U.S. – Lamb Meat case, the Appellate Body addressed the issue of “when” and “where” the demonstration of unforeseen developments should occur, but once again avoided deciding the matter of “how”. As to the aforesaid questions of “when” and “where”, since a determination of whether a development is unforeseen or not is a

prerequisite for the imposition of safeguard measures, it logically follows that the demonstration has to be made before such measures are applied, that is, in the competent authority's report.⁵¹ In the case under consideration, however, the same did not occur, since the United States International Trade Commission (USITC) did not consider the matter of unforeseen developments at all. The Appellate Body noted that the USITC report in the U.S. – Lamb Meat case was completed seven months before the Appellate Body reports in the two aforementioned cases, viz. the Argentina – Footwear case and the Korea – Dairy Products case, had been circulated, which could also explain why the USITC's report omitted to address the issue of unforeseen developments. Regardless, these considerations can scarcely be regarded as a valid excuse.⁵² The Appellate Body clarified that the published report of the competent authority, in this case the USITC, must contain a finding or reasoned conclusion on unforeseen developments. This finding having been made, the Appellate Body again deftly sidestepped the substantive issue as to what was required for a showing of unforeseen developments.⁵³

Thus, it remains unclear from the Appellate Body decisions as to what exactly constitutes an “unforeseen development”. Even in later cases like U.S. – Steel Products,⁵⁴ the Appellate Body failed to clarify the meaning of this clause, instead repeating the position that the United States must demonstrate that unforeseen developments were the cause behind the increase in imports, as well as the resultant injury.

Problems with This Clause

Amongst the several complications associated with the discipline on safeguards, perhaps the most problematic aspect is the addition of a legal requirement that is not explicitly mentioned in the Agreement on Safeguards. First, as Lee argues, the unforeseen developments clause is too ambiguous to be considered as an objective legal requirement.⁵⁵ In the Hatters' Fur case, the working party report stated that the term “unforeseen developments” should be interpreted to mean developments occurring *after* the negotiation of the relevant tariff concession and which it would not be reasonable to expect the negotiators of the country making the concession to have foreseen at the time when the concession was negotiated. According to this interpretation, the “foreseeability” of those developments should act as the requisite standard to determine the existence of “unforeseen developments”. Again, to understand the foreseeability, one has to determine the point in time at which the relevant tariff concession was negotiated. At the time of the Hatters' Fur case, it was easy to determine the same, as there had been only one negotiating round in 1947.

However, many of the tariff concessions now in place within the WTO were negotiated under the GATT and are decades old.⁵⁶ Many were also modified over a series of GATT negotiating rounds. In such instances, a void continues to exist as to the criteria necessary to determine the relevant point in time for assessing expectations.

Second, negotiations on tariff reductions broadly take place in accordance with either of the following two approaches: product-by-product negotiation based on requests and offers among countries, and reduction based on some general formula or principle for an across-the-board tariff cut, also commonly known as the formula approach.⁵⁷ In the first GATT rounds, tariffs were cut on a selective, product-by-product basis through requests and offers made between participants. However, subsequent contracting parties decided to use formulas to cut tariffs across the board. In the Ministerial Declaration in Hong Kong, the members decided to adopt the Swiss formula for further tariff reduction. Given such circumstances, it is difficult to assume that a country's commitment to tariff reductions reflects a considered opinion on its part that the trade scenario with regard to any particular product among hundreds would remain the same or undergo modifications. Therefore, it will certainly be oversimplification to make a presumption that a negotiator is always minutely analyzing world production and trade trends and only then bargaining and making a commitment according to the classical comparative advantage model. In the nerve-racking bargaining process involved, there is little scope and independence for a country to analyze the trade trend of each of its products. Therefore, to say that "unforeseen developments" means unexpected developments *after* the tariff concessions are granted, renders the entire procedure of proof to the realm of the hypothetical, without any relation to the realities of the bargaining process under the WTO.⁵⁸

Third, the addition of such a requirement does not appear to be at all consistent with the intent of the negotiators in the Uruguay Round. In fact, a perusal of the negotiating history reveals that the draft version of the AS did contain the unforeseen developments clause. By mid-1990, however, the clause was omitted from the draft, while other conditions of Article XIX were repeated almost verbatim. Therefore, it is only reasonable to conclude that this omission was intentional. Moreover, the preamble to the AS also indicates the intent of the Uruguay Round negotiators to this effect, while recognizing the AS to be a *comprehensive* agreement.⁵⁹

Finally, the requirement of unforeseen developments does not seem to serve much of a useful purpose. It is highly unlikely that any member would have granted import

concessions had they foreseen any developments that would lead to serious injury or threat thereof to their domestic industry.

How Great Is India's Concern?

India is at present one of the leading users of safeguard measures among the WTO member states, having adopted the highest number of such initiations (15 in number) till 2008 according to the latest available WTO statistical report on Safeguard Initiations by Reporting Members. In India, the imposition of safeguard duties is authorized by the Customs Tariff Act, 1975⁶⁰ (hereinafter referred to as the Tariff Act), which provides, like its U.S. counterpart, no requirement whatsoever of “unforeseen development”. Furthermore, the duties of the Director General of Safeguards, as specified by the rules and regulations made under the Tariff Act, are limited to the finding of the existence of “serious injury” or threat thereof as a consequence of increased imports.⁶¹ However, notwithstanding the fact that the Tariff Act does not mention the unforeseen developments requirement, the Director General of Safeguards is nonetheless obliged to demonstrate the existence of unforeseen developments for imposition of safeguard measures, in accordance with WTO Appellate Body interpretations. To date, no safeguard measure imposed by India has yet been challenged before the Appellate Body. However, it is the opinion of the author that if such a challenge indeed comes into play, it is highly doubtful whether such measures would pass the test prescribed by the Appellate Body.

Conclusion

While it remains beyond doubt that the Uruguay Round negotiators did not include the first clause of Article XIX in Article 2.1 of the AS, the Appellate Body has nonetheless, through its precedents, fully revived the said clause. Academia in general seems to agree that revival of the unforeseen developments clause was a mistake from a purely legal point of view. The clause is too ambiguous to withstand scrutiny and it creates a considerable hurdle for WTO members who desire to use safeguard measures. Further, the clause has also lost meaning since its inception, considering the changes in the nature of negotiations and tariff reductions. The practice of product-by-product negotiation is becoming obsolete in the context of the WTO. Hence, it is difficult for any country to prove why exactly it could not foresee during the negotiations a particular development that led to an increase in imports. The national laws of most regimes, for example the United States and even India, do not have this requirement. The draft version of the AS did contain the unforeseen developments clause. However, by the mid-nineties this clause was omitted while the other

conditions of Article XIX were repeated almost verbatim, as has been stated above. It ought to be mentioned here that both the EC and the United States had rejected this clause as being too difficult or restrictive for effective application. Even after the implementation of the AS, the demonstration of unforeseen developments has been omitted in the vast majority of safeguard applications since, thereby leading one to the suggestion that many members have not perceived the demonstration of unforeseen developments to be a legal requirement for the application of a safeguard measure. Therefore, it may be concluded that revival of the unforeseen developments clause by the Appellate Body was a legal mistake, and it should thus be removed from the discipline on safeguards.

Nonetheless, since the Appellate Body decisions remain unchanged and applicable to future safeguard cases, members remain obligated to demonstrate the existence of unforeseen developments. Another probable solution is that the text of the AS could be amended to define “unforeseen developments”, or at least to outline the parameters of the term. Several scholarly opinions have been voiced regarding the feasibility of this solution. Sykes suggests that an event that is beyond the reasonable expectations of trade negotiators during the prior negotiating round could be an unforeseen development. Horn and Mavroidis, on the other hand, suggest that to qualify as an unforeseen development the event in question must be outside the control of the importing nation. Though these definitions/qualifications leave room for subjectivity, as long as the Appellate Body insists on unforeseen developments, defining this clause could be a possible way out.

In conclusion, it may be said that the concept of the escape clause was always intended to be flexible, so as to allow for a case-by-case analysis. However, if safeguards are to be a workable remedy at all, the author sincerely believes that some guidelines urgently need to be laid down with respect to the requirement of unforeseen developments.

Endnotes

- *. Parts of this article have been extracted from the author's M. Phil thesis titled "Causation in Safeguards under the GATT/WTO: Confusions in Compliance".
1. YONG SHIK LEE, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS 3* (Kluwer Law International 2005).
 2. Patric A. Messerlin & Hilda Fridh, *The Agreement on Safeguards: Proposals for Change in the Light of the EC Steel Safeguards*, 40(4) *Journal of World Trade* 714 (2006).
 3. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL RELATIONS* 175 (MIT Press 1997)
 4. Agreement on Safeguards art. 2.1, Apr. 15, 1994. However, safeguards under Article XIX GATT and the Agreement on Safeguards should be distinguished from specific safeguards, i.e., the ones applicable only to a specified category of products. For instance, the safeguard measures mentioned in Article 5 of the WTO Agreement on Agriculture and Transitional Safeguards and those mentioned in Article 6 of the WTO Agreement on Textiles and Clothing are applicable only to agricultural and textile products respectively.
 5. Agreement on Safeguards art. 2.2, Apr. 15, 1994.
 6. See generally BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND*, (OXFORD UNIVERSITY PRESS 2001). See also Chad P. Bown & Rachel McCulloch, *The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact*, in *EMPIRICAL METHODS IN INTERNATIONAL TRADE: ESSAYS IN HONOR OF MORDECHAI KREININ* 145-168 (Michael G. Plummer ed., Edward Elgar 2004).
 7. In the years prior to the formulation of the Agreement on Safeguards the number of Article XIX initiations to be notified was only 30. In sharp contrast, from 1995 till mid-2007 about 158 safeguard initiations had been reported by the WTO members.
 8. *Supra* note 2 at p. 717.
 9. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *REGULATION OF INTERNATIONAL TRADE* 226, (ROUTLEDGE 1999).
 10. See *Safeguard Initiations by Reporting Member*, available at http://www.wto.org/english/tratop_e/safeg_e/safeg_stattab1_e.pdf (last visited October 20, 2009).
 11. *Id.*
 12. See generally Alan Macek, *The Political Argument for Safeguard Measures*, available at <http://www.alanmacek.com/legal/PoliticalArgumentForSafeguardMeasures.pdf> (last visited on October 15, 2009).
 13. T.V.G.N.S. Sudhakar and J. Adithya Reddy, *Does the Agreement on Safeguards Frustrate its Own Purpose?* 6(4) *The ICFAI Journal of International Business Law* 8, 9-10 (2007).

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14. ALAN O. SYKES, *THE WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY* 158, (Oxford University Press 2006).
 15. Reciprocal Trade Agreement with Mexico art. XI, Dec. 23, 1942. The escape clause in the U.S.–Mexico agreement read as follows:

If, as a result of unforeseen developments and of the concessions granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury.
 16. Supra note 14 at 17. Also see generally Alan O. Sykes, *The Safeguards Mess: A Critique of Appellate Body Jurisprudence*, 2 *World Trade Review* 261 (2003) and Alan O. Sykes, *The Safeguards Mess Revisited: A Reply to Professor Jones*, 3 *World Trade Rev.* 67 (2004).
 17. Report of the Working Party, GATT/CP/106, 27 March, 1951 (hereinafter cited as the “Hatters’ Fur case” or simply “Hatters’ Fur”).
 18. Supra note 14 at 102.
 19. Robert A. Rogowsky, *WTO Disputes: Building International Law on Safeguards*, available at http://www.vsb.org/publications/valawyer/june_july01/rogowski.pdf (last visited October 19, 2009).
 20. Korea – Definitive Safeguard Measures on the Imports of Certain Dairy Products, (Korea – Dairy Products) WT/DS98.
 21. Argentina – Safeguard Measures on the Imports of Footwear (Argentina – Footwear) WT/DS/121.
 22. Supra note 20 at para. 4.142-4.146 and 4.149-4.168.
 23. *Id.*
 24. Supra note 20 at para 7.39.
 25. Supra note 20 at para 7.42.
 26. Supra note 21 at para. 8.58.
 27. Supra note 21 at para. 8.66.
 28. Appellate Body Report, Korea – Dairy Products case (WT/DS98/AB/R) at para. 80.
 29. Appellate Body Report, Argentina – Footwear case (WT/DS/121/AB/R) para. 88.
 30. Supra note 1 at 104.
 31. Argentina – Definitive Safeguard Measures on Imports of Preserved Peaches (Argentina – Peaches) DS238, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand or Australia (United States – Lamb Meat) DS177&178, United States – Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe (United States – Line Pipe) DS202, United States – Definitive Safeguard Measures on the Imports of Certain Steel Products (United States – Steel) DS248, 249, 251, 252, 253, 254, 258, 259, & 274.

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32. United States – Definitive Safeguard Measures on Imports of Wheat Gluten (United States – Wheat Gluten) DS166.
 33. *Supra* note 17.
 34. See Appendix A of the Report of the Working Party dated 27 March 1951.
 35. Hatters’ Fur case, para. 11.
 36. Hatters’ Fur case, para.12.
 37. Hatters’ Fur case, para. 9.
 38. RAJ BHALLA, MODERN GATT LAW 956 (Sweet and Maxwell 2005).
 39. Appellate Body Report, Korea – Dairy Products case, para. 7.42; Appellate Body Report, Argentina – Footwear case, para. 8.69.
 40. Appellate Body Report, Korea – Dairy Products case, para.84; Appellate Body Report, Argentina – Footwear case, para. 91.
 41. Appellate Body Report, Korea – Dairy Products case, para.85; Appellate Body Report, Argentina – Footwear case, para. 92.
 42. *Supra* note 14 at 109.
 43. Appellate Body Report, Korea – Dairy Products case, para 84.
 44. *Supra* note 1 at 43.
 45. Appellate Body Report, Argentina – Footwear case, para 131.
 46. *Supra* note 31.
 47. Sheela Rai, *Imposition of Safeguard Measures and Unforeseen Developments*, XLI(4) Foreign Trade Review 60, 61 (2007).
 48. Raj Bhalla & David A. Gantz, *WTO Case Review 2001*, 19 Arizona Journal of International and Comparative Law 457 (2002).
 49. *Id.*
 50. *Supra* note 17.
 51. Appellate Body Report, United States – Lamb Meat case (WT/DS/178/AB/R), para 72.
 52. *Id.*, para. 74.
 53. *Supra* note 48.
 54. *Supra* note 31.
 55. *Supra* note 1 at 44.
 56. *Supra* note 14 at 110. See also Alan O. Sykes, *Protectionism as a Safeguard: A Positive Analysis of the GATT Escape Clause with Normative Speculations*, 58(1) University of Chicago Law Review 255 (1991).
 57. *Supra* note 29 at 63-64. See also B. L. DAS, THE WORLD TRADE ORGANIZATION: A GUIDE TO THE FRAMEWORK FOR INTERNATIONAL TRADE 60, (Earthworm Books, 1999).
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 59. *Supra* note 1 at 43.
 60. CUSTOMS TARIFF ACT, 1975 (51 OF 1975) § 8B (5).

61. CUSTOMS TARIFF (IDENTIFICATION AND ASSESSMENT OF
SAFEGUARD DUTY) RULES, 1997 § 4.1.

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