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Mastering a Two-Edged Sword: Lessons from the Rules and Litigation on Safeguards in the World Trade Organization

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MASTERING A TWO-EDGED SWORD: LESSONS FROM THE RULES AND LITIGATION ON SAFEGUARDS IN THE WORLD TRADE ORGANIZATION

*Julien Chaisse, Debashis Chakraborty & Animesh Kumar**

INTRODUCTION

The Uruguay Round discussions of GATT and the subsequent agreement liberalizing trade beginning in the mid-nineties through the WTO framework led to a considerable decline in tariff barriers among the Member countries. However, several non-tariff barriers (“NTBs”) increased simultaneously with the decline of tariffs. These NTBs include environmental and technical standards, dumping of products, provision of actionable subsidies, and misuse of rules of origin. Incorporation of a strong framework of trade remedial measures is an integral part of the WTO architecture. This architecture will counter unfair trade practices like dumping and the unequal subsidizing of partner countries, as well as a sudden surge in imports

The smooth functioning of the trade remedial measures, namely, the WTO Anti-Dumping Agreement (“ADA”), the Agreement on Subsidies and Countervailing Measures (“ASCM”), and the Agreement on Safeguards (“ASG”) play a crucial role in ensuring freer trade.¹ Nevertheless, growing misuse of the trade remedial provisions themselves evolved as a major NTB over the years. From January

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¹ See Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT’L L. & COM. REG. 393, 406 (1994). See generally Agreement on Safeguards, Apr. 15, 1994, 1869 U.N.T.S. 154, available at http://www.wto.org/english/tratop_e/safeg_e/safeint.htm [hereinafter Safeguards Agreement].

1995 through August 2014, a total of 4,230 anti-dumping investigations were initiated, with 2,719 investigations resulting in an imposition of final measures. The corresponding figures for countervailing measures have been 302 and 177 respectively. The WTO-incompatibility of several trade remedial practices has been established, leading to the withdrawal of key restrictive instruments like *zeroing methodology* and *Byrd Amendment*.²

The third form of trade remedial measure, namely safeguard (“SG”) actions, has been applied on relatively fewer occasions than the Anti-Dumping (“AD”) and the countervailing measures (“CVM”) so far. From March 1995 through October 2014, 255 instances of safeguard initiations were reported, while 118 final measures were imposed over the same period. Despite lower numbers of occurrences *vis-a-vis* ADA and ASCM provisions, there is reason to believe that ASG provisions can also be considerably trade distorting, and often the actions of the importing countries have been questioned.³

Hartigan has noted that “the ASG was negotiated as a response to the increasing use of extra-legal measures, such as voluntary export restraints and orderly marketing agreements, to restrict imports among contracting parties of the GATT.”⁴ However, almost two decades since the inception of the WTO, it is widely viewed that “as a means of inducing countries to move away from VRAs or VRA-equivalent measures (antidumping), the Agreement on Safeguards has been an abject failure.”⁵

SG raises five major problems which we briefly review: SG can be affected by political and trade policy factors; SG actions within the regional trade agreements (“RTA”) are getting increasingly important; potential problems of the ASG framework have been noted from the legal perspective since its origin; the economic impact of SG; and the

² As a result, ensuring greater transparency in the operation of trade remedial measures has already been acknowledged as a major goal of the Doha Development Agenda. VIVIAN C. JONES, CONG. RESEARCH SERV., R40606, TRADE REMEDIES AND THE WTO RULES NEGOTIATIONS (2010). In particular, given the potential implications on livelihood of a considerably large number of people, negotiation for reducing fisheries subsidies has as an important agenda in recent period. See Debashis Chakraborty et al., *Doha Round Negotiations on Subsidy and Countervailing Measures: Potential Implications on Trade Flows in Fishery Sector*, 6 ASIAN J. WTO & INT’L HEALTH L. & POL’Y, 201, 201–34 (2011).

³ Chad P. Brown, *Why Are Safeguards Under The WTO So Unpopular?*, WORLD TRADE REV. 47, 47–51 (2002).

⁴ James Hartigan, *Making Sense of Safeguards*, 5 REV. INT’L ECON. 809, 818 (2011).

⁵ Dennis Kitt, Note, *What’s Wrong with Volunteering? The Futility of the WTO’s Ban on Voluntary Export Restraints*, 47 COLUM. J. TRANSNAT’L L. 359, 380 (2009).

potential problems for the newcomers eyeing entry in the importing country.

- Political factors: The possibility of political and trade policy-related motivations influencing SG actions has been widely reported in literature.⁶ The SG actions of both developed and developing countries have come under review so far.⁷
- Regional dimension: SG actions within the RTA framework have also become increasingly important in recent periods. As a number of RTAs have entered into force with the objective of providing deeper tariff cuts to the partner countries *vis-a-vis* the prevailing most favored nations (“MFN”) rate, protection of domestic industries in the involved parties emerge as a major area of concern.⁸ Several RTAs in the recent period incorporate SG provisions.⁹ On the other hand, the possible violation of MFN through SG provisions in RTAs is not uncommon either. For instance, the recent objection raised by the EU against Brazil’s imposition of fines on table wine deserves mention here. The EU argued that despite the lack of any sudden and sharp increase in imports and lack of serious injury, Brazil has introduced SG measures. Moreover, Brazil excluded the imports from MERCOSUR countries (where Brazil is a key member) from its SG investigation.¹⁰ A similar concern arose when the Argentine SG actions against footwear imports from third countries came under scanner based on the fact that there was no intra-regional SG mechanism imposed on MERCOSUR partners. The Dispute Settlement Body

⁶ See Lihu Chen & Yun Gu, *China’s Safeguard Measures Under the New WTO Framework*, 25 *FORDHAM INT’L L.J.* 1169-86 (2002).

⁷ See, e.g., Dukgeun Ahn, *Restructuring the WTO Safeguard System*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 11, 11–31 (Cameron May ed., 2006) (discussing the manipulation and use of SGs in both developed and developing countries).

⁸ See PAUL KRUGER, WILLEMEN DENNER & JB CRONJE, *COMPARING SAFEGUARD MEASURES IN REGIONAL AND BILATERAL AGREEMENTS* 7 (Int’l Center for Trade and Sustainable Development 2009).

⁹ For instance, it has been reported that under the EC-CARIFORUM EPA more flexible SG triggers have been provided to the latter. In addition, CARIFORUM states are entitled to impose SG measures in the wake of a potential threat to infant industries (pro-development provision). See U.N. ECLAC, *The CARIFORUM-EU Economic Partnership Agreement (EPA): An Assessment of Issues Relating to Market Access, Safeguards and Implications for Regional Integration*, 9–10, U.N. Doc. LC/CAR/L.181 (Nov. 26, 2008).

¹⁰ See Committee on Safeguards, *Minutes of the Regular Meeting Held on 27 April 2012*, ¶ 13, G/GS/M/41 (July 16, 2012).

(“DSB”) ruling forced Argentina to dismantle those measures.¹¹ Bronckers noted, “As long as safeguards cover imports ‘from every source,’ the importing country can select its targets and discriminate.¹² Thus, the most efficient importers are not protected by this MFN rule.”¹³

- Legal factors: SG measures inherently accompany the processes of liberalization and *structural adjustment* that goes along with enhancing market access for imported products.¹⁴ Moreover, the instrument is politically necessary in order to undertake liberalization in the first place and to find the necessary majorities to do so at home. Members are thus entitled to *unilaterally* undertake restrictive measures, whenever trade liberalisations result in difficulties for domestic producers.¹⁵ For instance, the determination of “significant cause of material injury” is open to interpretation and hence may lead to protectionist policies. As a result, SG measures constantly run the risk of being abused, as domestic producers may seek excessive relief from policymakers by requesting that they take recourse to such measures. International trade law needs to strike a careful balance and define conditions for implementing SG measures in sufficiently precise terms. There exists vibrant literature on this aspect that is becoming increasingly important in the current context.
- Economic dimension: On the economic front, analysing the trade effects of SG measures over 1995-2000, Bown and McCulloch noted that safeguard actions both explicitly and im-

¹¹ Elías Baracat & Julio J. Nogués, *WTO Safeguards and Trade Liberalization Lessons from the Argentine Footwear Case* (World Bank Policy Research, Working Paper No. 3614, 2005).

¹² Marco Bronckers, *Nondiscrimination in the World Trade Organization Safeguards Agreement: A European Perspective*, in *LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE* 367, 368 (Kyle W. Bagwell, George A. Bermann & Petros C. Mavroidis, eds., Cambridge Univ. Press 2010).

¹³ *Id.*

¹⁴ Robert Wolfe, *The Special Safeguard Fiasco in the WTO: The Perils of Inadequate Analysis and Negotiation* 6 (Feb. 10, 2009) (Unpublished Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353909 (“At least three are relevant in this debate. The first is temporary protection against injurious imports based on an injury test. The second is encouragement to accept liberalization, if available only for products subject to a reduction commitment. The third is protection from volatility in the global market for all products.”).

¹⁵ Yong-Shik Lee, *Destabilization of the Discipline on Safeguards? Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards*, 35 *J. WORLD TRADE* 1235, 1235 (2001) (Neth.).

licitly lead to a departure from MFN principles.¹⁶ The analysis also notes that the economic impact of SG is a function of the form in which it is applied, and might discourage entry of new suppliers and non-RTA partner exports.¹⁷ Instances of procedural stringency have also been reported in the literature. For instance, Baldwin and Steagall analysed the US International Trade Commission (“ITC”) actions over 1980-1990 and noted that while calculating serious injury, the ITC applied a higher standard for SG *vis-a-vis* the same under AD and CVD cases.¹⁸ The optimality of SG as a trade policy tool has also been questioned. As Read observed, the benefits of the SG actions are much lower than the associated costs.¹⁹

- Problems for Newcomers: Finally, another major problem associated with SG actions is the potential problems for newcomers. SG measures result in quantitative restrictions in terms of tariff rate quotas, where licenses are often based on historical market shares in recent years.²⁰ For obvious reasons, this practice goes against the interest of countries who newly enter the market of the importing Member for the product facing SG actions.²¹

While the literature on SG actions is quite rich, the analysis on the related disputes, especially in terms of misuse of the ASG provisions, is a relatively less researched area. In this background, the present paper attempts to understand whether existing WTO SG provisions are vulnerable to potential misuse. The paper is arranged along the following lines. The WTO ASG provisions are discussed first, looking into the provisions susceptible to misuse. The actual violations of the SG provisions are analyzed next, followed by a policy conclusion identifying potential reform areas in the agreement.

¹⁶ Chad P. Bown & Rachel McCulloch, *The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact*, in *EMPIRICAL METHODS IN INTERNATIONAL TRADE* 145, 147 (Michael G. Plummer ed., 2004).

¹⁷ *Id.* at 147, 164.

¹⁸ Robert E. Baldwin & Jeffrey W. Steagall, *An Analysis of ITC Decisions in Antidumping, Countervailing Duty and Safeguard Cases*, 130 *WELTWIRTSCHAFTLICHESARCHIV* 290, 304 (1994) (Ger.).

¹⁹ Robert Read, *The Political Economy of Trade Protection: Determinants & Welfare Impact of the 2002 US Emergency Steel Safeguard Measures* 1 (Lancaster Univ. Mgmt. Sch. Working Paper No. 2005/013, 2005), available at <http://eprints.lancs.ac.uk/48759/1/Document.pdf>.

²⁰ Brown & McCulloch, *supra* note 16, at 145.

²¹ *Id.*

I. REGULATING SAFEGUARDS: WTO LAW AND PRINCIPLES

The WTO system comprises a number of different safeguard clauses in various agreements. The principal safeguard provision in the 1994 Global Agreement on Tariffs and Trade (“GATT”) is Article XIX, supplemented by the Agreement on Safeguards which came into force at the conclusion of the Uruguay Round. Moreover, certain other agreements also contain special safeguard clauses: Article 5 of the Agreement on Agriculture (“AoA”), Article 6 of the ATC (transitional safeguard mechanism) and Article X of the GATS (the criteria of which were left to future negotiations).

A. *GATT 1994 and the Agreement on Safeguards*

In general, the following requirements must be met for the adoption of a SG measure on the import of goods pursuant to Article XIX of the GATT 1994: there has to be an upward surge of imports of the product in question.²² This increase must be caused by developments that were not foreseen by the country applying the SG measure at the time when the relevant obligation, including tariff concessions, was incurred. Finally, the increase in imports must cause or threaten to cause “serious injury” to a domestic industry producing a “like” or “directly competitive” product.²³

In a very early dispute under the GATT 1947, the contracting parties were called upon to review a U.S. safeguard measure against imports of hats from Czechoslovakia. They examined the measure’s consistency with Article XIX of the GATT and concluded that the stipulated conditions were fulfilled.²⁴

Since the coming into force of the WTO and the adoption of the ASG, commentators dispute whether the requirement of unforeseen developments—as mentioned in Article XIX of the GATT 1994—still applies, as this criterion is omitted in this agreement.²⁵ Commentators

²² See Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina—Safeguard Measures*] (clarifying the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards). Again, it found these rules to apply concurrently and avoided finding conflicting norms. *Id.*

²³ See *id.* (detailing the legal regime of safeguards under the GATT 1994); see also J. Chaisse, D. Chakraborty, and J. Mukherjee, *Deconstructing Service and Investment Negotiating Stance*, J. WORLD INV. & TRADE 44–78 (2013).

²⁴ See GATT Contracting Parties, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, CP/106US (Mar. 27, 1951) at 4, 17 (regarding the requirement of the existence of unforeseen developments).

²⁵ See, e.g., Tilottama Raychaudhuri, *The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance*, 11 ESTEY CENTRE J. INT’L

state that the drafters deliberately replaced the criterion with other additional requirements under the agreement.²⁶ In *Argentina – Safeguard Measures on Imports of Footwear*, the Appellate Body settled the issue by applying its doctrine of effective interpretation.²⁷ It established that, despite the omission in the agreement, the existence of unforeseen developments nevertheless forms a relevant criterion in a SG investigation.²⁸

Safeguard measures adopted by national authorities so far have been subject to substantial review in various panel and Appellate Body reports. The following report examined the different requirements for adopting safeguard measures. The Appellate Body, in *US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat*,²⁹ assessed the requirement of a “threat of serious injury to domestic producers” as follows: a safeguard measure is imposed on a specific “product,” namely, the imported product.³⁰ The measure may only be imposed if that specific product (“such product”) is having the stated effects upon the “domestic industry that produces like or directly com-

LAW & TRADE POL’Y 302, 311 (2010) (“[d]ebate 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.”); JEANNE J. GRIMMETT, CONG. RESEARCH SERV., R40844, CHINESE TIRE IMPORTS: SECTION 421 SAFEGUARDS AND THE WORLD TRADE ORGANIZATION (WTO) 3 (2011) (“Although the Agreement on Safeguards does not contain language requiring the existence of ‘unforeseen developments,’ the WTO Appellate Body has determined that the requirement continues to apply.”).

²⁶ See, e.g., Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT’L ECON. L. 523, 523–24 (2004). See also Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—General exceptions clause as a forced perspective*, AM. J. L. & MED. 332–61 (2013).

²⁷ U.N. ECLAC, *supra* note 9, at 9–10.

²⁸ *Argentina—Safeguard Measures*, *supra* note 22, at ¶88 (noting that “the Panel states that the *express omission* of the criterion of unforeseen developments” in Article XIX:1(a) from the *Agreement on Safeguards* “must, in our view, have meaning. On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not”).

²⁹ Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 86, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001); accord Henrik Horn & Petros Mavroidis, *US – Lamb United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should Be Required of a Safeguard Investigation*, 2 WORLD TRADE REV. 395, 395–430 (2003) (Eng.) (commenting on this dispute over imported lamb meat).

³⁰ *Agreement on Safeguards*, *supra* note 1, at art. 2.1.

*petitive products.*³¹ . The conditions in Article 2.1, therefore, relate in several important respects to *specific products*. In particular, according to Article 2.1, the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are “like or directly competitive” with that imported product.³² In our view, it would be a clear departure from the text of Article 2.1 if a SG measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are not “like or directly competitive products” in relation to the imported product.

The problems inherent in the ASG have caused Hartigan to conclude that “[s]tandards and requirements in the ASG that are technically complex, such as non-attribution, and subjective, such as serious injury and an unforeseen increase in imports, will not be effective in disciplining the invocation of SG actions to protect import competing constituents.”³³

B. *Special Safeguard Clauses*

Both the Agreement on Textiles and Clothing (“ATC”) and the AoA contain special safeguard clauses. The former permits members to apply specific transitional safeguard measures while the latter provides for an elaborate and permanent, price-based SG mechanism for products specifically listed in the members’ schedules.³⁴ Both are different and mutually exclusive in relation to the general SG clause of Article XIX of the GATT 1994 and the Safeguards Agreement.³⁵

Article 6 of the ATC governs a special safeguard clause for the disciplines under that agreement. The ATC, however, expired after ten years at the end of 2004.³⁶ The application of the SG clause has given rise to a number of dispute settlement cases.³⁷ Article 5 of the AoA provides for two complicated price-based SG mechanisms.³⁸ Both rely

³¹ *Id.* at art. 4.1(c)(a) 131 (emphasis added).

³² *Id.* at art 2.1.

³³ Hartigan, *supra* note 4, at 810. See generally Julien Chaisse and Puneeth Nagaraj, *Changing Lanes—Trade, Investment and Intellectual Property Rights* 37 HASTINGS INT’L & COMP. L. REV. 223 (2014).

³⁴ Agreement on Textiles and Clothing, Jan. 1, 1995, GATT.

³⁵ *Id.*

³⁶ See generally Agreement on Safeguards, *supra* note 1, at art. 19.

³⁷ See generally Panel Report, *United States—Restrictions on Imports of Cotton and Man-Made Fiber*, WT/DS24/R (Feb. 25, 1997) (listing the peculiarities of the safeguard clause).

³⁸ Agreement on Agriculture art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994).

on trigger mechanisms and surcharge tariffs, either based on increased imports or based on declining prices.³⁹

C. Safeguards and Trade in Services

The General Agreement on Trade in Services (“GATS”) does not contain a safeguard mechanism in comparison to that of the “GATT 1994” or the special safeguard clauses.⁴⁰ The matter could not be resolved during the Uruguay Round negotiations.⁴¹ Article X of GATT explicitly provides that there shall be multilateral negotiations on the question of emergency SG measures based on the principle of non-discrimination.⁴² Traditional safeguard concepts applied to trade in goods can only, to a certain extent, be analogised to trade in services. Border measures such as tariffs and quantitative restrictions are not generally available in trade of services.⁴³

II. MAPPING THE USE OF SAFEGUARD PROVISIONS

In order to understand the Safeguard imposing behaviour of the major countries during the Jan. 1, 1995 to Oct. 30, 2014 period, we have conducted an analysis of the data obtained from WTO Safeguard Gateway.⁴⁴ We first review the global trends in SG practice (3.1.), then the geographical distribution (3.2), and finally the sectoral analysis (3.3).

³⁹ See Harry de Gorter, Merlinda D. Ingco & Laura Ignacio, *Market Access: Economics and the Effects of Policy Instruments*, in AGRICULTURE AND THE WTO: CREATING A TRADING SYSTEM FOR DEVELOPMENT 63, 76 (Merlinda D. Ingco & John D. Nash eds., 2004).

⁴⁰ General Agreement on Tariffs and Trade, art. 10, Apr. 15, 1994, 1869 U.N.T.S. 154 (1994).

⁴¹ See generally General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS] (negotiating the General Agreement on Trade in Services during the Uruguay Round).

⁴² GATT, art. 10, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

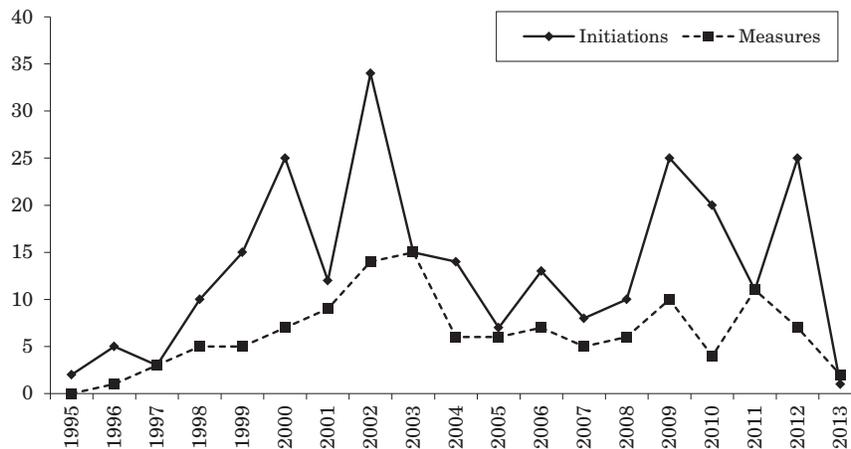
⁴³ See generally Note by the Secretariat, *Issues for Future Discussions on Emergency Safeguards*, ¶ 5, S/WPGR/W.27/Rev.1 499 (May 7, 1999).

⁴⁴ See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT’L ECON. L. 153, 158, 170 (2007) (devolving the methodology from which the analysis in this section is derived); see also Julien Chaisse and Mitsuo Matsushita, *Maintaining the WTO’s Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT. ECON. L. 1, 9–36 (2013).

A. Safeguards Activism: Global Trends

Figure 1 reveals the number of global SG initiations and measures fluctuated between 1995 and 2014. The number of SG initiations increased steadily from 1997 to 2000, peaking with thirty-four initiations reported in 2002. Since then, however, there has been a decline, with only seven reported cases of initiations during 2005. On the other hand, in the post-recession period, in line with AD and CVM measures, the number of SG actions has increased considerably, and during 2009, a total of twenty-five initiations were reported.⁴⁵

Figure 1: Safeguard actions initiated from 1995 to 2013, worldwide



Source: Constructed by the authors from WTO Safeguards database

The trend of “safeguard-activism” continued in 2010 as well, with twenty initiations reported and twenty-four reported in 2012. SG measures have also followed a similar pattern, with fourteen and fifteen measures reported during 2002 and 2003 respectively.⁴⁶ The numbers declined in the following years in line with the downward trend in initiations, but increased to ten and eleven during 2009 and 2011 respectively.⁴⁷

⁴⁵ See World Trade Organization, *Safeguard Measures by Reporting Member*, available at http://www.wto.org/english/tratop_e/safeg_e/SG-Measures_By_Reporting_Member.pdf (last updated Apr. 30, 2014).

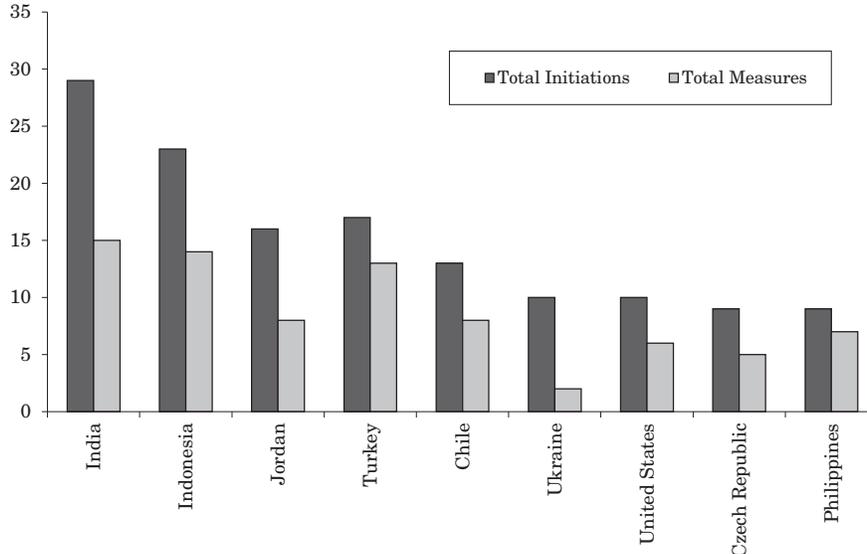
⁴⁶ See World Trade Organization, *Safeguard Initiations by Reporting Member*, available at http://www.wto.org/english/tratop_e/safeg_e/SG-Initiations_By_Reporting_Member.pdf (last updated Oct. 30, 2014).

⁴⁷ See *id.*

B. Geographical Analysis: SG as a Developing Country Phenomenon

Interestingly, unlike AD and CVM, SG measures have been used more frequently by the developing countries. **Figure 2** attempts to identify the major countries involved in SG actions.

Figure 2: Major Players undertaking Safeguard Actions (1995 to 2014)



Source: Constructed by the authors from WTO Safeguards database

Although mainly the developing countries are taking recourse to this policy tool, developed countries occasionally have also adopted this route. India tops the SG actions list with twenty-nine initiations, which accounts for 11.37% of the total initiated cases.⁴⁸ Indonesia, Turkey and Jordan come next in the list, by accounting for 9.02%, 6.67% and 6.27% of the total initiated cases each, followed by Chile (5.10%), the US (3.92%) and Ukraine (3.92%).⁴⁹

Regarding SG measures, India is at the top with 11.86% of the total measures, Indonesia and Turkey are also at the forefront with 11.02% each.⁵⁰ Jordan, the Philippines, and Chile come next, collectively accounting for 5.93% of the total SG measures to date.⁵¹ Several least developed countries (“LDCs”) and transition economies have also taken recourse to SG measure at times. For instance, the Czech Re-

⁴⁸ See World Trade Organization, Safeguard Initiations by Reporting Member, available at http://www.wto.org/english/tratop/_safeg_e/SG-Initiations_By_Reporting_Member.pdf (Apr. 30, 2014).

⁴⁹ See *id.*

⁵⁰ *Id.*

⁵¹ *Id.*

public (nine initiations), Bulgaria (six initiations), Morocco (six initiations) and Poland (five initiations) deserve special mention.⁵² As a whole, if the SG initiations from Australia, Canada, the EU, Japan and the US are taken aside, the actions by remaining developing countries and LDCs account for 91.76% of the total number of cases, and the corresponding figure for the top ten user countries stands at 58.86%. In other words, unlike the case of CVM duties,⁵³ SG actions are mainly a developing country phenomenon. It has been noted in the literature that the adoption of SG as a trade remedial instrument is much lower in the EU as compared to AD and CVM.⁵⁴ However, developed countries have taken recourse to this policy at times.⁵⁵

Lissel explains the phenomenon by acknowledging that the “lack of injury test and the lack of compensation makes application easier since developing countries often lack the capacity and means allowing them to compensate.”⁵⁶ However, the same provision may seriously constrain their market access when developed countries adopt SG measures. For instance, the twenty-one-month steel safeguard in the US in 2001 and the associated trade effects deserve mention.⁵⁷

The inclination of developing countries towards using SG actions can be explained by the fact that the importing country, which takes recourse to SG provisions (additional duties or quotas), needs to compensate the affected country by allowing it to retaliate accordingly. However, as per Article 8.3 of the WTO ASG, no retaliation is to be

⁵² *Id*; see also Julien Chaisse, Debashis Chakraborty & Biswajit Nag, *The Three-Pronged Strategy of India's Preferential Trade Policy: A Contribution to the Study of Modern Economic Treaties*, 26 CONN. J. INT'L L. 415. See generally, Julien Chaisse, *Deconstructing Services and Investment Negotiations – A Case Study of India at WTO GATS and Investment Fora*, 14 J. WORLD INV. & TRADE 1, 44–78 (2013).

⁵³ See generally Debashis Chakraborty et al., *supra* note 2, at 222 (noting that while Canada, the EU and the US account for 73.47% of all SCM initiations, China, India, South Korea, Indonesia and Thailand account as target for 50.20% of these initiated cases and concluding that the low cost economies of Asia are emerging as the major targets of SCM activism in developed countries).

⁵⁴ See Edwin Vermulst & Brian Gatta, *Concurrent Trade Defense Investigations in the EU, the EU's New Anti-Subsidy Practice Against China, and the Future of Both*, 11 WORLD TRADE REV. 527, 530–31 (2012).

⁵⁵ See Edwin Vermulst et al., RECENT EC SAFEGUARDS' POLICY: “KILL THEM ALL AND LET GOD SORT THEM OUT?” at 1–3, <http://www.vvgb-law.com/wp-content/uploads/2013/02/Vermulst-Recent> (last visited Sept. 17, 2013).

⁵⁶ Elenor Lissel, *Regional Safeguard Measures: An Incentive to Sign Regional Trade Agreements Without Taking Into Consideration the Special Needs for Developing Countries*, 23 (Sept. 2011) (unpublished dissertation, Lund University paper collection).

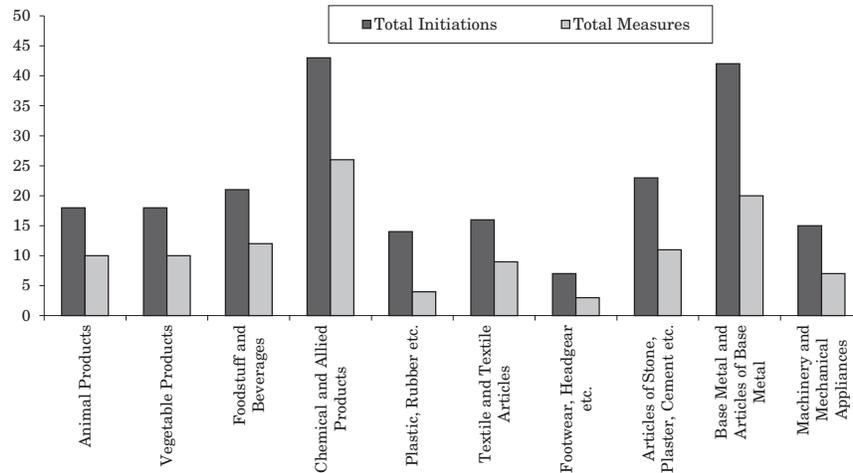
⁵⁷ Ritu Lodha, *US Steel Safeguard Dispute: Forged Protection Brought to Light*, CUTS Trade Law Brief No. 3 (2005) (describing the steel safeguard and its effects).

applied for three years since the implementation of the SG measure. This provides a crucial protection to the developing countries, and in particular, to their local firms.⁵⁸

C. *Sectoral Analysis: Primary Sector, Low-Tech or High-Tech Products?*

Figure 3 shows the distribution of the major sectors that are affected by the SG actions.

Figure 3: Major Sectors affected by Safeguard Actions (1995 to 2014)



Source: Constructed by the authors from WTO Safeguards database

It is observed that chemical and allied products suffer most from SG initiations (16.86% of the total cases), followed by the base metals and articles of base metal (16.47%), articles of stone, plaster, cement etc. (9.02%), foodstuffs and beverages (8.24%), animal products (7.06%), vegetable products (7.06%), textile and textile articles (6.27%), and machinery and mechanical appliances (5.88%). Final measures have been imposed more frequently on chemical and allied products (22.03% of the total cases), base metals and articles of base metal (16.95%), articles of stone, plaster, cement etc. (9.32%), animal products (8.47%) and vegetable products (8.47%) respectively.

A closer analysis of the SG actions by the major user countries (i.e., India, Jordan, Turkey and Chile) at the HS sectional level are reported in **Table 1**.

⁵⁸ Kitt, *supra* note 5, at 372.

Table 1: Major Players undertaking Safeguard Actions (1995 to 2014) (Sector)

HS Section	Description	Safeguard Actions				Safeguard Measures			
		India	Jordan	Turkey	Chile	India	Jordan	Turkey	Chile
I	Live Animals; Animal Products	0	0	0	3	0	0	0	2
II	Vegetable Products	1	0	0	3	1	0	0	2
III	Animal or Vegetable Fats and Oils and Their Cleavage Products; Prepared Edible Fats; Animal or Vegetable Waxes	1	0	0	1	0	0	0	0
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	0	3	0	1	0	2	0	1
V	Mineral Products	0	2	1	0	0	0	1	0
VI	Products of the Chemical or Allied Industries	18	1	3	0	12	1	2	0
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	2	0	1	1	1	0	1	0
VIII	Raw Hides and Skins, Leather, Furskins and Articles Thereof; Saddlerly and Harness; Travel Goods, Handbags and Similar Containers; Articles of Animal Gut (Other than Silk-Worm Gut)	0	0	1	0	0	0	1	0
IX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	2	0	0	0	0	0	0	0
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof	2	0	0	0	0	0	0	0

XI	Textiles and Textile Articles	1	0	1	1	0	0	0	1	1	0	1	1
XII	Footwear, Headgear, Umbrellas, Sun Umbrellas, Walking-Sticks, Seat-Sticks, Whips, Riding-Crops and Parts Thereof; Prepared Feathers and Articles Made Therewith; Artificial Flowers; Articles of Human Hair	0	1	1	0	0	0	1	1	0	1	1	0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	4	2	0	0	0	2	0	0	0	0	0
XV	Base Metals and Articles of Base Metal	2	3	0	2	0	0	0	0	0	0	0	1
XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles	0	2	3	0	0	0	1	3	0	1	3	0
XVII	Vehicles, Aircraft, Vessels and Associated Transport Equipment	0	0	1	0	0	0	0	1	0	0	1	0
XVIII	Optical, Photographic, Cinematographic, Measuring, Checking, Precision, Medical or Surgical Instruments and Apparatus; Clocks and Watches; Musical Instruments; Parts and Accessories Thereof	0	0	3	0	0	0	0	3	0	0	2	0
XX	Miscellaneous Manufactured Articles	0	0	0	1	0	0	0	0	1	0	0	0
	Total	29	16	17	13	14	7	13	7	13	7	13	7

Source: Constructed by the authors from WTO Safeguards database up to Oct. 2014

No clear sectoral trend, however, emerges from the SG actions analysis, which implies that country-specific domestic compulsions perhaps play a greater role in this context. For instance, in case of India, it is observed that nearly 62.07% of the SG investigations and 85.71% of the measures are being imposed on chemical products. On the other hand, Jordan's SG initiations have mainly been carried on prepared foodstuff and articles of stone. Turkey has imposed several SG actions on machinery and precision equipment, while Chile has imposed a number of such measures on live animals and vegetable products. On the other hand, looking at the data for developed countries, it is observed that in the US, 50% of the SG measures have been imposed on articles of base metals, and animal products and vegetable products have faced one SG measure each. In the EU, one SG measure has been imposed for animal products, prepared foodstuff, and base metals each. In other words, the SG actions by major developed and developing countries have affected both primary sector imports as well as the same from low-tech and high-tech products.

III. UNDERSTANDING THE USE AND MISUSE OF SAFEGUARDS: ANALYSIS OF WTO SCM DISPUTES

The current section attempts to analyse the disputes lodged at WTO's forum on SG-related concerns, and later reviews the litigants in these disputes.

A. *Quantitative Analysis of WTO Litigation on SCM*

It is observed from the WTO dispute gateway that a total of forty-three cases have been lodged between 1995 and 2014 on this provision.⁵⁹ The data shows that several SG provisions have been misused on quite a few occasions, both by developed and developing countries. The SG actions by developing countries have increased considerably over the last decade, in line with the decline in their tariff barriers.⁶⁰ The US has been the respondent in almost 34.88% of the SG-related disputes, though a number of these disputes were focusing on a similar problem. For instance, although DS 259 (complaint by Brazil), DS 258 (complaint by New Zealand), DS 254 (complaint by Norway), DS 253 (complaint by Switzerland), DS 252 (complaint by China), DS 251 (complaint by South Korea), DS 249 (complaint by Japan), DS 248 (complaint by EC) are considered different cases here, they were focusing on the same issue: an increase in duties on imports of iron and steel products in the US. The WTO panel and appellate

⁵⁹ See World Trade Organization, *Dispute Settlement: Subsidies and Countervailing Measures*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20.

⁶⁰ *Id.*

body noted that the serious injury provision and other clauses were violated by the US actions.⁶¹ Subsequently, DS 274 (complaint by Taiwan) also focused on US SG actions imposed on iron and steel products.⁶² DS 202 (complaint by South Korea), lodged in the later period on line pipe products, led to the finding that the US failed to establish a causal link between the increased imports and the serious injury, and also failed to provide an adequate opportunity for prior consultations with interested parties, among other measures.⁶³

United States SG actions in the area of primary products have also been successfully challenged by partners at times. For instance, DS 178 (complaint by Australia), DS 177 (complaint by New Zealand), involving *Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb*, and DS 166 (complaint by EC), focusing on *Safeguard Measure on Imports of Wheat Gluten*, deserves mention here.⁶⁴ The dispute settlement bodies in these cases indicated WTO-incompatibility of US investigation procedure and SG duty determination, among other findings.⁶⁵

In line with the US experience, a clustering of disputes on similar issues has been noticed in cases of developing countries as well, given the nature of SG action involving imports “irrespective of its source.”⁶⁶ For instance, Argentina has faced several disputes on the SG front to date. Three of these disputes are based on the *Footwear*

⁶¹ See Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS259/R (July 11, 2003); Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10, 2003).

⁶² Request for the Establishment of a Panel by Taiwan, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS274 (Nov. 1 2002), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds274_e.htm.

⁶³ See Panel Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001); Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Feb. 15, 2002).

⁶⁴ Request for the Establishment of a Panel by Australia, *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from Australia*, WT/DS178 (Nov. 21, 2001) available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds178_e.htm; Request for the Establishment of a Panel by European Community, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166 (Jan. 19 2001), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds166_e.htm.

⁶⁵ *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from Australia*, *supra* note 64; *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, *supra* note 64.

⁶⁶ See Safeguards Agreement, *supra* note 1, at art. 2.2.

Imports—DS 164 (complaint by USA), DS 123 (complaint by Indonesia), and DS 121 (complaint by EC). In the case of DS 121, the DSB noted that the provisional SG measure in the form of specific duties was not consistent with WTO provisions.⁶⁷ DS 238 (complaint by Chile) focuses on *Safeguard Measures on Preserved Peaches*.⁶⁸ The DSB verdict in this case indicated unsatisfactory performance by the competent authorities while determining the extent of serious injury.⁶⁹ Recently, four disputes have been lodged against Argentina—DS 446 (complaint by Mexico), DS 445 (complaint by Japan), DS 444 (complaint by US), and DS 438 (complaint by EU), all of which are targeted at *Measures Affecting the Importation of Goods*.⁷⁰

A similar clustering effect is noted in the case of another Latin American country, Chile, as well. For instance, DS 356 and DS 351 (Argentina is complainant in both cases) concerns *Safeguard Measures on Certain Milk Products*; DS 278 (complaint by Chile) looks into *Definitive Safeguard Measure on Imports of Fructose*, while DS 230 and DS 228 (Columbia is complainant in both cases) concerns *Safeguard actions on Sugar*. DS 220 (complaint by Guatemala)⁷¹ and DS 207 (complaint by Argentina), on the other hand, relate to the *Price Band System in Chile* and its *Safeguard Measures Relating to Certain Agricultural Products*.⁷² Responding to the complaint in DS 207, the DSB indicated violation of several relevant WTO provisions by Chile. DS 418 (complaint by El Salvador), DS 417 (complaint by Honduras), DS 416 (complaint by Guatemala) and DS 415 (complaint by Costa Rica),

⁶⁷ Panel Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121 (Feb. 11, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm.

⁶⁸ See Panel Report, *Argentina—Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238 (Apr. 15, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds238_e.htm.

⁶⁹ *Id.*

⁷⁰ Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS446 (Aug. 24, 2012), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds446_e.htm; Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS445 (Sept. 26, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds445_e.htm; Panel Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS444 (Sept. 26, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds444_e.htm; *Id.*

⁷¹ Panel Report, *Chile—Definitive Safeguard Measures on Certain Milk Products*, WT/DS356 (Aug. 1, 2008); Panel Report, *Chile—Definitive Safeguard Measure on Imports of Fructose*, WT/DS278 (Dec. 20, 2002); Dispute Settlement, *Chile—Safeguard Measures and Modification of Schedules Regarding Sugar*, WT/DS356 (April 17, 2001).

⁷² Request for Consultations by Argentina, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/1 (Oct. 12, 2000).

on the other hand, are lodged against the *Safeguard Duties on Imports of Polypropylene Bags and Tubular Fabric* by the Dominican Republic.⁷³ The WTO-incompatibility of the Dominican Republic's actions has been noted by the WTO dispute settlement panel in their verdict.⁷⁴ The clustering of disputes is an indicator of the level of conviction complainant countries have over the validity of their claim on one hand and the violations of WTO provisions on the other.

B. DSB Complaints on Safeguard Related Disputes

Table 2 is constructed by adopting the framework developed in Chaisse and Chakraborty for understanding the dynamics of the SG-related complaints lodged at the DSB.⁷⁵ It is observed that although the number of SG disputes declined after 2002, the incidence of the same has increased in 2010 and 2012.

⁷³ Request for Consultations by El Salvador, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS418/7 (Oct. 19, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds418_e.htm.

⁷⁴ Report of the Panel, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R-WT/DS416/R-WT/DS417/R-WT/DS418/R (Jan. 31, 2012) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx.

⁷⁵ See Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L L. 153 (2007).

Table 2: Analysis of DSB Complaints on Safeguard related Disputes⁷⁶

Global Scenario								
Year	A	B	C	D	E	F	G	Total
1997	1	-	-	-	1	-	-	2
1998	1	-	-	1	-	-	-	2
1999	3	-	-	-	1	-	-	4
2000	2	-	-	-	1	-	-	3
2001	1	-	4	1	-	1	-	7
2002	8	-	2	-	1	-	-	11
2003	-	-	1	-	-	-	-	1
2005	-	-	1	-	-	-	1	2
2006	-	-	-	2	-	-	-	2
2010	4	-	-	-	-	-	-	4
2012	-	-	5	-	-	-	-	5
Total	20	0	13	4	4	1	1	43
Disputes with US as Respondent								
Year	A	B	C	D	E	F	G	Total
1997	-	-	-	-	1	-	-	1
1999	3	-	-	-	-	-	-	3
2000	1	-	-	-	1	-	-	2
2002	8	-	1	-	-	-	-	9
Total	12	0	1	0	2	0	0	15

Source: Constructed by the authors from WTO Safeguard-related disputes

Following their methodology, the SG complaints lodged at the DSB are placed under seven different categories, from a complainant's perspective. The first two columns represent victory and defeat in a particular case. Victory by a complainant is defined as determination of WTO-inconsistency in the respondent's alleged policy at the panel level, which remains unchanged even if the appellate body later reverses certain legal interpretations of the verdict, since the existence of a WTO-incompatible policy has been established. However, rejection of the complainant's claims, initially at panel stage and subsequently at the appellate body level, is defined as defeat. The cases classified under the third column encompass several possibilities, namely cases at consultation stage, disputes currently for consideration at the appellate body stage, cases where panel verdict is expected within a specified time or cases which have never been officially closed. The fourth column signifies the scenario where the complainant and the respondent jointly request DSB for suspension of proceeding after panel for-

⁷⁶ A – Victory for complainant; B – Defeat for complainant; C – Continuing/result expected soon/case with Appellate Body/not officially closed; D – Request to suspend panel proceeding; E – Panel not formed/formed but not composed; F – Amicably settled; G – Discontinuation of the alleged measure by the respondent

mation. This clearly indicates traces of flexibility in the respondent country to negotiate the alleged measures in force.

The fifth column shows the cases where no panel had been formed, potentially implying mutual discussion, probably leading the respondent to guarantee the desired market access for the complainant to resolve the dispute. However, two other possibilities cannot be ruled out in this case. First, a complaint might have been raised for harassing the respondent as a trade policy instrument and second, a complainant might have lacked the necessary technical expertise to support the claim, and decided to opt out before formation of the panel. The sixth column notes the cases where a mutually agreeable solution has been notified to the DSB. In the last column, the cases where the alleged measure was promptly discontinued after the initial notification at DSB are placed. The last column on one hand indicates the existence of a WTO-incompatible measure in force, and highlights the effectiveness of the dispute settlement mechanism on the other.

The top and the bottom panels of **Table 2** represent the global SG dispute scenario and the same for the US respectively. The US scenario is reported separately because the country has faced the most complaints for violating its obligations from partner countries. It is observed from the top panel that among the forty-three cases lodged at the WTO on SG provisions during the period under consideration, on twenty occasions (46.51% of the cases), the WTO-incompatibility of the alleged measure was proven.⁷⁷ Interestingly, not proven on a single occasion was a safeguard-related complaint rejected.⁷⁸ On four occasions (9.30% of the cases), the parties did not persist in the dispute by requesting to suspend panel proceedings, as a result of which these cases are still not officially closed. Only in four cases was the initial complaint not actively pursued, resulting in the formation/composition of no panel. Amicable settlement between parties⁷⁹ and discontinua-

⁷⁷ The comparable figure for CVM related cases stands at 36.14%. Debashis Chakraborty et al., *supra* note 2, at 208. This indicates greater intensity in potential abuse of the SG provisions, despite lesser number of initiations vis-à-vis SCM provisions.

⁷⁸ This is again in sharp contrast with the experience under ADA and ASCM related cases, where the respondent has won a number of times. For instance, in DS 221 involving *Section 129(c)(1) of the Uruguay Round Agreements Act*, the dispute settlement body noted that Canada has failed to establish that section US actions were inconsistent with Articles VI:2, VI:3 and VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the ADA, and Articles 10, 19.4, 21.1, 32.1 and 32.5 of the ASCM among other provisions. Panel Report, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002).

⁷⁹ Notification of Mutually Agreed Solution, *Slovakia—Safeguard Measure on Imports of Sugar*, WT/DS235/2 (Jan. 16, 2002).

tion of the alleged measure by respondent⁸⁰ have each been observed once.

It is observed from the bottom panel that the US has lost twelve out of the fifteen cases (80%) faced as respondent, signifying strong justification behind the claims lodged by their trade partners. On two occasions, no panel was formed.⁸¹ Notably, no case involving the US has been amicably settled, nor have any requests for suspending the panel proceedings ever been submitted to the WTO. This denotes the intensity of the conflict between the US and their partners on Safeguard grounds. However, since 2003, no new SG cases have been lodged against the US. This is quite different *vis-a-vis* ADA and ASCM scenarios, where the misuse of those provisions by the US has been alleged regularly by other WTO member countries, notably the developing countries.⁸²

Among major developing countries, the SG disputes lodged against Chile (eight disputes) and Argentina (eight disputes) deserve special mention. In case of both countries, the SG measures in question were proven WTO-incompatible at times.

IV. EXPLORING THE MISUSE OF SAFEGUARDS: WHICH ARTICLES OF THE SAFEGUARD AGREEMENT ARE SUSCEPTIBLE TO MISUSE?

The overall trend analysis based on SG-related complaints lodged in DSB in the preceding section is supplemented in the following with an article-level micro analysis. With this objective, each individual safeguard-related dispute is analysed with respect to the alleged violations under particular provisions in the WTO ASG.

A. Allegations of WTO Violations

The article-level data on alleged/conclusively proven violations from individual disputes on SG provisions has been obtained by accessing the cases reported at the Safeguard Gateway among WTO web-

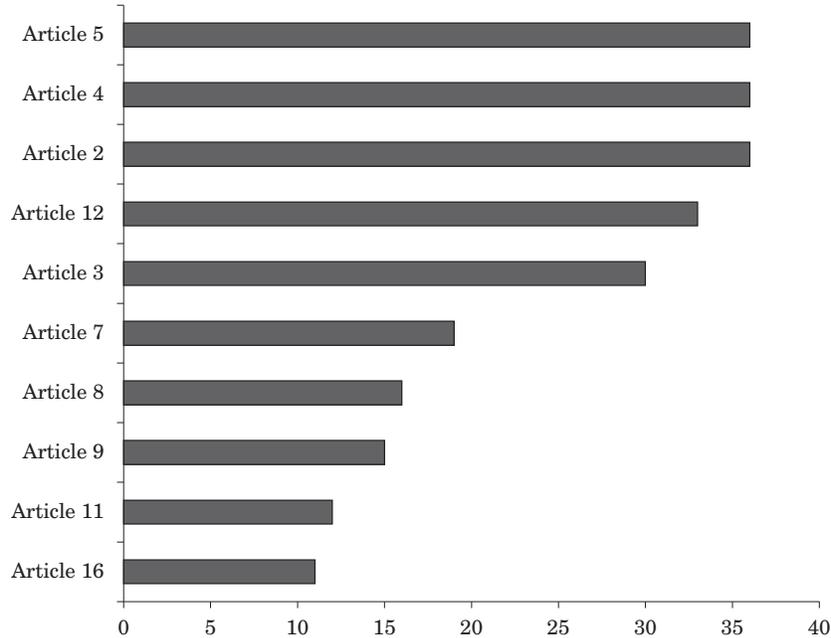
⁸⁰ Communication from Chile, *European Communities—Definitive Safeguard Measure on Salmon*, WT/DS326/4 (May 17, 2005).

⁸¹ See generally Request for the Establishment of a Panel by the European Communities, *United States—Definitive Safeguard Measures on Imports of Steel Wire Rod Circular Welded Quality Line Pipe*, WT/DS214/4 (Aug. 10, 2001) (requesting a panel that was never formed); Request for Consultations by Columbia, *United States—Safeguard Measures Against Imports of Broom Corn Brooms*, WT/DS781/1 (May 1, 1997).

⁸² See generally Debashis Chakraborty et al., *supra* note 2, at 208 (stating that the articles of the SCM agreement are susceptible to misuse).

resources.⁸³ The alleged violations, as revealed from the complaints, are reported in **Figure 4**.

Figure 4: Alleged violation of WTO Safeguard Provisions at DSB (by Article)



Source: Constructed by authors from WTO Safeguard related disputes

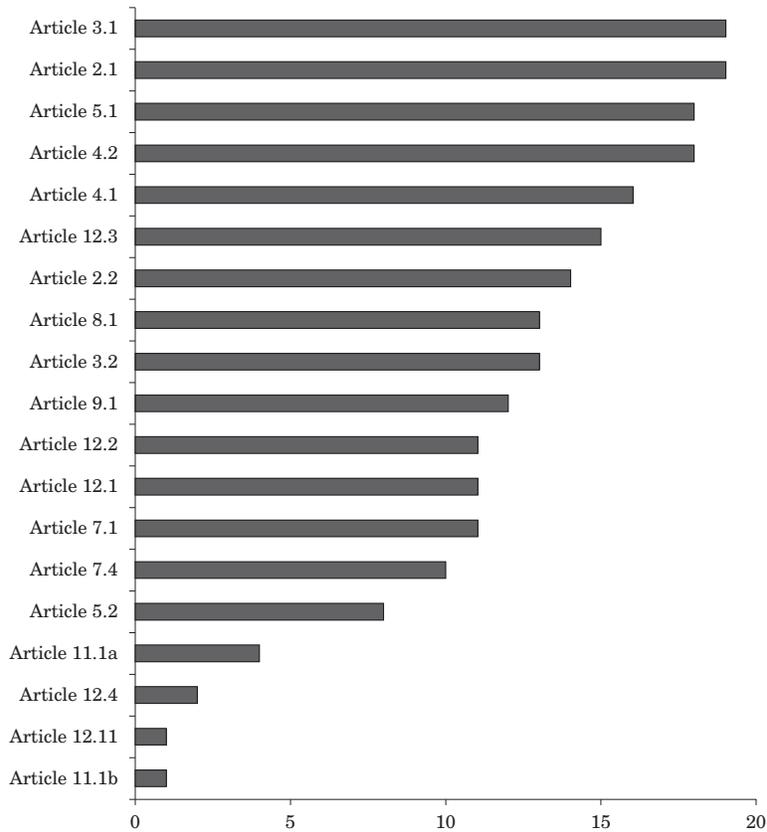
It is observed from the figure that Article 2 (conditions), Article 4 (determination of serious injury or threat thereof) and Article 5 (application of safeguard measures) of the Safeguard agreement have allegedly been violated the most (14.81% of the total alleged violations each). The other provisions allegedly being violated include Article 12 (notification and consultation) and Article 3 (investigation), which account for 13.58% and 12.35% of the total number of alleged violations respectively. Article 7 (duration and review of safeguard measures), Article 8 (level of concessions and other obligations), and Article 9 (provisions relating to developing country members) come next with alleged violations in 7.82%, 6.58%, and 6.17% of the cases respectively. Article 11 (prohibition and elimination of certain measures) and Article 6 (provisional safeguard measures) witnessed violations in 4.53% of the cases each.

⁸³ *Safeguard Measures*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (last visited Nov. 19, 2014).

B. Allegations of WTO Violations at Sub-Article Level

Figure 5 attempts to understand the alleged safeguard violations at the sub-article level, by analyzing the WTO disputes.

Figure 5: Alleged violation of WTO Safeguard Provisions at DSB (by Sub-Article)



Source: Constructed by authors from WTO Safeguard related disputes

It is observed from **Figure 5** that major SG violations take place under Article 2.1 (condition for imposing safeguard measures), Article 3.1 (opportunity to exporters to respond and publication of the findings), Article 5.1 (application of safeguard measure only to the necessary extent), Article 4.2 (evaluation of all relevant factors during investigation), Article 4.1 (definition of serious injury and threat of serious injury), Article 12.3 (opportunity for consultations before applying or extending safeguard measures), Article 2.2 (application of safeguard measure on imports irrespective of its source), Article 8.1 (adequate means of trade compensation), Article 3.2 (confidentiality of information), Article 9.1 (provisions relating to application of safe-

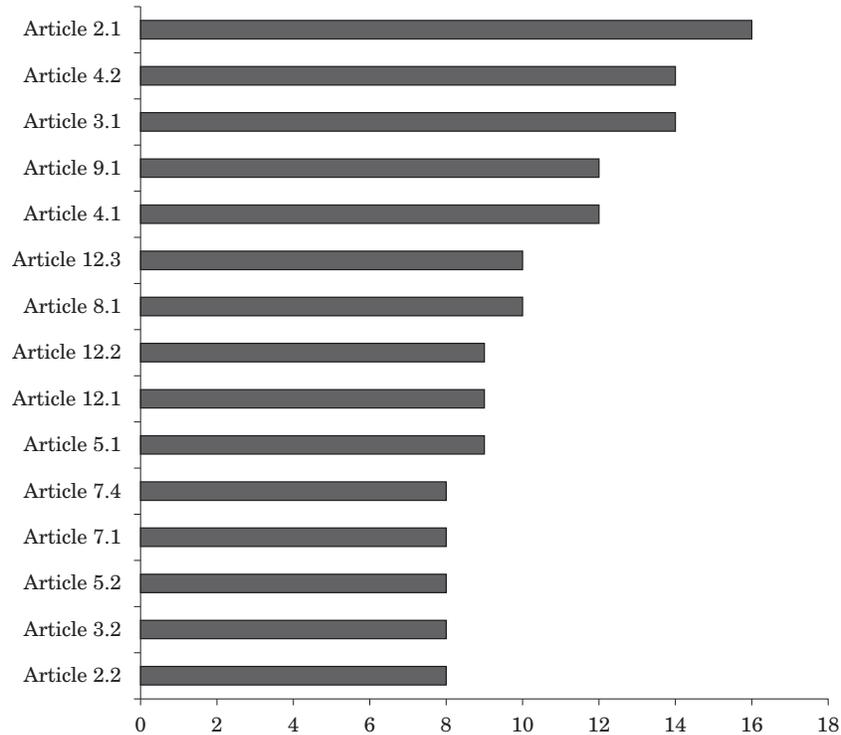
guard measures on developing country imports), Article 12.2 (notification of evidence to Committee on Safeguards), Article 12.1 (safeguard notifications), Article 7.1 (application of safeguard measure only for the necessary period), Article 7.4 (progressive liberalization of applied measure and mid-term review provisions), and Article 5.2 (allocation of quota while implementing the safeguard measure).

C. Lesson from Litigation: Actual Violations of ASG

It is clearly observed from the analysis that almost all the major provisions in the WTO Agreement on Safeguards have been allegedly violated in both developed and developing countries. In order to identify the provisions more prone to violation, the above-mentioned methodology is applied now to the completed cases (i.e., where the verdict of the dispute settlement panel/appellate body has been released). In the current context, only cases reported under columns A of **Table 2** are included for the analysis.⁸⁴ The findings are summarized in **Figure 6**.

⁸⁴ Here the cases involve the ones where panel rulings or the appellate body verdicts (if the defeated party challenged the panel ruling) have been made. On the DSB role in the WTO system, see generally Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013).

Figure 6: Actual violations of WTO Safeguard Provisions – DSB rulings



Source: Constructed by authors from WTO Safeguard related disputes

It is observed from Figure 6 that actual violations have taken place most frequently (sixteen times) under Article 2.1 (condition for imposing safeguard measures), which accounts for 10.32% of the total number of violations. The actions of WTO Members have been proven to be WTO-incompatible under Article 3.1 (opportunity to exporters to respond and publication of the findings) and Article 4.2 (evaluation of all relevant factors during investigation) fourteen times each. The alleged violation against both Article 9.1 (provisions relating to non-application of safeguard measures on developing country imports) and Article 4.1 (definition of ‘serious injury’ and ‘threat of serious injury’) has been confirmed by WTO DSB twelve times. Article 8.1 (adequate means of trade compensation) and Article 12.3 (opportunity for consultations before applying or extending safeguard measures) has been proved WTO-incompatible ten times each. Article 5.1 (serious prejudice), Article 12.1 and Article 12.2 (application of Article VI of GATT 1994) have been misused nine times each, while Article 3.2 (confidentiality of information), Article 5.2 (allocation of quota while implementing the safeguard measure), Article 7.1 (application of safeguard measure only for the necessary period), and Article 7.4 (progressive

liberalization of applied measure and mid-term review provisions) has been proven WTO-incompatible eight times each. Like the case of initiations, clearly actual violations have also taken place under each and every major provision of the ASG.

The WTO cases demonstrate that in practice the reason behind seldom applying the provisions on serious prejudice probably lie in its vague legal text. There are still legal elements which are arguable and need further clarification. There is also no clear threshold for subsidies which causes “serious prejudice.” For example, phrases such as “significant” without any clarification and threshold makes these provisions open to interpretation and misuse. But the actual challenge lies in fixing certain determinants to find serious prejudice because every case on this aspect is unique and each dispute will have different threshold and determinants to find serious prejudice.

The discussion so far explains why the WTO members, before initiating the “serious prejudice” case, should always bear in mind the possible difficulties and obstacles they can face and only after consideration of all pros and cons should they bring the dispute before the WTO DSB. Moreover, it is apparent that today only developed countries can take advantage of the present legal text on serious prejudice because they can potentially abuse the fact of difficulty for the complainant to demonstrate “serious prejudice” (especially for developing countries) and thus can adopt subsidies which could have adverse consequences for international trade. The replacement of the phrase “serious prejudice” to “simple prejudice” would be one of the solutions to this problem. This replacement would simplify the process of proof of the adverse effect caused by subsidies to international trade. In this case, the developing countries will gain from such reformation and the result will be the reduction of adverse subsidies and therefore harmonization of international trade.

Thus, there is still room for further development of the concept in order to make the application of serious prejudice provisions easier for the complainant party and to avoid abuse by developed WTO members due to the inability of developing countries to initiate a case.

CONCLUSION

The GDP and trade growth rate suffered across the countries in 2011, thanks to the compounding effects of Arab spring and Greece’s economic crisis, among other factors.⁸⁵ The recession effect contributed

⁸⁵ See World Bank, *Global Economic Prospects: Uncertainties and Vulnerabilities* 1–30 (Jan. 2012), available at http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/82871391326374900917/GEP_January_2012a_FullReport_FINAL.pdf (providing a general overview of economic activity and prospects for the future around the globe).

in continued economic crisis in several developing countries during late 2011 and early 2012. The rising SG-activism from 2010 onwards can be explained in light of those developments. In 2011, Indonesia justified the upward movement in its safeguard notifications on the basis of growing “awareness” of their domestic industry about the contingency measures and their importance in protecting them from the “negative effects of trade liberalization.”⁸⁶

The ability of the governments to effectively determine whether SG intervention is a necessary tool or not for reaping the free trade advantages holds a crucial position.⁸⁷ Over the period, however, the emergence of SG actions as a major contingency measure with potential trade-restrictive usage has been an area of concern. As noted earlier, the usage has increased mostly in developing countries (e.g., India, Indonesia, Chile, Ukraine) in the wake of import tariff decline. The products targeted under the SG actions include both low-tech light manufacturing products (e.g. woven fabrics of cotton, ceramic tableware, footwear) as well as consumer products (e.g. motorcycles, electrical appliances).⁸⁸ The saving grace is that SG actions are less discriminatory in nature than the AD actions, and are hence less problematic from the exporter’s view.⁸⁹

Meanwhile, new cases have been brought, and sometimes with innovations in terms of grounds for the claims. In April 2012, some WTO members asked the Safeguards Committee to find whether or not the SCM procedural requirements have been complied with in connection with the safeguard measures taken by Turkey on cotton yarn.⁹⁰ This is the first time Article 13.1(b) SCM has been invoked by members.⁹¹ This provision provides that one of the functions of the

⁸⁶ See Press Release, World Trade Org., Indonesia, Ukraine Lead Safeguard Notifications to the WTO (May 2, 2011), http://www.wto.org/english/news_e/news11_e/safe_02may11_e.htm.

⁸⁷ See J. Michael Finger, *GATT Experience with Safeguards: Making Economic and Political Sense out of the Possibilities that the GATT Allows to Restrict Imports* (World Bank Policy Research Working Paper Series 2000, 1998) (providing suggested guidelines for a safeguard process that emphasizes an import restriction’s impact on the domestic economy).

⁸⁸ Committee on Safeguards, *Report (2011) of the Committee on Safeguards to the Council for Trade in Goods*, G/L/972 (Nov. 1, 2011).

⁸⁹ See Kitt, *supra* note 5, at 372–75.

⁹⁰ See Request for Consultations by India, *Turkey—Safeguard Measures on Imports of Cotton Yarn (Other Than Sewing Thread)*, WT/DS428/1, G/L/979, G/SG/D41/1 (Feb. 15, 2012) (detailing India’s request that the Safeguards Committee investigate Turkey’s compliance with safeguard measures related to its cotton yarn imports).

⁹¹ In the review of 13 safeguard investigations reported to the Committee, the following concerns were raised: On India’s safeguard measure on N1, 3-

Safeguards Committee is “to find, upon the request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods.”⁹²

One major point of contention under the Doha Round negotiations regarding the Agreement on Agriculture has been devising a Special Safeguard Mechanism (“SSM”) both in terms of price and volume triggers, which would be acceptable to both developed and developing member countries.⁹³ Developing countries are strongly inclined in favour of the SSM option given the ease of its operation,⁹⁴ but the proposals on this front, as outlined in the December 2008 draft,⁹⁵ have so far witnessed a very strong opposition between developed and developing nations. As a result, the formal introduction of this provision in trade policies in the coming future may also usher in increasing disputes on the newly adopted measures. In October 2012, the Friends of Safeguards Procedures (“FSP”) (a WTO grouping made of Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Chinese Taipei, Singapore, and the United States) expressed concern about “procedural, transparency, and due process issues” related to safeguard investigations.⁹⁶ The FSP especially cited the following “examples of where there appears to be an emerging and serious disregard of multilateral rules”: imposition of provisional safeguard measures without clear evidence; lack of rationale and consistency in the data examined during the investigation; “suspension” of previously

dimethylbutyl-N Phenyl paraphenylenediamine, the US complained that India had never acknowledged its request for consultations while the European Union expressed concern that the measure had replaced an anti-dumping measure. On Thailand’s measure on glass block, the EU complained that the Thai measure was on top of an existing anti-dumping measure. On Turkey’s measure on polyethylene terephthalate, India raised doubt as to whether threat of serious injury existed. On Ukraine’s safeguard measure on motor cars, the EU and Japan raised doubt as to whether there was surge of imports. The EU noted that Indonesia had reported four safeguard actions, and urged Indonesia to exercise utmost caution in using safeguards.

⁹² Agreement on Safeguards, *supra* note 1, at art. 13(1)(b).

⁹³ Robert E. Baldwin, *Resolving the Conflict Leading to the Collapse of the Doha Round*, VOXEU (Sept. 25, 2008) <http://www.voxeu.org/article/how-resolve-doha-stalemate-better-agricultural-safeguard-trigger>.

⁹⁴ See generally Jason H. Grant & Karl D. Meilke, *The WTO Special Safeguard Mechanism: A Case Study of Wheat 2–6, 16–18* (Canadian Agricultural Trade Policy Research Network, Working Paper No. 2, CATPRN) (describing SSMs and their effectiveness).

⁹⁵ *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev. 4 (Dec. 6, 2008).

⁹⁶ *Friends of Safeguards, Urge More Transparency and Investigations*, WTO.ORG (Oct. 22, 2012) http://www.wto.org/english/news_e/news12_e/safe_22oct12_e.htm.

imposed safeguard measures; untimely notifications to the Committee; and unwarranted safeguard investigations.⁹⁷

The present discussion clearly indicates that unlike other trade remedy issues, SG matters are not squarely addressed in the Doha Development Agenda.⁹⁸ While the result of the SG disputes reveal that the alleged measures in most of the cases have been proven WTO-incompatible, the cases have often been dragged for a long time, usually in excess of two years.⁹⁹ The safeguards regulation is a sensitive issue *par excellence* which makes it a stumbling block in Doha negotiations. But, the WTO jurisprudence can also be criticized,¹⁰⁰ as the ineffectiveness of a normal WTO dispute settlement procedure to address unjustifiable SG measures is blatant.¹⁰¹

Given the problems associated with the SG mechanism, this may lead to a new wave of protectionism demonstrating how difficult it is to control the use of a two-edged sword as a safeguard. We can only emphasize the limited prospects for reforms, but obvious emergency exists for liberal trade order. The present analysis shows an increase in the number of SG initiations. Only a few SG of doubtful validity were brought to the review of the DSB. Such a trend demonstrates the non-respect of SG-related principles and the shift to litigation, thereby shifting the burden on DSB, which by definition will take necessary time to analyze temporary measures. The ASG framework has not been able to respond to the corresponding challenges and there is a need to address the following issues as a priority: applying an “Unforeseen Development” requirement; causality requirement; parallelism doctrine; and legal requirement of structural adjustment. Moving towards this step will ensure the initial goals of GATT, which are to allow for a safety valve to members entitling them to undertake restrictive measures. SG is politically necessary in order to undertake liberalisation and to find the necessary majorities to do so at home.

⁹⁷ Committee on Safeguards, *Systemic Concerns with Certain Safeguard Proceedings*, ¶ 1, G/SG/W/226, (Oct. 5, 2012).

⁹⁸ Dukgeun Ahn, *Restructuring the WTO Safeguard System*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 11, 24 (Mitsuo Matsushita, Dukgeun Ahn, & Tain-Jy Chen eds., Cameron May Publishers, 2006).

⁹⁹ *See id.* at 12–14, 27–28.

¹⁰⁰ *See generally* Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence* 30 (Chicago: John M. Olin Law and Economics Working Paper, 2d Series, No. 187, 2003).

¹⁰¹ Ahn, *supra* note 6, at 15.