SAFEGUARDS MEASURES UNDER THE WTO REGIME: A LEGAL ANALYSIS

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CERTIFICATE

This is to certify that the dissertation entitled **SAFEGUARDS MEASURES UNDER THE WTO REGIME: A LEGAL ANALYSIS** submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** is my own work and has not been previously submitted for the award of any other degree of this or any other university.

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List of Acronyms

AB	-	Appellate Body
AOA	-	Agreement on Agriculture
AOS	-	Agreement on Safeguards
ASEAN	-	Association of South East Asian Nations
ATC	-	Agreement on Textiles and Clothing
BOP	-	Balance of Payment
CECA	-	Comprehensive Economic Cooperation Agreement
DSB	-	Dispute Settlement Body
EC	-	European Communities
EEC	-	European Economic Communities
EOU	-	Export Oriented Unit
FTA	-	Free Trade Agreement
FTZ	-	Free Trade Zone
GATS	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariff and Trade
ITO	-	International Trade Organization
MERCOSUR	-	Common Market of the South
MFA	-	Multi Fibre Agreement
MFN	-	Most-Favoured Nation
NAFTA	-	North-Atlantic Free Trade Agreement
NAMA	-	Non-Agricultural Market Access
OMA	-	Orderly Market Arrangement
PTA	-	Preferential Trade Agreement
RTA	-	Regional Trade Agreement
SDT	-	Special and Differential Treatment
SEZ	-	Special Economic Zone
SLA	-	Soft Lumber Agreement
STA	-	Short term Arrangement Regarding International Trade in Cotton Textiles
TMB	-	Textiles Monitoring Body
TRIPs	-	Trade Related Aspects of Intellectual Property Rights

USITC	-	United States International Trade Commission
VER	-	Voluntary Export Restraints
VRA	-	Voluntary Restraint Arrangement
WTO	-	World Trade Organization

CHAPTER I

INTRODUCTION

CHAPTER – I

INTRODUCTION

I. 1. Introduction

The evolution of a world trading system, aims towards achieving, the efficient allocation of the world's resources through unimpeded trade in competitive international markets, free from policy-created barriers to the flow of goods, services and capital between countries.[1] States that advocated the above policy in international trade concluded trade agreements upon realization that cooperation would be more beneficial in terms of enhancing their economy's welfare than following a unilateral trade policy. Some experts suggest that the Governments entered into trade agreements solely to remedy the inefficient terms-of-trade-driven restrictions that arise when trade policies are unilaterally set.[2] There are others who argue that States liberalize trade in order to attain free and fair trade.[3] According to few others, formation of international trading system was potentially most beneficial to the developing countries, as they formed the majority of the Member States to the ever-expanding world trading system. It was also argued that assurance of more markets for their products, unimpeded access to the products from all over the world at a competitive price, among other things, was considered necessary to achieve the goals of efficient allocation of the economic resources for the welfare of the citizens' worldwide.[4]

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[1] T. N. Srinivasan , "Regionalism and the WTO: Is Nondiscrimination Passe'?" in Anne O. Krueger, ed., *The WTO as an International Organization* (Delhi : Oxford University Press, 1999), pp. 329-37.

[2] Kyle Bagwell and Robert W. Staiger, "An Economic Theory of GATT", *The American Economic Review*, vol. 89, no. 1, 1999, p. 215.

[3] Judith Goldstein, "The Political Economy of Trade: Institutions of Protection", *American Political Science Review*, vol. 80, no.1, 1986 in Ronald A. Cass, Michael S. Knoll, ed., *International Trade Law: The International Library of Essays in Law and Legal Theory*, Series 2, (Ashgate: Dartmouth Publishing Co.'s, 2003), p. 63.

[4] Wolf, M., "Two - Edged Sword: Demands of Developing Countries and the Trading System", in Kym Anderson and Bernard Hoekman, ed., *The Global Trading System*, vol.II, (London: I. B. Tauris Publishers, 2002), p. 306; Felix Mueller, "Is the General Agreement on Tariffs and Trade Article XIX "Unforeseen Developments Clause" Still Effective Under the Agreement on Safeguards?", *Journal of World Trade*, vol. 37, no. 6, 2003, p. 1120.

Contrary to the above-mentioned potential expectations the countries that entered into the General Agreement on Tariffs and Trade (hereafter referred as GATT 1947), refused to bind themselves fully to the tariffs with intent to protect the interests of their own industries[5] and economy. Accordingly, they retained the right to impose restrictions through quotas (Quantitative Restrictions, hereafter referred as QR's) and higher import duties or tariffs in order to protect their economy from the uncertainties of liberalization. States used certain measures through policy intervention by the Governments, to protect a specific sector in international trade. This feature was found in the case of industrial goods and the major users of the protectionism were the developed countries that traded extensively to promote their own goods. It was when they started facing difficulties from their trading partners in terms of competition that they insisted on having certain safeguards (protection) against their trading partners.

It is necessary to look at the *rationale* for such protective measures, evolving while GATT set to liberalize trade by reducing, primarily, the border barriers (tariffs).[6] The level playing fields of the states are different, based on their economic development, since few countries expand more rapidly than others due to technological advancement. Hence, these States were skeptic about the implications of opening up of their markets to the whole world. Keeping

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[5] This concept of protecting the industries has been regarded as violative of the most fundamental theorems of international trade and of economics in general. This is so because under such practice the import-competing industry is protected in higher degree than the export competing industry within the same State when both import and export contribute to the national growth. For a more detailed explanation as to the difference in protection awarded to the importing industries, see Anne O. Krueger, "Asymmetries in Policy between Exportables and Import-competing Goods", in Jones. R. W and Anne O. Krueger in *The Political Economy of International Trade* (Massachusetts: Basil Blackwell, 1990), pp. 161-174. Several reasons have been given for the use of protective measures, like, (i) the individuals are rational in seeking the protection of their self-interest in the political as well as in the economic market, (ii) As trade is of important concern to a nation it has to consider the recommendations put forth by its stakeholders whose interests are affected primarily by the trade policies it adopts.

[6] The preamble to the General Agreement on Tariffs and Trade, 1947 provided that the States had entered into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce for raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, The Legal Texts (Geneva: GATT Secretariat, 1995), p. 486; see also Alan Wm. Wolff, "Need for New GATT Rules To Govern Safeguard Actions" in William R. Cline, ed., *Trade Policy in the 1990's* (Washington. D. C.: MIT Press, 1983), p. 366.

such apprehensions in mind, they evolved a system that would enable the States to open up markets with effective measures to be utilized to protect them from the adverse effects of liberalization. The remedy suggested was to impose safeguard measures against the other trading partner, whenever the importing country found it difficult to adjust with the changing trading system.

The GATT, when concluded by the Member States included several safeguard provisions, which enabled them to withdraw, suspend or modify their obligations as agreed between themselves. The entire system of safeguards under the GATT forms an exception to the obligations especially the general prohibition of barriers to trade.[7] The safeguard measures in effect legalized the use of non-tariff measures that were otherwise prohibited under Article II and Article XI of the GATT 1947.[8] The inclusion of the safeguard provisions in the trade agreements encouraged States to be parties to the world trading system.

The entire corpus of safeguard remedies available within the GATT regime can be categorized as permanent and temporary.[9] Those actions, which could be imposed on a permanent basis, are provided as under:

1. Article XII and XVIII (b) for Balance of Payments (hereafter referred as BOP) crisis;
2. Article XX provides for non-performance of obligations under general exceptions in order to protect public morals, human and animal health etc;
3. Article XXI - security exceptions; and
4. Article XXXV - Non-application of Agreement between particular Contracting Parties and

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[7] Article XI (1) of the General Agreement on Tariffs and Trade, 1994 reads as follows – No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by the contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[8] Drafting History of Article XIX and its Place in GATT, Background Note by the Secretariat, 16 September 1987, MTN.GNG/NG9/W/7, para.9. Available at http://www.worldtradelaw.net/history/ursafeguards/ursafeguards.htm accessed on August 11th 2005.

[9] Bernard Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (New York: Oxford University Press, 2001), pp. 303-04, see also Hoekman and Kostecki, 1995, pp.161- 62. See also Communication from Switzerland to the Negotiating Group on Safeguards, 5th October 1987, MTN.GNG/NG9/W/10, p. 2.

The circumstances necessary to resort to the temporary action in the event of a pre-defined set of circumstances are dealt as under:

1. Article VI - due to unfair trade-antidumping or countervailing duties;
2. Article XVIII (a) and (c) for establishing an industry;
3. Article XIX emergency action on imports of particular products;
4. Article XXVIII for withdrawal of concessions; and
5. Article XXV waivers.

Therefore, these provisions that served as exceptions to the obligations under the General Agreement provided the States with a choice in trade remedies to protect their markets while imposing a safeguard measure.[10] Out of the nine remedies mentioned above, few aim towards the protection of the industries in cases of increased imports they are the imposition of countervailing duties antidumping measures and the emergency actions for imports. The existence of these industry specific measures encouraged State's participation in the process of liberalization ensuring adequate protection in times of unexpected increase of imports. Greater participation was achieved by permitting the States in avoiding the performance of the obligations entered into at the time of tariff negotiations, at the cost of their trading partners. The most famous among these set of remedies against increased imports affecting the domestic industry was the '*escape clause.*'[11] It permitted States to take temporary actions to protect the domestic industry.

I. 1. 1. Emergence of the 'Escape Clause'

The States were ardent in imposing the 'escape clause,' as it enabled them to escape from the obligations undertaken by them towards their trading partners and to raise the trade barriers to safeguard the domestic industry, which suffered injury. [12] This was a practice in US, which was later on included in the GATT

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[10] Kenneth W. Abott, "Trade Remedies and Legal Remedies: Antidumping, Safeguard and Dispute Settlement After Uruguay Round", in A. Panagriya, M. G. Quibria and N. Rao, ed., *The Global Trading System and Developing Asia* (Oxford: Oxford University Press for the Asian Development Bank, 1997), p.366.

[11] Actions taken under the escape clause Article XIX of the GATT are otherwise called as safeguard measures and have been used interchangeably throughout this study.

lexicon, and practice. This clause was primarily incorporated under Article XI of the trade agreement entered into between United States and Mexico (US-Mexico Reciprocal Trade Agreement, 1943), negotiated pursuant to the Reciprocal Trade Agreement Act of 1934,[13] which permitted them to take action in case of injury due to increased imports. It reads thus:

> "If as a result of *unforeseen developments* and of the concession 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 on part, or to modify it to the extent and for such time as may be necessary to prevent such injury*."

During the early twentieth century, the US had opened up its markets to its partners through the various trade agreements, expecting that its counterparts would also follow the same principle based on the principles of reciprocity.[14] On the contrary, their trading partners did not provide any such reciprocity and maintained higher tariffs against the US. This lead to the increase in imports from their trading partners thereby causing injury to the domestic producers of the US at their own costs, as they had agreed to reduce their tariffs to the products originating from the latter.[15] This lead to major discontent among the domestic producers of the US and the government was forced to remedy the situation in their favour.

Pressurized by the domestic producers due to the disruptive effects of the opening up of its markets through bilateral agreements the US officials insisted upon the drafting of such a clause during the review of extension of the Trade Act which empowered the President to conclude trade agreements. In 1947 President Truman issued an Executive Order that required an escape clause to be included in

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[12] Raj Bhala and Kevin Kennedy, *World Trade Law*: *The GATT-WTO System, Regional Arrangements and US Laws* (Charlottesville, Virginia: Lexis Law Publishing, 1998), p. 111.

[13] See John H. Jackson, *The World Trading System*, edn. 2, (Cambridge MA: MIT Press, 1997), p. 153.

[14] This principle is central to the negotiating framework for reduction of tariff since the inception of GATT 1947. It implies that during rounds of negotiations for reduction of tariffs each country will make equivalent tariff concessions.

[15] The US has for decades been in leadership of trade liberalization and the result was an American market with comparatively few import barriers while the foreign markets are protected by a variety of restrictions. For details of the reciprocity approach taken by the US see William R. Cline, " "Reciprocity": A New Approach to World Trade Policy ?" in R. W. Jones and Anne O. Krueger, *The Political Economy of International Trade* (Massachusetts: Basil Blackwell, 1990), p.121-158.

every Agreement negotiated under the 1934 Act. The Order triggered the ongoing discussions on the adoption of the International Trade Organization (ITO) and General Agreement on Tariffs and Trade (GATT) in the Congress.

The escape clause was negotiated at the time of the Havana Conference for the establishment of the International Trade Organization during the GATT negotiations under Article 40. It differed from the GATT escape clause,[16] with respect to the determination of the injury caused by increased imports; being relative to the domestic production as different from the absolute increase. It also stated that action can be taken "in circumstances of special injury" while the GATT emphasized on the existence of "critical circumstances" as a condition to determine the injury.[17] While interpreting Article XIX of the GATT reference has often been placed on the historical development of the language and the subsequent State practice.

The Tariff Commission (predecessor of the International Trade Commission, ITC) of the US has since 1948 conducted several investigations under the escape clause. Incorporation of the recommendations for the inclusion of an escape clause in the GATT became inevitable as the United States, being a major player in the field of international trade, communicated its disapproval of accepting any international trade arrangement without this clause.[18] The Order of President Trumann thus was amended and this clause became a permanent feature of the US statutory law under Section 7 of the Trade Agreements

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[16] Article XIX: Emergency Action on Imports of Particular Products:

1. (*a*) If, as a *result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, *any product 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.*

(*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party ..., so as to cause or threaten serious injury ... in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, ...

2.....

3..... See ANNEX II at p.144.

[17] See n. 9, para. 3-8, at p.3.

[18] John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs Merill, 1969), pp.553-67; see also Bhala & Kennedy (1998), at p. 898, also Raj Bhala, *International Trade Law: Theory and Practice* (Lexis Nexis: Lexis Publishing, 2001), edn. 2, pp. 1117-8.

Extension Act of 1951. The Escape Clause now finds its existence under Section 201 of the Trade Act of 1974.[19]

Subsequently, every trade agreement entered into by the States contained an escape clause allowing the government to exempt themselves from the performance of obligation for a limited time period to facilitate adjustment, of their domestic industry, to the new market conditions. Hence, in a trade agreement a safeguard measure was designed to protect, the interests of the importing countries against those of exporting countries, for a temporary period, whenever the former has to handle a situation likely to injure their domestic economies.[20] The safeguard measures became a significant factor in international trade sphere, soon after it was incorporated into the GATT, 1947. After the establishment of the WTO, the General Agreement, 1947 has been transformed into GATT, 1994 along with the Protocols and the Decisions by the Council. Both the developed and developing countries have incorporated these measures in the trade agreements concluded by them.

The safeguard measures are initiated as a 'safety valve'[21] upon which the States could act in case of serious injury due to increased imports. The process of initiation of these measures begins with a complaint from the domestic industry, stating that an increase in imports of a specific product is affecting their interests in the domestic market. The authorities are empowered to impose these measures

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[19] The Escape Clause was later on amended several times by the Trade Expansion Act of 1962, the Trade Agreement Act of 1974, the Trade and Tariff Act of 1984, Omnibus Trade and Competitiveness Act of 1988 and finally in the Uruguay Round Agreements Act of 1994. The Section 201 derives its legitimacy from Article XIX of the GATT. See Jackson, ibid, p. 555.

[20] Patrizio Merciai, "Safeguard Measures in GATT", *Journal of World Trade Law*, vol. 15, no.1, 1981, p. 41.

[21] See n. 9 at p.3; Kenneth Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), p. 106; See also Bernard Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (New York : Oxford University Press, 2001), pp.303-4; Hoekman and Kostecki, 1995, p.167; R. K. Gupta, *Safeguards, Countervailing and Antidumping Measures : Against Imports and Exports* (Delhi : Academy of Business Studies, 1995), p.4; Sara Dillon, *International Trade and Economic Law and the European Union* (Oxford : Hart Publishing, 2002), p.199; Kenneth W. Abbott, " Trade Remedies and Legal remedies: Antidumping, Safeguards and Dispute Settlement After the Uruguay Round" in Arvind Panagriya, Quibria M.G., Narhari Rao, ed., *The Global Trading System and Developing Asia* (New York: Oxford University Press, 1997), p.387; *Anti-Dumping, Anti-Subsidy and Safeguards- Law and Practice*, Post Qualification Course in International Trade Law & World Trade Organization, Study Material, Group B, Paper V, The Institute of Chartered Accountants of India (New Delhi: ICAI, 2004), p. 251.

through the relevant domestic legislations in force in the territory of the nation State. It is however important to note that only the developed countries especially Australia, Canada, EC and the United States used to impose these measures as they had well established rules to govern such matters. The reason for this is because they formed the group of traders, which had made a major share of their goods bound under specific tariff commitments under the Schedules of Concession, and they had more to lose compared to the developing countries who were becoming competitive to the developed States. The developing countries could thus easily be targeted by the developed countries when they posed a threat to the latter's interests in trade.[22]

For a better understanding of the safeguard (escape clause) measures undertaken by the States it is pertinent to study the use of such measures by analyzing the State practice of Members that are party to the GATT 1947 and the WTO 1994 which established the multilateral regime for regulation of trade. This study shall deal in detail with the safeguard measures taken by a State pursuant to *serious injury* resulting from increased imports excluding measures of similar kind taken on other grounds within the framework of GATT/WTO.

I. 1. 2. Rationale for imposing an escape clause action

During the negotiations of the GATT (the London Round 1946), the States felt the necessity to provide more flexibility to the commitments undertaken, which would provide for the temporary modification of the commitments to meet temporary situations. The States preferred such action under the escape clause, since it

- Permitted them to address the unforeseen circumstances. This clause was considered as the best form of remedies available against their trading partners, whenever there was a surge in imports of a particular product.
- Focused on resolving the injury caused due to the bound concessions by allowing them to escape from the obligation to perform it, temporarily.
- Further the States could make use of the escape clause as it permitted provisional action to be taken prior to consultation on preliminary

[22] Out of the 134 actions notified to the GATT as on 31 July 1987 only 7 actions were taken by developing countries. See n. 9, para 14.

determination that critical delay would cause damage to the industry upon condition that consultations shall be initiated immediately after taking such action.[23]

- The benefit under Article XIX of the GATT action is that it provides for action to be initiated immediately upon decision by the Sovereign and without the permission of any international organization.
- Included the provision for claiming compensation from the other trading partners, which made the actions under the escape clause a better substitute for the remedy under Article XXVIII of the GATT.[24] Moreover the choice of remedies available provides also for the temporary suspension of the concessions as compared to Article XXVIII, which provided for the permanent restructuring of the tariffs of the products of different classification. This benefits the importing State to restore the situation between it and the exporting State or States.[25]
- The measure under this clause provided the States with the immediate remedy, which was otherwise difficult to achieve through Article XXVIII.[26] The States were reluctant to renegotiate the same rules, which they had finalized after years of deliberation. They feared that the entire process would be time consuming and during that time the imports would have done maximum damage to the domestic industry.

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[23] Article XIX (3) of the GATT, 1947.

[24] Article XXVIII (1) of the GATT 1947 provides that '.....a contracting party may, by negotiation and agreement with any other contracting party with which such concession was initially negotiated and with any contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest, and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantially equivalent interest in such concession, modify or withdraw a concession included in the appropriate schedules annexed to this Agreement.' Though renegotiation under Article XXVIII is considered a remedy (raising of bound tariffs against corresponding compensation) the measures are not limited in time nor linked to any other particular condition as compared to the Article XIX actions that are taken to the extent of preventing or remedying the domestic industry facing adjustment problems. Article XXVIII actions may be taken without an industry being in difficulty (for example, to equalize a tariff structure or to replace a non-tariff measure by a customs duty) and thus do not strictly have a safeguard function when compared the escape clause as it aims to protect the domestic industry.

[25] The Agreement on Safeguards: Use of the Instrument, Problem Areas, and Proposals for Change, National Board of Trade, REPORT, November 2004, Available at http://www.ppl.nl/bibliographies/wto/files/2749.pdf accessed on 5 August 2005.

[26] For a detailed comparison between Article XIX and Article XXVIII; see Dam, 1970, pp. 99-107.

Article XIX (1) (b) permitted actions to be taken by the Importer State on behalf of an exporter State with which the former had a Trade Agreement when the latter was affected by loss of market for its product due to trade concessions given by the importing State to non-member country. Actions could be taken,

(a) only after giving adequate notice to the Contracting Parties (CP) and

(b) by allowing the CP to consult with the exporters who has substantial interest and against whom actions were proposed to be taken.

Under Article XIX 3 (a), retaliatory actions could be initiated based on the agreement between the parties. If no agreement is reached on the nature of action to be resorted, then the State initiating the action (injured State) can take or continue the action (if provisional) and the injuring State (against whom the action is taken) shall within 90 days of initiation of such action and after expiration of notice of such action to the Contracting Parties, suspend substantially equivalent concessions or other obligations under the Agreement upon approval from the Contracting Parties. Whereas in the case of actions initiated on provisional basis without prior consultation, the party affected shall also suspend such concessions and obligations as may be necessary to prevent or remedy the injury.[27]

For a better understanding of the functions the escape clause performs it now becomes necessary to categorize the salient features of the escape clause and its use within the GATT as resort to these measures prevented the Members from the full enjoyment of the benefits of trade concessions.

1. 1. 3. Salient Features of the Escape Clause Measure

Article XIX of the GATT, otherwise termed as the 'escape clause' empowers a State to suspend, withdraw or modify the performance of the agreed obligations under the GATT. The imposition of an escape clause measures, by a State is contingent, when it satisfies the 'unforeseen development' criteria that results from the obligations incurred by the States including tariff concessions. These unforeseen developments should have resulted in increase in imports of a

[27] Article XIX 3 (b) of the GATT, 1947.

product and this increase should have caused or threatened to cause serious injury to the domestic producers in its territory.[28] Thus the criteria's necessary to impose an escape clause measure are the following:

(i) increase or surge in imports of any product, when imported into the territory of another contracting party in such increased quantities and under such conditions;

(ii) As a result of unforeseen developments and due to the effects of the obligations incurred by a contracting party, including tariff concessions;

(iii) causes or threatens to cause serious injury to domestic producers of the importing State; and

(iv) The products should be 'like or directly competitive products.'[29]

Under this provision, there is no mention regarding the kind of measures that can be instituted against the injuring State, rather, it provides for suspension, withdrawal and modification of state's obligations.[30] Member States of the GATT, have bound their tariff rates[31] in the Schedules of Concession and those tariff levels they have to be maintained by them. The nature of the commitments made by the Member States include the promise not to increase the duty above a specified level or an agreement not to raise the duty above the present level or relate to the lowering of the duties to a stated level.[32] The safeguard measures provide for the non-performance of these obligations for a *temporary period.*[33] The nature of measures resorted by the Member States under GATT, thus includes actions in the form of:

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[28] Article XIX (1) (a) of the GATT 1947, see n. 16, at p. 9.

[29] Like or directly competitive products means products having similar use.

[30] ibid.

[31] Binding commitments in GATT terminology means the rate of customs duties each State has consented to in relation to a product included and are the Schedule. A given rate of duty becomes binding on the member when an agreement is reached with the other State.

[32] Kenneth Dam, *The GATT: Law and Economic Organization* (Chicago: Chicago University Press, 1970), p. 31.

[33] The measures are temporary in nature as they are used to render the domestic industry adjust to the changes in the market and helping it become more competitive. Thus measures taken are to be revoked once the industry shows signs of adjustment.

1. Tariff increase, wherein safeguard measure as a tariff increase means that a State can increase the duty beyond the binding level agreed upon, if it is proved that the import of a particular product has increased as a result of the bound rate of commitment and that such increase is or will injure the domestic industry of a like or directly competitive product in its territory.
2. Quantitative restriction (hereafter referred as QR or quota), then the importing State sells quotas to the exporting States, permitting the latter to import annually into the formers territory, products equaling the amount of the quota.
3. Tariff rate quotas is a combination of the tariff and the quota, which provides that a State can import certain quantities on the payment of a normal tariff (duty) without paying the safeguard duty (increased duty than the bound rate) or on payment of a nominal safeguard duty and when the import exceed beyond the quota then they can be imported only upon the payment of a higher safeguard duty.

While the tariffs can be imposed on all exporters forming a source of income to the injured State which can utilize it to make the industry competitive, the quotas lack this benefit as the exporters would not be losing as long as they fill the quota and are in turn benefited as they can increase the price of the imported product to their choice. As compared to the above-mentioned remedies the tariff rate quota is regarded to be efficient as it keeps a check on the domestic industry, which still faces a competition from imports if the prices were increased beyond the protected level.

The choice given to the States in the form of the safeguards measure either the tariffs and/or non-tariff measure to be taken makes the escape clause an exception to the general rules laid down within the General Agreement.[34] These measures are bound by one of the fundamental pillars of the trading system,

[34] Article XIX measure by permitting imposition of higher tariffs on imported products than the bound rate violate Article II which provides that no State should impose tariffs higher than that imposed upon the same product by the importing State in its territory. See, n. 9 at p.3 also see Alan Wm. Wolff, "Need for New GATT Rules To Govern Safeguard Actions" in William R. Cline, ed., *Trade Policy in the 1990's* (Washington .D.C: MIT Press, 1983), p.366.

namely, the Most Favoured Nation (hereafter referred as MFN) principle.[35] The importing State can apply this measure upon proof of serious injury against all the exporting States,[36] after giving prior notice to the Contracting Parties. The Importer State is also required to provide an opportunity to the interested States, exporters and the States who are principal suppliers of the product going to be subject of protection under the safeguards law, before an action is taken.[37] The burden of proof of serious injury lies with the exporting State, which means, when a country is aggrieved by the safeguard action imposed against it, can challenge such action before the Contracting Parties and have to prove that the State imposing the measure, has acted in violation of the rules. Though the GATT mentioned the need of proof of serious injury for an action it failed to provide a proper definition for the same, which lead States to use the clause in violation of the intended purpose.[38]

The rationale for the general safeguard clause was to allow some flexibility with respect to tariff commitments thereby promoting efforts of trade-liberalization.[39] The incorporation of the escape clause is termed as permitting legalized backsliding[40] by J. Michael Finger and the reason for this is because it

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[35] Article I of the GATT, 1947 provides for the General Most-Favoured-Nation Treatment to be meted to all States in terms of the duties or charges levied on the importation or exportation of any product into its territory or destined to the territory of all other contracting parties. The reason for the inclusion of this principle is because it promotes economic efficiency by minimizing the trade distortions associated with safeguard remedies. This is done firstly, by imposing the burden on all exporters of the causing such injury and by avoiding the trade diversion to the third-countries. Secondly the uniform application of a measure increases the number of adversely affected exporting countries, and their combined pressures against the initial invocation of safeguard relief or for its removal or for granting of compensation, which act as a deterrent against abusive safeguard measures. See Michel J. Trebilcock and Robert Howse, edn. 2, *The Regulation of International Trade* (London: Routledge, 1999), p. 233.

[36] The non-discriminatory application of the emergency action is imbibed in the words "...in respect of such products,...." of Article XIX (1) (a) of the GATT, 1947.

[37] Article XIX (2) of the GATT, 1947.

[38] The States used VERs and other bilateral arrangements to save them from the performance of strict safeguard provisions. Some of the industries protected include the textile industry, electronic goods industry, agricultural and food products etc. The important example of the use of measures outside the GATT conditionalities is the Multifibre Agreement, which the developed countries concluded with the developing countries. Discussed else where in this Chapter.

[39] Bernard Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO*, (New York: Oxford University Press, 1995), p. 167.

[40] Michael J. Finger, Legalized Backsliding: Safeguard Provisions in GATT in Will Martins and L. Alan Winters, ed., *The Uruguay Round and the Developing Economies*, World Bank Discussion Papers 307, (Washington, D.C.: The World Bank, 1995), p. 286.

encourages States to enter into the world trading system by accepting obligations in the nature of reduction of tariffs for entailing trade liberalization and side by side providing them with an opportunity to waive their obligation for a temporary period if by reason of this tariff reduction there is a surge in imports of a particular product, which injures the domestic producers of the like or directly competitive product in its territory.

The initiation of a safeguard action is the only remedy of the kind permitted against fair trade practices and its purpose was to serve as an emergency action providing immediate relief to the injured producers of the importing State. It thus differs from other forms of trade remedies[41] available like antidumping or countervailing duties imposed against an exporting State due to unfair practices like the dumping or subsidization of products. The GATT provision permits its application only so as to prevent or remedy the injury caused by the surge in imports.[42] Actions under Article XIX have been argued to be the most protectionist[43] among the trade remedies available to the States as they distort trade even though temporarily, but the nature of the function performed by the measure reveals that they are more of adjustment providers to the industry rather than having a trade distorting effect.[44] It was necessitated in order to deal with the vices of importing countries situation of market disruption. Though the measures are regarded as being beneficial to the domestic industry of the importing State they do create market disruption.[45]

Another important feature of the safeguard provision incorporated into the GATT was that it provided for compensation to be made to the exporting State

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[41] Trade remedies are the mechanisms of commercial defence against competing imports that can be adopted under the WTO rules. They include the antidumping or countervailing duties and safeguard measures covered under Article VI, XVI and XIX of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), the Agreement on Subsidies and Countervailing duties and the Agreement on Safeguards under the WTO.

[42] Article XIX (1) (a) of the GATT, 1947.

[43] John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs Merill, 1969), p. 570.

[44] Alan Wm. Wolff, "Need for New GATT Rules to Govern Safeguard Actions" in William R. Cline, ed., *Trade Policy in the 1990's* (Washington. D. C.: MIT Press, 1983), p. 367; It was during the 1962 Trade Expansion Act that the escape clause was changed from its fundamental concept of protectionist nature to include adjustment assistance, see Jackson, 1969, p. 567.

[45] Scholars like Jackson and others treat the safeguard measures as disrupting the markets of the importing State by the import of excess of a particular product.

for the action taken against it resulting in loss of its share in the world trade by trading fairly due to the inability of the importing country's domestic industry to compete with the imports.[46] The option for compensation provides for restoration of balance in trade by offering additional access for other products of the exporting State. The compensation was to be reached by consultation with the exporting State and if no agreement could be reached the exporting State or the State against whom a safeguard measure has been taken can retaliate by withdrawing substantially equivalent concessions.[47] If agreement on compensation is not reached then the exporting State is permitted to retaliate by withdrawing equal concessions granted to the importing State. Therefore, the exporting State can exempt MFN application in retaliation as opposed to the mandatory compliance of the rule for the suspension (withdrawal or modification) of the concessions under Article XIX (1) (a) of GATT 1947. The States are exempted from following the MFN rule in case of retaliation as per the interpretative note to Article 40 of the Havana Charter.[48]

1.2 Safeguards Measures under the GATT

The *escape clause* enabled a State to take emergency action on import of particular products by suspending obligations incurred, including tariff concessions, resulting in an increase in import of a product which causes or threatens to cause serious injury to the domestic producers of a like or directly competitive product of the importing State.[49] As is evident the wordings of the provision are strikingly similar to the escape clause in the US-Mexico Agreement as mentioned above. The functions of these measures are temporary, permitting the

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[46] Article XIX (2) of the GATT, 1947.

[47] Article XIX (3) of the GATT, 1947.

[48] Kenneth Dam is of the opinion that States should provide compensation by reaching an agreement rather than resorting to retaliation. He states that if MFN rule is applied for retaliation it will lead to the beginning of a trade war. This is feared as the State against whom retaliatory action is taken will also tend to take similar actions by suspending or increasing other tariff lines thus unleashing a series of uncontrollable countermeasures by third countries. The interpretative note distinguishes between paragraph 3 (a) and paragraph 1 (a), 1(b), 3 (b) to mean that the actions under the latter must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries. See Dam, 1970, pp. 104 - 5.

[49] See n.16 at p. 6.

industry affected by the surge in imports to adjust to the newly competitive market structure. The measures undertaken pursuant to the safeguard action consists of two forms, imposition of quantitative restriction (QRs) or imposition of higher tariffs than the bound rate.[50]

The GATT, aiming towards removal of trade barriers except those relating to tariffs (customs duties) restricted the use of tariffs and non-tariff barriers (quantitative restrictions) that went against its objectives of facilitating trade. Quantitative restrictions (QRs) explicitly prohibited under Article XI, were permitted under Article XIX and thus making them legal upon satisfaction of the required conditions.[51] Safeguard measures were permitted as they would enable the States to agree upon broad reductions in barriers and to increase trade flexibility as the measures would provide temporary protection to the industry and hence ensure stability to the multilateral regime by preventing discriminatory trade measures.[52] A measure under Article XIX was the only measure recognized as a legalized sanction in the GATT as compared to the other measures mentioned above be it under Article VI, XXI etc.[53] The escape clause as compared to the other provisions like Article II and Article XI in the General Agreement created a balance between the need to provide the stability necessary for decisions relating to investment and international trade and the flexibility necessary for the governments to accept international obligations.

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[50] The safeguard measures permitted imposition of import duties higher than the bound rate agreed to in the Schedule of Concessions. These duties include the discriminatory source specific duties that can be levied against a *specific product* and do not include the ordinary customs duties, which are non-discriminatorily levied uniformly on all imports (all goods imported into the territory of a State) irrespective of their source of origin. The 1987 Note which mentions that tariff measures notified under Article XIX have included increases in specific duties, increases in ad-valorem duties, surcharges, surtaxes, imposition of a minimum value for duty, increases in compound duties, compensatory taxes, tariff quotas and imposition of surtaxes and charges on products imported below a minimum price. The non-tariff measures notified during 1960-79 saw a rise from 45%-70% increase which included outright embargoes and bans on import restrictions and a few actions during 1980-87 involved both tariff and non-tariff measures, see n. 9, para 17; Guide to GATT Law and Practice hereafter referred to as Analytical Index of the GATT, 1995, pp. 522.

[51] Drafting History of Article XIX and Its Place in GATT, MTN.GNG/NG9/W/7, 16 September 1987, para. 9.

[52] Michel J. Trebilcock and Robert Howse, *Regulation of International Trade* (London: Routledge, 1999), edn.2, p. 227.

[53] Alan Wm. Wolff, "Need for New GATT Rules to Govern Safeguard Actions" in William R. Cline, ed., *Trade Policy in the 1990's* (Washington .D.C: MIT Press, 1983), p. 367.

The purpose of this Chapter is just to introduce the topic to the reader. The subsequent Chapters of this study deals in detail with the various aspects of the escape clause. They include a study of the State practice on the application of safeguards measures during the GATT period and an examination of the cases that have been decided by the GATT Panel. This study further deals with the changing trend in the State practice in application of the measures during the GATT period and the process of planning for the restructuring Article XIX of the GATT and attempts to trace the evolution of the new safeguards law under the legal system of international trade law. The subsequent Chapter has attempted to study the evolving law through the interpretations rendered by the WTO DSB.

I.3. Scope and Objective of the Study

As mentioned in the beginning, this study pertains to the safeguard measures taken by the States in response to *increased imports* that *cause or threaten to cause serious injury* to the domestic industry producers of 'like or directly competitive product'. This study analyzes the application of the provisions of the Agreement on Safeguards (AOS) and Article XIX of the GATT. It also looks into the methods adopted by the States to implement them and the suggestions offered to bring in clarity in the application of such measures on a "rule based" approach. It attempts to study the debate on the opinion of usage of 'selectivity' in the application of safeguard measures, which deviate from one of the fundamental principles of the world trading system, the MFN rule. The study proposes to examine the existing legislations of some select countries, particularly of the US and the European Union, in comparison with the domestic legislation of India. To understand the State practice evolved in the matter relating to the application of safeguards and the discrepancies that arise as a result of the interpretation of the Agreement by the Dispute Settlement Bodies, some of the related cases are discussed thereafter. It also studies the extent of implementation of the safeguards measures through the national laws and the application of the escape clause in the trade agreements entered into by India.

I.4. Methodology

The study relies on the primary and secondary sources available on this subject. The primary sources include the relevant legal texts like WTO Agreement and the covered agreements, decisions of the Panels and the Appellate Bodies, and also national laws of countries that have been chosen for the study. The secondary sources include books, articles, institutional working papers and discussion papers and the relevant websites.

I.5. Outline of the Study

The study is divided into five chapters. Chapter I examines the origin of the escape clause, the need for the States to opt for the remedies available under the escape clause in comparison to other remedies available under the GATT. It also studies the negotiating history of the clause under the GATT and the salient features of this clause, which is couched in Article XIX of the GATT 1947. This chapter further introduces the subject into its legal debates. It mentions the various remedies available under the umbrella of trade law, in brief. It seeks to explain their differences in relation to escape clause action and the existing framework for the application of the measures under International Trade Law.

In Chapter II, the GATT and WTO regime on the use of safeguard measures are dealt in detail. It studies the manner in which the States have used the measures under the GATT followed by a comparison of the measures used by the developed countries against the developing countries. It also analyses the discussions before the GATT Council relating to the restructuring of the safeguard measures. The chapter concludes by throwing light upon the major changes introduced in the safeguard measures on the adoption of WTO Agreement on Safeguards.

Chapter III subsequently reviews the State practice evidencing the application of safeguard measures by the States, both developed and developing, after the establishment of the WTO through a study of the decisions rendered by the adjudicating bodies like the WTO Panels and Appellate Body.

Chapter IV of the study includes the law and the procedure for the effective implementation of safeguard measures under the existing national legal regime, for the fulfillment of the commitments undertaken by India. The procedural aspects of the application of measures and their method of

implementation by the national authority within India are discussed along with the study of safeguard actions so far initiated by India. It also tries to analyze the application of escape clause by India through the trade agreements entered with other countries. This Chapter also examines the compatibility of the national laws of selected countries like US, EU and India with the AOS.

The final Chapter draws conclusions and also attempts to propose suggestions required for the effective implementation of the measures.

CHAPTER II

MULTILATERAL REGIME OF SAFEGUARDS MEASURES

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II. 1. Introduction

The previous chapter has explained the evolution of the escape clause/safeguard measures before the GATT period and the manner in which it found place in the GATT due to the efforts of the US. This chapter deals with the practice of States' pertaining to the safeguard system during the GATT period by studying the cases that were decided by the GATT Panels and the subsequent changes that have taken place within the system. This chapter thus analyses the extent of implementation of the safeguard system through a study of the cases decided by the Panel in relation to the application of the measures under the multilateral trade regime. In doing so the cases dealt by the WTO, successor of the GATT shall be discussed in the next Chapter. Studied below are the relevant cases that have helped shape the safeguards law, as it exists under the GATT and the WTO Safeguards Agreement.

II. 1. 1. 'Unforeseen Developments' clause

The GATT provisions for the application of the escape clause measures provide that they can be initiated only upon satisfaction of the unforeseen developments clause. The drafters required the States to prove that the increased imports, which provide for the initiation of action, should have been unforeseeable at the time the concessions were negotiated.

II. 1. 1. a. Hatter's fur case[1]

The most important case that was decided by the GATT Panel was the *Hatter's Fur* case and also constitutes the leading decision on the action taken under Article XIX. This case finds importance even today as the decision interpreted one of the crucial factors in the provision permitting the use of safeguard measure under GATT, the *unforeseen developments* clause. Article XIX 1 (a) of the GATT provided for the criteria of unforeseen developments to be

[1] Report of the Working Party on the Withdrawal by the United States of a Tariff Concession under Article XIX as cited in GATT Analytical Index, 1994. Also available at http://www.worldtradelaw.net/reports/gattpanels/furhat.pdf.

satisfied for the initiation of a safeguard action but it failed to define as to what kind of situations would constitute unforeseen and also the definition of serious injury.

In the instant case the US government decided to initiate action against Czechoslovakia by imposing higher tariffs on the import of hats and hat bodies and the latter aggrieved by the action approached the GATT Council alleging that US has violated the GATT rules. Czechoslovakia challenged the US action of withdrawal of concessions negotiated at Geneva in 1947, for import of women's fur felt hats and hat bodies, as the change in fashion did not satisfying the requirement of 'unforeseen development' which was an essential ground for imposition of safeguard measures. The US argued that the change in fashion had caused increase in imports and it affected the domestic industry. The petitioners contended that a change in fashion was foreseeable and that the US action based on that ground was not sound and required to be declared as violative of the GATT principles.

The Report of the Working Party, in the case though recognized that change in fashion could generally not constitute an unforeseen development, declared that in the circumstances of the case it is the particular degree to which the change in fashion has affected the competitive situation of the industry that has to be taken into consideration. The Working Party defined unforeseen development as those developments, which could not or should not have been reasonably expected to be foreseen at the time of negotiations and include only those situations that arise after the negotiation of the concessions. It thus gave importance to the *very particular changed circumstances* and not mere general economic change. It was thus decided that the effect of change in the fashion to the market was unforeseeable and that the action taken was justified even though change in fashion was not considered a criterion, to take safeguard action.[2]

The Report of the Working Party also concluded that action under Article XIX is essentially of an emergency character and it should be of limited duration. A government taking action under that Article should keep the position under review and be prepared to reconsider the matter as soon as this action is no longer

[2] Guide to GATT Law and Practice (herein after referred to as the Analytical Index of the GATT), vol. I and II (Geneva: WTO, 1995), p. 522; John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs Merill, 1969), pp. 557- 63.

necessary to prevent or remedy a serious injury. In the case under review events which have occurred after it was decided to raise the duties would indicate that it would be desirable for the US government to follow the trends of consumption, production and imports in the following months with a view to restore the concession on hat bodies in whole or in part if and as soon as it becomes clear that its continued complete withdrawal cannot reasonably be maintained to be permissible under Article XIX.[3]

The decision of the Hatter's Fur case extended the scope of the escape clause by a liberal interpretation of the clause making it possible for invocation in a wide variety of situations. The decision permitted mere increase in imports as the factor for invoking the escape clause measure. The decision rendered by the Working Party is still considered binding even under the WTO jurisprudence on Safeguards, along with the other decisions given by the GATT Council details of which shall be explained in the next Chapter. The other issues that were contested related to the discriminatory application of the escape clause. From the interpretations drawn from the intention of the drafters, the Panel had consistently held that the meaning of the terms 'in respect of such products' for the application of the measures meant nothing but the application of the measures on *that particular product* which caused injury indicating the application of Article 1 of the GATT.[4]

II. 1. 1. b. Norway Textiles case[5]

This case dealt with one of the critical aspects regarding the manner of application of the safeguards measures. It was for the first time in the history of GATT that a question arose before the Panel as to whether governments may use Article XIX restrictions *selectively* i.e. providing for deviation from one of the fundamental pillars upon which GATT is established – Most Favoured Nation

[3] The Chairman of the GATT Council in his report in 1984 also stated that the safeguard actions are emergency measures, which should therefore be temporary by definition and progressively liberalized during the period of their application, unless they are maintained for such a short time as to make this impractical. See Jackson, ibid, p. 522.

[4] See Modalities of Application of Article XIX.

[5] Norway - Restrictions on Imports of Certain Textile Products Report of the Panel adopted on 18 June 1980 (I/4959 - 27s/119). Available at http://www.worldtradelaw.net/reports/gattpanels/norwaytextiles.pdf.

(non-discrimination) principle. The matter came up in this dispute brought against Norway in 1980 by Hong Kong in relation to the allocation of quota for import of textiles in the midst of renegotiation of the MFA.[6] Hong Kong argued that it was entitled to a fair share of the quota allocated by Norway to the other six countries with which it had bilateral agreements.[7] The Panel found that Hong Kong had a substantial interest as exporter and the claim raised under Article XIII: 2(d) relating to allocation of share in the Norwegian market based on the trade volumes of previous representative period of time was justified. The Panel further stated that Norway had acted with effect to allocate import quotas for these products to six countries but had failed to allocate a share to Hong Kong and thus its Article XIX action was not consistent with Article XIII.[8] The significance of this decision is that it established a relation between GATT Article XIX and Article XIII relating to imposition of quota, making the application of escape clause measures subjective to non-discriminatory application.

This decision is also important as the WTO incorporated the ratio of this case in the Agreement on Safeguards thus making use of quotas, valid upon satisfaction of the conditions laid under Article XIII of GATT. The discriminatory allocation of quotas to the countries, which have a substantial interest, is also a result of this decision.[9] Further the developing countries have expressed their concern during the GATT period as to the discriminatory application of the measures against them.[10] In another case where Canada imposed measures by exempting the imports of certain footwear above a certain value, the contracting

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[6] For detailed facts, see ibid. para. 5.

[7] The issues raised by Hong Kong before the Panel were -
(a) Norway's Article XIX action is not consistent with the General Agreement, and in particular Article XIII;
(b) as a result of Norway's failure to carry out its obligations under Article XIII, Hong Kong's benefits under the General Agreement have been, and continue to be, nullified or impaired;
(c) the CONTRACTING PARTIES should recommend that the Government of Norway should either immediately terminate its Article XIX action, or immediately make it consistent with the provisions of Article XIII:2(d) by allotting an appropriate quota to Hong Kong.

[8] ibid, para. 16.

[9] Article 5. 2 (a) of the Agreement on Safeguards, 1994.

[10] In the action taken by the United Kingdom, the representatives submitted that the application of measures against Korea for the disruptive imports of television sets to the former was not justified. See Analytical Index of the GATT, p. 520.

parties stated that the GATT Article XIX does not provide for discrimination to be taken against suppliers, either geographically or on the basis of prices.[11]

The GATT Panel has also delivered that the level of import duty to be imposed as a safeguard measure would be difficult to be determined with precision as the injury suffered by the domestic industries would vary according to the economic status of the State. It also ruled in relation to the duration of the application of the measure that the States should not use the measure beyond what is 'necessary to prevent or remedy the injury'.[12] In the *Hatter's Fur* case the Working Party stated that the government taking the action should keep the position under review and be prepared to reconsider the use of the measure as soon as the industry shows sign that the action would no longer be necessary[13] and also to take immediate steps to restore the original concessions once the industry becomes efficient to compete with imported surplus without the support of higher duties.

II. 2. Retaliation and Compensation

The State proposing to take a safeguard action is required to compensate the loss of the exporter. Compensation is required to be made to the exporters as the factors which necessitate the resort to action by the importing State is due to the inadequacy of the latter to compete with the former and against fair trade practice. As per Article XIX 3 (a) retaliatory actions can be initiated if the parties fail to reach an agreement upon consultation as to the adjustments that would remedy the injury caused or threatened to be caused to the domestic industry. If an agreement on the nature of action (compensation) to be resorted to fails, then the State initiating the action (injured State) can take or continue the action (if provisional) and the State against whom the action is taken *viz.* the exporter State shall not later than 90 days after such action is taken and after expiration of 30 days from the date on which a written notice of such action is made to the Contracting Parties, suspend substantially equivalent concessions or other obligations under the Agreement upon approval from the Contracting Parties. The

[11] ibid, p.521.

[12] Article XIX 1 (a) of the GATT, 1947.

[13] GATT/CP/106, 22 October 1951, para. 29-30.

GATT provides for the deviation of the MFN rule by permitting the use of retaliatory action against the State that has taken the safeguard measure.[14] The GATT Panel has time and again resorted to the interpretations given to Article 40 of the Havana Charter, which forms the predecessor of the escape clause.[15]

In a dispute brought before the GATT where an action was taken by Australia against European Communities on motor vehicles and footwear the General Council stated that the settlement reached between States should be constructive involving granting of compensation rather than resorting to retaliatory withdrawal of benefits.[16] The GATT supported the mode of compensatory settlement of the dispute rather than resorting to retaliatory actions but did recognize that the threat of retaliation is a double edged sword as it has the effect of promoting agreement on compensation and also that it would be more effectively used by some of the States than others.

II. 2. 1. Dried Figs case[17]

Article XIX 3 (b) stated that in case of action initiated on provisional basis without prior consultation, the party affected shall also suspend such concessions and obligations as may be necessary to prevent or remedy the injury. The Panel in this case, ruled that the countermeasure, taken against the safeguard action on import of dried figs by US, have to be taken proportional to the action taken by the Importer State.[18]

Other cases that have been dealt by the GATT Panel relates to those taken in relation to the assessment of the Voluntary Export Restraints. Though they were agreements reached by the parties outside the GATT regime of safeguards,

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[14] See Analytical Index of the GATT, p. 527 and Kenneth Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970), p. 104.

[15] See as in Article 40. 3 (a) of the Havana Charter provided for the counteraction clause similar to Article XIX 3 (a) of the GATT 1947 and the Sub Committee D in Committee III at the Havana Conference recognized that the provision provides for the discriminatory application of the retaliatory measures; emphasis added.

[16] Dam, p. 527.

[17] *US* v. *Turkey*, Increase in the United States duty on Dried Figs, decision of 8 November 1952, (sr.7/15 - 1s/28). See Analytical Index of the GATT. Available at http://www.worldtradelaw.net/reports/gattpanels/figduties.pdf .

[18] ibid.

the Panel ruled that the determination of rights and obligations between governments arising under a bilateral agreement is not a matter within the competence of the Contracting Parties and rather, it clearly refers only to the determination of rights and obligations as between the parties to the bilateral agreement. Further held that it is free to determine whether the action under the agreement would or would not conflict with the provisions of the General Agreement.[19]

II. 3. Import Restrictions

Some of the cases that were decided by the Panel were not directly dealing with the violation of the Article XIX. Since the States were reluctant to use the measures due to the stringent conditions that need to be satisfied, they often resorted to restrict the increase in import of particular products under Article XI and Article XIII of the GATT 1947. The grounds on which they have been targeted related to the discriminatory application of quotas etc.

II. 3. 1. EEC-Restrictions on Imports of Apples from Chile[20]

In this case, the Panel was requested to rule on the import restrictions; which were applied by the EEC on imports of apples from Chile. Chile maintained that the EEC protective measure against Chile was discriminatory as it affected exclusively, apples of Chilean origin and was thus inconsistent with the most-favoured-nation treatment prescribed in Article I. Chile indicated that the prohibition against import of apples from Chile imposed by the EEC clearly contravened Article II:1 (a), in that the EEC measure involved treatment less favourable than that provided for in the concession granted by the EEC for apples. Chile held that it had a principal supplying interest on subsequent EEC tariff concessions concerning apples imported during the relevant marketing period as well as a principal supplying interest on other EEC bindings concerning apples imported during other marketing periods. It also argued that the restriction was not valid under Article XI of the GATT as not covered even by the exceptions. Again for the violation of Article XIII the EEC stated that having obtained agreements

[19] Analytical Index of the GATT, p. 534.

[20] *EEC* v. *Chile*, Report of the Panel (L/5047 - 27S/98), adopted on 10 November 1980.

with all other Southern Hemisphere suppliers, it could not simply leave Chile free to export to the EEC all the quantities it desired. In the EEC view, this would have been inequitable and discriminatory for the other suppliers. It also stated that the measures taken were GATT consistent.

The Panel determined that the matter needs consideration under Article XIII and not under Article I. Panel found the EEC measure to be in conformity with Article XIII: 3(b) and not in conformity with the most-favoured-nation type obligations of Article XIII as it did not fulfill the requirements of paragraphs 1 and 2(d) thereof. The Panel also found that the EEC had not conformed to the provisions regarding public notice under: 2(a) and 3 (b). The Panel was of the view that the economic interests of Chile had been adversely affected. The Panel considered that the Contracting Parties should recommend that the EEC and Chile consult bilaterally with a view to arriving at a mutually satisfactory solution.

In a subsequent case the *Japan-Semiconductor*[21] case, the EEC contested that the import restriction taken by Japan was in contravention of Article I, VI, XI and X of the GATT. The Panel decided that the regulation of trade by not permitting the export of those products that are not below a minimum price level, constituted inconsistent restrictions on exportation within the meaning of Article XI.1 of the GATT.

A perusal of the above cases reveals that not many cases were taken by the States as violative of Article XIX of the GATT. The subsequent part of the study looks into the reasons for the minimal usage of the escape clause measure and the subsequent changes that occurred during the GATT period, which changed the entire system of the safeguards system as is applied today.

II. 4. Evolution of Safeguard Measures outside the GATT

The GATT empowered States to use measures like imposition of *quantitative restrictions* (QR), the prohibition of which formed a centerpiece in GATT.[22] It resulted in reduction of imports of goods to particular quantity per year

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[21] *EEC* v. *Japan*, Report of the Panel (L/6309 - 35S/116) adopted on 4 May 1988. Available at http://www.worldtradelaw.net/reports/gattpanels/japansemiconductor.pdf.

[22] Kenneth W. Abbott, "Trade Remedies and Legal Remedies: Antidumping, Safeguards and Dispute Settlement After the Uruguay Round" in Arvind Panagriya, Quibria M.G., Narhari Rao, ed., *The Global Trading System and Developing Asia* (New York: Oxford University Press, 1997), p. 384.

as permitted to the exporter by the importing country and *increasing the tariffs* subject to the rule of non-discrimination set forth in Article I, II and XIII. In the Multilateral Tariff Negotiations the States especially the developing countries limited their commitments to certain goods as a result of which they were free to impose any rate of tariff preferred to protect their domestic producers of goods that were not bound. Goods exempted from commitments included textiles, steel, agricultural products etc. The protective measures in the form of QRs adopted by the importing nations were agreed to by the exporting nation primarily because of the threat and that unilateral actions would result in severe cuts in their trade.[23]

The industrialized or the developed nations like US, European Community, Australia and Canada were the major users of such measures to protect their specific industries. These States witnessed the competition posed against them by the newly industrialized countries (NICs), which began exporting to their markets in high quantities injuring their domestic industries.[24] Liberalization of trade made the States more dependent on QRs, which in fact were prohibited as they restricted or made conditional the right to trade of the exporting State by requiring the injured State to be compensated and empowering them to retaliate for such measures taken against them. The application of quotas were considered as new forms of protection, termed as *neo-protectionism*[25] which developed towards the end of the 1960's and proliferated during the 1980's. They constituted the use of non-tariff interventions on trade, which included recourse to quantitative measures, selectivity, bilateralness and invisibility.[26]

The insistence on application of measures on transparent basis or and the application of measures upon proof of serious injury to the domestic industry proved more costly to be performed States were prompted to resort to in-formal safeguard measures not governed by the GATT. Thus States began rampant use of

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[23] Grey Area Measures, Background Note by the Secretariat, MTN.GNG/NG9/W/6, 16 September, para.10, Available at http://www.worldtradelaw.net/history.ursafeguards/ursafeguards/htm, accessed on 8 August 2005.

[24] Heinz Gert Preusse, "Voluntary Export Restraints-An Effective Means Against a Spread of Neo-Protectionism?", *Journal of World Trade*, vol. 25, no. 2, 1991, p.7.

[25] Preusse, ibid, p.5 and Taeho Bark and Jaime de Melo, "Export Quota Allocations, Export Earnings, and Market Diversification", *The World Bank Economic Review*, vol. 2, no. 3, 1988, p. 341.

[26] ibid , p. 5.

measure during its entry into force subject to the condition that they shall be either expired on 1999 or brought into compliance with the WTO provisions.[72]

b) It provides for the application of the measures when there is an increase in imports absolute *or* relative[73] to the domestic product as different from the GATT Article XIX which requires action to be taken on proof of absolute *and* relative terms and most important of all the application of such measures on a non-discriminatory basis irrespective of the source of origin of the imported product. [74]

c) It provides for the measures to be applied after determining the existence of 'serious injury' to the domestic industry due to increase in imports (casual link), [75] to be done on the basis of an investigation conducted by the respective national authorities. The Agreement defines *serious injury*[76] as significant over all impairment in the position of the domestic industry and *domestic industry*[77] to mean producers as a whole of the like or directly competitive products operating within the territory of a Member or producers who collectively account for a major proportion of the total domestic production of those products.[78] This definition has removed one of the important hurdles in the implementation of the escape clause/safeguard measures under Article XIX.

d) It lays down that action should be based on proper investigation taking into consideration all the relevant factors having a bearing on the industry, for which detailed procedures for investigation for determination of injury is provided. Further it states that in case were the measure to be used is a QR the States shall

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[72] The only country that carried on the application of the earlier measures was the EC against Japan in relation to the import restriction it had in place for the passenger cars, off road vehicles, light trucks mentioned as Exception Referred to in Paragraph 2 of Article 11 in ANNEX to the Agreement on Safeguards.

[73] Article 2.1, ibid.

[74] Article 2.2, ibid.

[75] Article 2.1, ibid.

[76] Article 4. 1 (a), ibid.

[77] Article 4. 1 (b), ibid.

[78] Article 3 and 4, ibid.

not reduce the quantity of imports below the level of a recent period which shall not be less than the last three representative years for which statistics is available.[79] Further permits the selective application of the measures in case the imports from an exporter on proof that there has been an increase in disproportionate percentage in the imports after consultation with the Committee on Safeguards once sufficient reasons are given and the conditions of departure from the fundamental principle are equitable to all suppliers of the concerned product.[80]

e) It permits provisional application of the safeguards measures for a period of 200 days if pursuant to a preliminary determination critical circumstances exist that would cause irreparable loss. It also stipulates that the provisional measures shall be applied only in the form of tariff increases and not a quota as is generally available in the case of application of safeguards measures. The Agreement requires the period of provisional application to be included in the term of use of the measure if on final determination injury is found and to return the duty so collected if the final determination shows no proof of serious injury.[81] In comparison to the escape clause under GATT, the Agreement on Safeguards has expanded the ambit of application of provisional measures.

f) It has specifically mentioned that the State taking the action or intending to extend the action has to provide adequate compensation to the exporter States by maintaining a substantially equivalent level of concession and other obligations, after consultation that existed under the GATT. The exporter country is permitted to retaliate by notifying the Council of Trade in Goods. The exporter under such circumstances is prevented from retaliatory suspension for the first three years that a measure is in effect.[82] The GATT laid no such restrictions.

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[79] Article 5. 2 (a), ibid.

[80] Article 5. 2 (b), ibid. This provision has been incorporated on the basis of the proposals made by the developed countries as has been discussed above.

[81] Article 6, ibid.

[82] Article 8, ibid.

g) It requires the *periodic review* of the applied measures and requires them to be progressively liberalized[83] in relation to the rate at which the industry adjusts and confers a right on the exporting member to claim compensation for actions and to retaliate against actions, if taken. The Agreement has limited the right to retaliate within the first three years that a safeguard measure is in effect only when the action taken is due to absolute increase in imports[84] as compared to the GATT, which had no rule for the application of retaliation.

h) It also provides for Special and Differential Treatment by exempting the imports of the developing countries if their imports constituted less than 3 per cent of share and if the developing country's share is less than 3 per cent unless the imports from all of them collectively accounted for more than 9 per cent of total imports.[85] The Agreement establishes procedure for notification, consultation and surveillance duties of the Committee on Safeguards established under the Council for Trade in Goods, which monitor the rule-based application of these measures.[86] The Agreement finally provides for the option for dispute settlement in accordance with Article XXII and XXIII of GATT 1994, which is empowered to interpret the Uruguay Round Agreements to resolve the disputes between the trading parties.[87]

With the detailed rules in place the safeguard measures are the only action permitted against fair competition the center point being that its application facilitate temporary market adjustment which is the most distinguishing factor as compared to other remedies available against increased imports. As compared to other measures (antidumping or countervailing measure) they are subject to non-discriminatory application and measures taken are by way of imposing duties higher than the bound tariff rates or through quantitative restriction of imports whilst additional duties are charged for the former. The price of the product in the domestic market is not a determinant factor.

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[83] Article 7. 4, ibid.

[84] Article 8. 3, ibid.

[85] Article 9, ibid.

[86] Article 12 and 13, ibid.

[87] Article 14, ibid.

measures outside the purview of the multilateral regulations termed as 'grey area measures' like (i) voluntary export restraints (VERs) or voluntary restraint arrangements (VRAs) (ii) orderly market arrangements (OMA) constituting more of intergovernmental arrangements, which was later legalized by the adoption of the US Trade Act, 1974. (iii) export moderation, (iv) export or import price monitoring or surveillance, (v) compulsory import cartels, (vi) discretionary export or import licensing schemes etc.

II. 4. 1. Voluntary Export Restraints (VERs)

The VERs involved the application of quotas by the government of the exporting country on the request by the importing country and was created by agreement between governments or industrial representatives directed to control the flow of particular goods for a limited period and are directed at the individual countries and individual producers within these countries. The more permanent and the less transparent nature of the measures made States to use them. They were resorted by the States due to the less transparency involved and the non-payment of compensation and of retaliation since they were entered into with the States' consent and above all such measures were not time bound. The VERs differ from the OMAs, as under the former, the importing country does not apply restrictions to enforce the agreement rather it relies on the exporting country to control its exports. These measures were termed as the 'cancer in the trading system' as they promoted the use of trade barriers, which were sought to be obliviated by the Member States to the trading system.[27] These measures were mostly used under Article XIX or Article VI of the GATT. Resort to such measures undermined the escape clause as the States used them as temporary measures circumventing the norms laid under Article XIX of the GATT. The resort to retaliation under this practice was minimal as the exporting State, majorly the developing States or the newly industrialized countries never wanted to loose the market in the developed States (importing State), which would remove this VER once their industry became competitive.

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[27] D. Greenway, and Whally, Negotiations on Tariff and Non-Tariff Liberalization in the Uruguay Round as cited in Heinz Gert Preusse, "Voluntary Export Restraints – An Effective Means Against a Spread of Neo-Protectionism?", *Journal of World Trade*, vol. 25, no. 2, 1991, p. 5.

The VERs provided States an opportunity to negotiate bilaterally as compared to the QR's, which were unilaterally imposed through national legislation. Artificial reduction in trade gave the States monopoly (market access) over the market allowing them to generate economic rent (as reduction in volume of imports raise the price in the domestic market, thereby creating a rent benefiting the importer if he succeeds in maintaining a higher price, or both the importer and exporter, from the other country if a medium price can be arranged) as far as they could succeed in raising the world prices. Industries in the importing country were relieved from the pressure of foreign competition and thus the importing government could control the adverse public opinion and the protectionist groups without possibly facing the disapproval from within and or retaliation from other trading partners as they would be affected by the diversion of the exports into their territory. VERs thus allowed States to conceal the breach of obligations, delay circulation of information to avoid immediate third-party protests etc. and most important of all it could be used bilaterally instead of the multilateral non-discriminatory application as required for the formal safeguard measures.

Instances[28] where VER were used by European Community (EC) and US include in case of industries like automobiles, steel, electronic appliances, numerically controlled machine tools, textiles, agriculture and food products etc.[29] During the 1980's the VERs initiated by the EC and the US constituted around 70% of the trade measures. The use of VER against import of cars from Japan during 1970s by the US was primarily to cover for 4 years from 1981-84 and was extended annually. The EC also practiced the same and continued renewal of the measures upto 1991. The other industry, which was subject to protection by the

[28] The United States President upon determination of serious injury by the United States International Trade Commission (USITC), in 1975 negotiated an OMA with Japan (principal supplier) for restricting its import of steel and series of quotas for Sweden, Canada and other groups of the European Communities and for Korea, Finland, Argentina, Mexico (small suppliers), this measure was well outside the GATT. In 1976 the President entered into an OMA (which expired in 1982) with Taiwan and Korea the most disruptive suppliers of Footwear into the US (action within the GATT). The same year Japan was subjected to yet another OMA for import of television when the USITC recommended for imposing restrictions. In 1979 US entered into a VER/VRA with Japan for restricting the import of automobiles (small fuel efficient cars), in spite of the dismissal of the complaint by the USITC on the ground of consumer preference and fuel price.

[29] Drafting History of Article XIX and its Place in GATT, MTN.GNG/NG9/W/7, 16 September 1987, p. 3.

US Government, was the steel industry.[30] Protection was intended to be for a period of 5 years from 1984-89 but was renewed upto recently. The measures taken against the major exporters like the EC and Japan started as early as 1960's and the measures were introduced as Trigger-Price System before new VERs were negotiated. The increase in imports from suppliers in the developing States in fact could not be effective with the actions against the traditional exporters. The protection of the textile sector was another important area that was subject to greater protection by the developed States. This also turned out to be for a long period after the first negotiated Short Term-Agreement on Cotton Textiles in 1961, which was reformulated under the Long Term Agreement named the Multi- Fibre Agreement in 1986. In the case of the latter the protection continued even during the WTO period and its effect was that it kept the textiles sector out of the GATT system.[31]

The use of the VERs though have been termed as temporary and making possible immediate action for critical situations, States practice show that their use has been disadvantageous to the importing State. The reason for it is that include that the discriminatory measures causes a forced redistribution of income or chances to generate income. The measures have burdened other States by making them include the imports that have been restricted by the Arrangements. Practice also shows that the certain corrective measures that permitted States to penetrate into still unprotected markets and by shifting new higher quality products were resorted to by the States. Actions of these sorts permitted the unrestricted exporters to penetrate in to the restricted markets. This led the protection granted by the Arrangements to be of limited time and ineffective further triggering increased protection from the government. These arrangements were thus deemed to provoke counter reactions and directing towards increased protection, distorting

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[30] The United States have made use of the escape clause protection during the GATT period and also continued the same during the time of its successor, WTO, which has recently been decided as violative of the WTO rules.

[31] The textile sector has been one of the major departures from the GATT principles of non-discrimination. But with the phasing out of the Agreement in January 1st 2005 the textile system is now subject to the WTO rules. For further details see Heinz Gert Preusse, "Voluntary Export Restraints – An Effective Means Against a Spread of Neo-Protectionism?", *Journal of World Trade*, vol.25, no.2, 1991, pp. 5-17. For a detailed explanation on the use of such measures by the business firms see Michel M. Kostecki, "Marketing Strategies and Voluntary Export Restraints", *Journal of World Trade*, vol.25, no.2, 1991, pp. 87-98.

international allocation of resources by extending the measures to more goods rendering long-term protection and adjustment problems, putting in place the snowball effect.[32]

While analyzing the State practice as to the use of safeguard measures, it is pertinent that the States utilized measures outside the GATT regime to control the adverse effects of imports on their markets. The reason leveled against the States that used these measures was that they possessed a political system wherein the rights of the individuals to contest actions of their national government were well recognized. Though this practice shows the efficient participation of the citizens in the affairs of a State, it certainly acted as a barrier to liberalization of trade. The effect was that every measure to be undertaken by them was scrutinized by the nationals and if found to be prejudicial to their interests, they were bound to be opposed by them.[33] This prevented the Governments from allowing opening up of markets and even if permitted it was subjected to unconditional protection guaranteed to the domestic producers.

Thus entering into bilateral agreements or arrangements were considered convenient by the governments as it permitted them to act in secrecy devoid of public intervention as compared to their participation in the process of safeguard initiation. For example in the case of US safeguard system, the President is required to impose a safeguard measure only upon satisfaction that action is in consonance with public interest.[34] They further guaranteed some direct compensation to the exporters as they could sell their limited products for higher prices and this surplus acted as compensation, which need be provided to the

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[32] This snowball effect means the series of protectionist measures that States initiated in order to protect the industry following the 1st action taken under the voluntary restraint arrangement. The reason is that the action would provide either temporary remedy to the initial parties and or even give rise to problems form new States (interest holders) against whom action would have to be initiated as a result of the trade diversion caused to their markets and yet again to remedy the new States that would initiate similar actions in retaliation to the loss in their world trade share. Some scholars have feared the actions as leading to trade wars and have also termed them as having the 'domino' effect, intending multiplying in nature.

[33] Alan Wm. Wolff, "Need for New GATT Rules to Govern Safeguard Actions" in William R. Cline, ed., *Trade Policy in the 1990's* (Washington .D.C: MIT Press, 1983), p. 375.

[34] The WTO Agreement on Safeguards has incorporated this clause thus ensuring the imposition of safeguard measures only upon the proof of its impact on the public. See Article 3.1 of the Agreement on Safeguards. If the measures do not require action under the Agreement then the parties are required to conduct investigation take under different heads of trade remedies, if they satisfy the requirements.

particular State (even under the GATT rules) with which the importer has a VER as compared to the non-discriminatory application of safeguard measures.

Despite having recourse to these methods, States started resorting to other remedies available under GATT *viz.* antidumping measures and countervailing duties, in place of safeguard measures. Antidumping gained importance as it required the fulfillment of lesser injury as a threshold for initiation of a measure to protect the domestic industry. An action for antidumping could be initiated on the basis of material injury caused to the domestic industry in terms of products imported in increased quantities for less-than fair price or prices lower than the market price for the product in the importing State.[35] It was preferred to the safeguard measures as it lacked transparency and provided its application on *selectivity* as it permitted action against the specific State engaged in the unfair practice[36] unlike the safeguard measures, which were to be applied on MFN basis. Other measures that made possible their use were the absence of the need to provide compensation, absence of restriction in time as to application of the measure etc. Thus while analyzing the State practice it is evident that the GATT Article XIX had certain inbuilt deficiencies due to which the provision was termed 'extraordinarily oblique' by an eminent scholar.[37]

The replacing of these measures by the end of the twentieth century became the fundamental task of the future foreign economic policy and an essential pre-condition for further liberalization of world trade. Thus with the usage of selectivity and the requirement for the payment of compensation and the threat of retaliation coupled with the lack of any governing body for the initiation and monitoring of a safeguard measure, the escape clause was far from a success as a trade remedy.[38]

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[35] Article VI of the GATT 1994 and the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[36] Article 2 of the Antidumping Agreement explains dumping to occur when a product is being 'introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting State'.

[37] John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs Merill, 1969), p. 557.

[38] The VERs and other measures outside GATT safeguard rules were used in place of formal safeguards measures from fear of objections against liberalization form the consumers, as the safeguard measures tend to protect only the producers. They wanted to avoid the negative impact by the consumers, as they are aware that any across-the-border measure, tariff or non-tariff would

II. 5. Need for new rules

As a result of the drawbacks, which the States faced due to the discriminatory and illegal application of the escape clause the Member States to the multilateral trading system demanded certain changes that would ensure their rule-based application. Several States, before the GATT Council at the various levels of the negotiations, stated that the application of the measures should be reformed with proper rules to avoid the great amount of protection provided to the industries of the developed States against the products from the developing States. Discussions were raised regarding this matter in the GATT meetings before the Council and States suggested amendments that would remove the existing deficiencies.

During the GATT discussion, the States submitted a report mentioning the nature of implementation of the measures that were outside the GATT regime.[39] The States found that the Article XIX actions notified to the GATT up to 1987 were 134 in number and the developed countries took the actions majorly. These included actions taken by Australia, which invoked the greatest number of Article XIX actions (a total of 38 actions with 5 still in force), followed by the United States (27 actions with 2 in force) and Canada (22 actions with 2 in force). Fourteen actions were taken in the name of the European Communities, and its Member States took a total of 12 actions. There are 9 actions by the Community or its Member States, which were in force during1987.[40]

Out of the 134 actions[41] notified, only 7 actions were taken by developing countries, 4 of which are still in force during 1987. Further the products that were frequently subjected to by the measures included the Agriculture and food products with the greatest number of actions being taken (35 actions). The next

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affect their interests. VERs helped the government to escape from public review at the national level and also from the multilateral level, as there was no body to keep a check on the actions taken by the States. For example the EC in order to protect its automobile industry against the imports from Japan entered into VERs first and then ensured every calendar quarter that the share of imports does not exceed the agreed limit under the VER.

[39] Inventory of Article XIX Actions and other Measures which Appear to Serve the Same Purpose, Background Note by the Secretariat, MTN.GNG/NG9/W/2/Rev.1, 17 August 1987.

[40] For a detailed list of the safeguards actions taken see ANNEX III of the Drafting History of Article XIX and Its Place in GATT, MTN.GNG/NG9/W/7, 16 September 1987, p. 7-37.

[41] See Table 1 of ANNEX I for the countries that used the safeguards measures.

popular item subject to safeguards protection was textiles and clothing with 26 actions from 1986 -1989. Together they constitute almost half of all the actions taken. Iron and steel (12 actions), electrical and electronic products (9 actions) and footwear (9 actions) also top the list. The years 1970-1979 represents the period when the greatest numbers (47) of actions were invoked.[42] The measures used by the States related to the tariff or non-tariff measures and at times included both.[43]

The States also evidenced a few cases of compensation that were provided, pursuant to the imposition of safeguard measures to the exporting States.[44] The cases were non-payment of compensation was treated with retaliation were also notified by the States and consisted of nine cases. The data provided reveals that out of the 20 cases of compensation paid or offered and the 13 cases of retaliation; only 1 case in each category involved a developing country. From the above information it is very clear that the developed countries were the only users with the developing countries faintly visible in the picture. The developed countries were also in the forefront in relation to the claim for compensation and use of retaliatory actions. [45]

The developments during the pre and post Tokyo Round of trade negotiations are of importance to the safeguards provision under the GATT. It was the developments during this period that were later followed and succeeded in the

[42] The period 1960-1969 has 35 actions and from the period 1980 has 33 actions. It is interesting to note that Australia, for instance, invoked 17 and 15 actions during the periods 1970-1979 and 1960-1969 respectively, but only 2 before 1960 and 4 starting from 1980. The pattern for the United States is different. It invoked 11 actions between 1950 -1959 and 9 actions between 1970-1979, with relatively few in 1960-1969 and the current period. The pattern for Canada again is different. It invoked 13 actions during 1970-1979 and very few in the other periods. The European Communities has invoked the greatest number of Article XIX actions during the current period (11 actions). Actions before 1979 were notified in the name of individual Member States.

[43] The actions taken shows that exactly half (67 actions) of them were tariff measures. During the period 1950-1959, tariff measures were predominant with almost 80 per cent of the actions take in that form. The subsequent period up to 1970-1979 was replete with the use of non-tariff measures and constituted the majority 70 per cent of all actions invoked. The share of tariff and non-tariff measures is about equal during the 1980's. Twenty-six per cent of the actions lasted between 1 to 2 years, and 30 per cent lasted for 3 to 5 years. Twenty-one per cent of the measures lasted for over 5 years. See n. 41, para. 18.

[44] There were 20 cases where compensations were paid or offered, usually when the actions took the form of a tariff increase. The distribution of such cases over the period of time is extremely uneven. There were 10 such cases during 1950-1959, 8 cases in 1960-1969 and only 1 case each in 1970-1979 and in 1980 to present. The United States is by far the country, which paid or offered compensations for the greatest number of occasions (9 times), followed by Greece (3 times), Canada and Australia (twice each). See n. 42, Table 1 of ANNEX I.

[45] Two cases of retaliatory measures were taken or proposed during the period 1950-1959, 3 cases in 1960-1969, but 4 cases respectively in 1970-1979. See n. 42. Table 1of ANNEX I.

completion of the new safeguards law under the WTO. In 1953 when Japan negotiated its accession to the GATT, Member States tired to bring in selectivity in the safeguards clause.[46] This could not materialize and Japan acceded to the GATT while concluding bilateral agreements containing special safeguard clauses. In the year 1959 substantial study was done on the effects of market disruption. The study revealed a number of grey area measures in existence against the developing countries especially Japan and others in relation to the textiles sector.[47] Though the Contracting Parties made ardent efforts they were not of any help to control the measures outside GATT. This in turn led to the conclusion of the discriminatory application of safeguard measures under the Short-Term Arrangement Regarding International Trade in Cotton Textiles (STA) 1961. The STA was extended to a Long Term Agreement known as the Multifibre Agreement (MFA).[48] The MFA was later extended upto 1991, which later integrated the textiles sector into the world trading system after the elimination of all the quotas under the Agreement on Textiles and Clothing. The safeguards measures available under this Agreement have been dealt with subsequently in this Chapter.

II. 5. 1. Tokyo Round and Beyond

In the 1972 Tokyo Round, States aimed to "include an examination of the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX..." among others. The developing States proposed for differential treatment in the field of safeguards as they limited

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[46] Analytical Index of the GATT, p. 534.

[47] The elements of market disruption that were identified to the GATT include -
(i) a sharp and substantial increase or potential increase of imports of particular products from particular
sources;
(ii) these products are offered at prices which are substantially below those prevailing for similar goods of
comparable quality in the market of the importing country;
(iii) there is serious damage of domestic producers or threat thereof;
(iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices.
See Work Already Undertaken in the GATT on Safeguards, MTN.GNG/NG9/W/1, 7 April 1987, para. 7. Available at http://www.worldtradelaw.net/history/ursafeguards/ursafeguards/htm accessed on 25 August 2005.

[48] Article 3 of the Agreement permits members to impose discriminatory quantitative restrictions when they consider that imports cause or threaten to cause "market disruption' as defined by Annex A of the Agreement.

bindings. The developing countries also proposed for the non-discriminate application of the safeguards measures as opposed to some of the developed countries that argued for the selective application of the measures. The developing States insisted on the compliance of the measures with Article II and XIII of the GATT as they were sure that the more sophisticated measures would again be used against them as done in case of the textiles sector.

II. 5. 2. Committee on Safeguards

The failure of the negotiations during the Tokyo Round made the Director General to establish a Committee for further discussion on safeguards, since the area was of utmost importance. The function of the Committee included continuation of the discussions and negotiations, with the aim of elaborating supplementary rules and procedures regarding the application of Article XIX of the GATT, in order to provide greater uniformity and certainty the implementation of this provisions. In 1981 the Committee adopted a decision, which held that the application of Article XIX of GATT would continue and that all actions that are taken shall be notified to the Contracting Parties. In the next Ministerial which was decided to be held by the decision of November 1981, the Members found the increased use of grey area measures covering important sectors like steel, automobile, electronic equipment, the idea of introducing the notion of selectivity into safeguards emerged again. In June 1982 the concept of consensual selectivity was discussed in case of exceptional and unusual circumstances based on prior agreement between the Parties.

In November 1982 the Contracting Parties undertook, individually and jointly to bring into effect expeditiously a comprehensive understanding on safeguards to be based on the principles of the General Agreement. The elements were subject to numerous consultations and a study of the submissions made by the developed and the developing countries can be summed up as hereunder. During all the rounds of consultations and discussions both the developed and the developing States agreed that the safeguard measures should be used on a temporary basis respecting the purpose behind which it was included in the GATT 1947. The elements discussed during the 1982 Meeting were used for the Uruguay Round of trade negotiations that began in 1986. Member States to the GATT made several submissions for the restructuring of the safeguards clause.

The Nordic Countries highlighted that for the States to make use of the safeguard measures it is necessary to enter into binding commitments, as required by Article XIX 1 (a) of the GATT 1947. This was proposed as they realized that making more commitments would alone permit them to withdraw the obligations once entered into along with the satisfaction of the causal link of increased imports establishing injury.[49]

II. 5. 3. Elements of Safeguards[50]

Mentioned below are suggestions put forward by the developed, developing and the least developed countries. While analyzing the proposals given by the States it is evident that as all of them preferred the rules to be changed, the developed countries in particular the European countries and the United States stressed on the inclusion of provisions that permit the use of actions on selective basis against the imports from some of the supplier countries that contribute more to the injury along with the other suggestions of making the rules more definite. The Chairman of the Council was also of the view that the grey area measures outside the General Agreement have to be terminated and brought under the GATT regime. One of the important changes proposed in the interests of the developing countries related to their special and differential treatment (SDT). This was to be achieved by exempting the exports from those developing countries that were new entrants to trade and small suppliers as compared to the bigger States

[49] MTN.GNG/NG9/W/16, 30 May 1988.

[50] All the countries (developed, developing and the least developed countries) submitted proposals for the modification of the safeguards rules. The least developed countries MTN.GNG/W/14/Rev.1, Communication from Australia, Hong Kong, Korea, New Zealand and Singapore, MTN.GNG/NG9/W/8, 5 October 1987; European Communities (EC), MTN.GNG/NG9/W/32, 29 November 1990 and in its communication MTN.GNG/NG9/W/30, 21 September 1990, EC stressed on the interim application of the grey area measures and stated that it would be unrealistic to rule out the possibility of taking selective action which would be accompanied by adequate guarantees for exporting countries. Such action would be justified when a sudden increase in imports from a limited number of suppliers was causing serious injury. The Community put forward the view that it would be in the objective interest of both importing and exporting countries to agree on a specific remedy designed especially for the situation. The United States MTN.GNG/NG9/W/12, 9 December 1987, procedure for determining injury MTN.GNG/NG9/W/13, 3 March 1988, it also stressed on the selective application of measures MTN.GNG/NG9/W/31, 31 October 1990. MTN.GNG/NG9/W/29, 31 January 1990; Brazil, MTN.GNG/NG9/W/3, 25 May 1987 and MTN.GNG/NG9/W/5, 2 July 1987; COMMUNICATION FROM CHINA MTN.GNG/NG9/W/14, 21 March 1988; Egypt, MTN.GNG/NG9/W/9, 5 October 1987; India , MTN.GNG/NG9/W/15, 21 March 1988 and MTN.GNG/NG9/W/22, 14 November 1988, Japan MTN.GNG/NG9/W/11, 13 October 1987; SWIS MTN.GNG/NG9/W/10, 5 October 1987.

that practiced the use of safeguards measures against the products originating from the former.[51]

II. 5. 3. a. Transparency

There has been a general recognition that maximum transparency should be maintained and that all safeguard actions taken under Article XIX as well as grey-area measures should be reported or notified to GATT. However, isn respect of the grey-area measures, a question has been raised as to the purpose and usefulness of their being notified, unless it was agreed that they would be subjected to multilateral surveillance.[52] On the other hand, concerns were expressed that agreement on greater transparency with respect to such measures might result in the legitimization of such measures. Some suggestions were made to bring domestic procedures in the form of public notices and hearings on investigations on proposals to take safeguard actions, in order to facilitate transparency. Some delegations, however, felt that it was difficult to unify domestic procedures because these reflected different political and constitutional systems and that public hearing might increase political pressure on governments for actions.

II. 5. 3. b. Coverage

The term "coverage" in the discussions on safeguards includes three things:

(a) *Nature of a safeguard action*

Some delegations suggested that, in the normal course of events, safeguards should take the form of tariffs rather than QR. The reason stated was that the tariff measures were not always effective in certain instances.

(b) *Product coverage*

It was suggested by the majority that all products must be made subject to the safeguards measures.[53] This was crucial for the developing countries since they still had several of their products out of the tariff Schedules. Other delegations had pointed out that special problems might present themselves in the agricultural sector since most of the developing States had not bound it and that sector was

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[51] Such suggestions came from Brazil and other countries whose individual proposals were integrated in the Synopsis of Proposals, MTN.GNG/NG9/W/21, 31 October 1988, pp. 13-14.

[52] Communication by the Nordic countries MTN.GNG/NG9/W/16, 30 May 1988.

[53] ibid.

outside the GATT system. Concern was also expressed about the possibility of circumventing the provisions of any agreement on safeguards through over-categorization of products.

(c) *Geographic coverage*

The geographic coverage of safeguard measures, or the question of whether Article XIX measures should continue to be applied on a non-discriminatory basis or could be applied on a selective basis and, if so, under what conditions, has been the most difficult issue in past negotiations and discussions on safeguards. The developed States especially the EC and US argued for the selective application of safeguard measures. Their arguments were supported on the ground that the selective action should be taken only if prior authorization were obtained and that a surveillance body composed of independent individuals who should carry out a post-hoc examination of the conformity of particular selective safeguard actions with the rules; and that a post hoc review be carried out by a committee open to all contracting parties, but none of these found general support.[54]

One of the main arguments put forth by the preachers of the selective action was that this would allow countries to deal with problems created by a few exporting countries in a way which would cause a minimum disturbance of trade. This especially would result in the protection of their interests more than those of the developing States. Another argument was regarding the need to bring "grey-area" measures within the system.

Inspite of the demand by the major players for selectivity, the developing States insisted on the use of MFN principle as basic to the GATT multilateral system. Many small and medium trading countries, in particular, considered that it was the MFN application of Article XIX which protected their interests since a government taking such an action would come under pressure to remove it from all countries affected. They stressed that to legalize selective action would not simply be to regularize the existing situation, pointing out that only a relatively small number of governments had used "grey-area" measures but that other governments would not hesitate to use them if they were permitted to do so by the

[54] The US stated that 'in exceptional circumstances, an importing country may apply a safeguard measure selectively against imports from a limited number of sources only if these countries agree to such a measure. United States' Thoughts on Safeguards, MTN.GNG/NG9/W/12, 9 December 1987.

GATT. They also mentioned that selective actions would be contrary to the basic principles of the General Agreement but would also impair their bargaining position by removing the option which they have at the moment of relying on their GATT rights to resist requests for restraints.

II. 5. 3. c. Objective criteria for action[55]

All the States recognized that safeguard actions should only be taken if the criteria laid down in Article XIX were met, and that these criteria, especially the terms "serious injury" and "threat of serious injury" should be clarified. While some delegations maintained that these terms should be defined in terms of quantifiable criteria, many suggested that a checklist of factors might be drawn up which would be used when determining whether serious injury to producers was caused or threatened. Some of the criteria's that were suggested by the States to determine injury included output, inventories, market share, profits, domestic prices, exports, domestic employment and wages, utilization of productive capacity, productivity, and investment. On the other hand, competition among domestic producers, contraction in demand due to substitution by other products or to changes in consumer tastes, decline in domestic consumption or production, shifts in technology, structural deficiencies or loss of competitive advantage *etc.*, have been suggested as factors not to be attributed to imports and therefore should not feature in the determination of injury. It was also suggested that the notion of "threat of injury" should be abolished, as injury had to be tangible and verifiable. Furthermore, it was required to be demonstrated that increase in imports was the major cause, not a cause among others, of injury. In relation to the decision as to who should decide whether the criteria's are met, some of them gave the responsibility to the importing State and some others supported the concept of an international surveillance mechanism.[56]

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[55] India stated in its proposal the need for (i) establishing non-discrimination and temporariness as the key principles which should govern a future comprehensive understanding on safeguards; and (ii) declaring grey-area measures with selective application as measures proscribed by GATT, Communication by India, MTN.GNG/NG9/W/22, 14 November 1988.

United States submitted that departure from this principle will not only make recourse to safeguard action more frequent, but also the weaker nations more vulnerable, MTN.GNG/NG9/W/31, 31 October 1990, Additional United States' Proposals On Safeguards, (MTN.GNG/NG9/W/25/Rev.3).

[56] Elements of an Agreement on Safeguards, Communication from Australia, Hong Kong, Korea, New Zealand and Singapore, MTN.GNG/NG9/W/4, 25 May 1987, p.2.

II. 5. 3. d. Temporary Nature[57]

The developing countries suggested a time limit of no more than one year without, in principle, any extension, on the grounds that safeguard measures were in essence temporary relief to industries and that it was essential to keep to the minimum the adverse effects of these measures to exporting countries. Some developed countries, while agreeing that all emergency actions should be of a truly short-term nature, indicated that what was short-term depended on the nature of the trade in question and the state of world markets for particular products. Durations of eighteen months, two years and four years have been suggested by various delegations.

II. 5. 3. d. i. Degressivity[58]

Most of the States argued for degressivity, the reduction in the degree of the measure once the industry for the protection of which safeguard measures whether it was in the form of tariffs or QRs were invoked show signs of adjustment or recovering competition. Suggestions were also made for the surveillance and review mechanism to be implemented for the progressive liberalization of the measures.

[57] Japan submitted that the reintroduction of a safeguard measure shall be prohibited during a certain period of time after termination of the said measure. Japan's basic view with regard to compensations and retaliation was that they should be maintained with a view to preventing the abuse of and to ensuring deterrence against safeguard measures, Proposal On Safeguards, MTN.GNG/NG9/W/11, para. 7.

[58] Communication from Switzerland, MTN.GNG/NG9/W/10, 5 October 1987.

II. 5. 3. d. ii. Structural Adjustment[59]

It was recognized that safeguard measures should not be used as a substitute for structural adjustment to changed conditions of fair competition and shifts in comparative advantage and that countries applying safeguard actions should take appropriate policy measures to encourage the adjustment of domestic producers to import competition. Some delegations have suggested that safeguard measures could not be an emergency action unless accompanied by adjustment programmes designed to ensure that the measures were phased out. Others considered that it was not appropriate to make the existence of domestic adjustment programmes a pre-condition for action. Some delegations considered that the best way of ensuring that structural adjustment took place was simply to set a firm date for the termination of safeguard measures and to allow market forces to operate.

II. 5. 3. e. Compensation and Retaliation[60]

There has been a convergence of views that the right of a contracting party to the General Agreement to suspend substantially equivalent concessions or other obligations under Article XIX:3(a) should be maintained. It has also been recognized that the right to retaliate could promote agreement on compensation, and that the threat of retaliation could have a deterrent effect against the application of safeguard actions. On the other hand, there has been recognition that retaliatory action had trade disruptive effects and that therefore, whenever possible, constructive settlement should be reached involving compensation rather than the retaliatory withdrawal of benefits. Developing countries believed that the right to retaliate could be used more effectively by some contracting parties than

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[59] The Swiss delegation pointed out an important aspect of the safeguard measures namely the structural difficulties. When seeking to draw up suitable rules relating to action recognized *de lege ferenda* by GATT in case of structural difficulty, it is first of all necessary to ask whether trade measures (restrictions at the frontier, whether on imports by the importing country or on exports by the exporting country) are economically justified., This discipline should include certain elements, which have already been raised (for example, in the document of the Pacific countries, MTN.GNG/NG9/W/4, ibid. para. 6.

[60] Japan to place priority on compensation rather than on retaliation though the GATT provision does not necessarily require for it. Proposal on Safeguards, MTN.GNG/NG9/W/11, 13 October 1987, Delegation of Japan. Also Communication From Australia, Hong Kong, Korea, New Zealand and Singapore, MTN.GNG/NG9/W/8, 5 October 1987, para.21-22; Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat, MTN.GNG/NG9/W/21, 31 October 1988, p.10.

others, and that the special situation of developing countries should therefore be taken into account in this context.

II. 5. 3. f. Notification and Consultation[61]

Some delegations believed that the notification and consultation requirements in Article XIX were adequate, so long as the procedures laid down were followed strictly. Others believed that it was necessary to strengthen the mechanisms for notification and consultation to ensure uniformity in their application. The areas where improvements could be made included some specification of the contents of the notification, the time element for consultation with interested parties in the implementation and extension of a safeguard measure, as well as the conditions that had to be fulfilled in "critical circumstances".[62]

II. 5. 3. g. Multilateral Surveillance and Dispute Settlement[63]

Delegations were, in general, favourably inclined towards the introduction of some form of multilateral surveillance. Most preferred the establishment of a committee composed of representatives of all contracting parties to supervise the operation of an agreement. Various tasks and powers of a surveillance body, such as the assessment of injury, consultation, review of time-limits, examination of adjustment assistance measures, assessment of compensation, balance of obligations, dispute settlement, *etc.*, have been mentioned. It has been recognized that the right of a party to avail itself of the procedures of Articles XXII and XXIII of GATT should not be impaired.

European Communities' submission stated that as an essential component in the process of trade liberalization, safeguard disciplines have a decisive impact

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[61] Japan in relation to the Notification and Consultations mentioned that all safeguard measures shall be notified to the Contracting Parties particular days prior to the implementation. Proposal on Safeguards, 13 October 1987, Delegation of Japan. Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat, MTN.GNG/NG9/W/21, 31 October 1988, p. 11.

[62] See n. 52, at p. 39.

[63] Japan proposed that a subcommittee in charge of dispute settlement should be established under the Safeguard Committee. Dispute settlement should be basically sought in this subcommittee, which, however, shall not prejudice the rights of contracting parties to seek solution under Article XXII and XXIII (as in the case of Anti-dumping Code), ibid. Negotiating Group on Safeguards, Synopsis of Proposals, Note by the Secretariat, MTN.GNG/NG9/W/21, 31 October 1988, p. 12.

on the establishment of a secure framework for the implementation of commitments on market liberalization. Conversely, safeguard disciplines cannot operate effectively unless participants are willing to commit themselves to trade liberalization compatible with their level of development.[64] The US suggested in 23 February 1988, from the office of the United States Trade Representative in Geneva that the United States has developed over time, a set of transparent, objective procedures for making injury determinations through an independent, impartial investigatory process consistent with Article XIX of the GATT. These procedures as were set out in Section 201 of the United States Trade Act of 1974, as amended.[65] The draft of the Agreement on Safeguards included the criteria's for the determination of injury and other relevant definitions crucial for the determination of serious injury as proposed by America.

The Tokyo Round of Negotiations ended with a draft and the establishment of a Committee that would discuss the matters relating to the conclusion of an agreement. The Round however failed on the issue of selective application of the safeguards measures. In 1990 the Chairman of the Council no part of the draft of the Agreement was necessarily accepted until the whole text was accepted, and that participants were free to present new suggestions and amendments.[66] After agreement on the content of the draft, the Chair stated that the question of adoption of the changes in the form of a formal agreement, a protocol of interpretation or a decision of the Contracting Parties, was to be decided at a later stage. Finally the draft was accepted as an independent agreement.

II. 6. SAFEGUARD MEASURES AND THE WTO

The nations wanting to regulate measures outside the GATT system at the multilateral level, decided to include issues relating to market access at the Uruguay Round of Multilateral Trade Negotiations to establish a separate set of rules governing the use and misuse of safeguard measures. Efforts were made during the Tokyo Round Negotiations to establish rules governing safeguards but

[64] MTN.GNG/NG9/W/24/Rev.1*, 26 June 1989.

[65] Submission by the United States to the Negotiating Group on Safeguards MTN.GNG/NG9/W/13 3 March 1988 United States Procedures for Determining Injury in Article XIX Cases. p. 1.

[66] Note by the Secretariat, MTN.GNG/NG9/21, 26 October 1990.

difference in opinion as to application of measures on selective basis and the surveillance measures among others as mentioned above could not be brought to fruition.

The successful completion of the Uruguay Round significantly strengthened the Multilateral Trading Systems' achievement in addressing the areas and sectors (antidumping, agriculture, clothing, safeguards, subsidies, textiles) that had resulted in undermining the system. It made market access more secure, transparent and predictable by allowing developing countries to benefit from it and, foreign direct investment brought significant tariff cuts and increased the coverage of tariff bindings, and tightened the disciplines on non-tariff barriers all by maintaining the momentum for trade liberalization. As rightly opined by David Palmeter the degree of liberalization achieved in the Uruguay Round will necessitate the pressure for trade remedies, foremost among them antidumping and to a lesser extent safeguards.[67] The reason for such a statement stems from the fact that the tariff commitments play a crucial role in the process of trade liberalization.

The Agreement on Safeguards (AOS) came into existence along with the Agreement on Trade in Goods through Annexure-I to the Agreement Establishing the World Trade Organization (WTO). It seeks to abolish the use of measures outside the legal regime by establishing detailed rules for the application of GATT Article XIX. It brought greater legalism and a stricter form of trade liberalization as it was no surprise that the safeguards measures had become more difficult and costly to invoke, and far less of an open-ended invitation to protect vulnerable national economic sectors.

The new system made available to the States several remedies to choose from in order to deal with particular situations, which arise after committing themselves to new obligations during negotiations. The developing countries have extensively made use of the various remedies available under the WTO be it through discriminatory taxation or imposition of anti-dumping duties or safeguard

[67] David Palmeter, "Comments on "Trade Remedies and Legal Remedies: Antidumping, Safeguards and Dispute Settlement After the Uruguay Round" in Arvind Panagriya, Quibria M.G., Narhari Rao, ed., *The Global Trading System and Developing Asia* (New York: Oxford University Press, 1997), p. 425.

measures.[68] There was a shift from the developed to the developing countries in the earlier usage of safeguard measures during the post GATT period. They have especially used the safeguard measures in-order to protect their domestic industries than any other remedy available under the WTO system. This shift reveals that the developing countries are active participants in the world trading system unlike the earlier times.

The Agreement carries with it the rules and procedures to clarify and reinforce the disciplines relating to the application of the GATT safeguard measures after recognizing the significance of structural adjustment of an industry. One of the important aspects to be kept under consideration by the States while interpreting the WTO Agreements is that, the WTO seeks to implement them along with the General Agreement on Tariffs and Trade (GATT) 1947 which has been totally incorporated into the WTO along with its decisions, protocols and the Understandings on Interpretations of the Articles of GATT 1947. The conclusion of the Agreement in the Uruguay Round made it possible for the States to re-establish multilateral control over safeguards and eliminate measures that escape such control.[69]

II. 6. 1. Main features of the Agreement on Safeguards

a) Of utmost importance and well appreciated by the Member States of the WTO is the prohibition of *grey area measures* through a *sunset clause* as the biggest achievement of the AOS.[70] The Agreement fixed a time limit for the period for which a safeguard measure can be in force by restricting its use for a period of 4 years (extension up to 8 years is provided, for developing countries – 10 years).[71] It thus succeeded in the elimination of the grey area measure that existed outside the Article XIX of GATT 1947. It permitted only limited extension of such

[68] ibid, pp. 95-107.

[69] For details on the Safeguards Agreement visit http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#IAgreement.

[70] Article 11. 1 (b) of the Agreement on Safeguards.

[71] Article 7, ibid.

However, the use of safeguard measures have been criticized by some experts as being detrimental to the economy as they fail to protect the interests of the consumers (Finger,1988). The Agreement provides an exception to the trade rules and primarily relates to clarifying and reinforcing the Article XIX of GATT and encouraging adjustment of the industry. Under the GATT, the developed States have made use of antidumping measures in large quantities as compared to the safeguards measures to protect the domestic industry, a reason why such practice existed could be summed due to the higher degree of injury prescribed and also due to the choice to discriminate action given to the injured State as against all the exporters being available under the Safeguards agreement. However, after the establishment of WTO safeguard actions were used by countries both developed and developing alike.

II. 6. 2. Expanding Horizon of Safeguard Measures – Doha and Beyond

Some of the other Covered Agreements under the WTO also provide for safeguard measures in their respective terms. Need for the safeguard measures under Agreements other than the AOS arose, as the States had not liberalized certain sectors prior to the Uruguay Round. The States especially developing States had not bound all tariffs, they entered the WTO by keeping reservation against reduction of barriers (tariff) in agricultural products, textiles, clothing, fish and fish products, leather, and footwear. In the above-mentioned sectors, the Members have always recognized the need to protect the interests of the developing countries especially in products of export interest to them in order to promote their integration into the world trading system. Thus the States established safeguard provisions to curb the effects of liberalization on those sectors in the specific agreements.

In the first Ministerial Conference at Singapore in 1996 the Members renewed their commitments towards achieving the goal of sustainable growth and development for the common good by means of establishing a fair and equitable rule based system, by progressive liberalization and elimination of tariff and non-tariff barriers in goods and trade in services, rejecting all forms of protectionism, and by integrating the developing and least developed countries and making

possible the maximum level of transparency in international trade.[88] In the later Conferences the Members have reaffirmed their commitment to the same and in the Doha Development Agenda (2001) established a Work Programme addressing the implementation issues of States as to the application of the Agreements.[89] Areas of special concern for the developing countries lie in the agricultural sector, service sector, TRIPS, investment and market access for non-agricultural products (NAMA). Being a developing country, the commitments to be undertaken by India in these sectors are of great significance.

II. 6. 2. a. Agriculture and safeguards

It was thus in tune with the need for protection of interests of States that the Members to the WTO inserted separate safeguard measures in the various agreements other than the AOS. Article 5 of the Agreement on Agriculture (AOA) provides for a special safeguard provision different from the measures taken under the AOS.[90] The AOA permits safeguard action without proof of serious injury or causation, which are required under Article 2 of the AOS. Actions taken under the agreement are two fold, one is *volume-based*, permitting action if the volume exceeds a specific trigger level and the other is *price-based* - if it falls below a trigger price equal to the average of 1986-1988 reference price for the product concerned. The measures can be invoked only for products designated as "SSG" in the Members Schedule for one year and only under the two heads mentioned above and the action permitted is charging of additional duty alone and not quantitative restrictions. The Members have expressly exempted recourse to the Article XIX paragraph 1(a) and 3 of GATT 1994 and Article 8 (2) of the AOS and of the requirement of the notification of an action to be made to the Committee on Agriculture, thus establishing that a safeguard measure taken in relation to an agricultural product shall solely be governed by the principles laid down under the AOA.

[88] Available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

[89] Available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[90] The EU and the US proposed the inclusion of the price based and import based SSG Mechanism respectively to the Agreement keeping in mind the displacements that would occur during the tariffication of the agricultural sector at the Uruguay Round Negotiations. See Jai. S. Mah, "Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO" , *Journal of World Trade*, vol. 33, no.5, 1999, pp. 197-204.

India being a nation were majority of the people are dependent on agriculture as a means of livelihood, it needs to take its steps towards liberalization in this sector very carefully. Though India has made few commitments under the Agreement it is entitled to implement the safeguard measures under the AOS unlike under the AOA, which provides for use of such measures for agricultural products considered as goods in general. It is in this context that the measures taken under the AOS gains importance towards the protection of the domestic agricultural industry.

The Doha Mandate reiterates on the Members' commitments to give Special and Differential Treatment (SDT) to developing countries, which are integral for negotiations and are to be embodied in the Schedule of Concessions and commitments. By the time of the 2002-2003 preparations for "modalities", the discussions on tariff negotiations in agriculture cover six headings: tariffs; tariff quotas; tariff quota administration; special safeguards; importing state trading enterprises, and other issues. The developing countries like India have in their submissions to the Committee on Agriculture discussed in detail as to the modalities of tariff concessions under different heads including discussions on special safeguards to the sector. The submission made states:

> "Given the volatility of agricultural commodity markets and the inability of farmers in developing countries to bear risks arising out of violent fluctuations in international prices, an effective safeguard mechanism for preventing a surge in imports becomes absolutely essential for preserving the livelihood of farmers. The provision of general safeguards available under the Agreement on Safeguards would be extremely difficult to invoke, as farming in developing countries is an unorganized family based economic activity involving a majority of the population. Moreover, the time taken to invoke these provisions would render the entire proceedings infructuous, as by the time action is taken, farmers would have already suffered due to the adverse impact of volatile markets. There is thus a requirement for providing an effective safeguard mechanism on the lines of the Special Safeguard provisions (Article 5 of AOA) including provisions to put quantitative restrictions, which could be used by developing countries irrespective of tariffication for all products that they consider sensitive. On the same count developing country members must be allowed to maintain existing level of tariff bindings keeping in mind their developmental needs and the high distortions prevalent in the international market."[91]

The developing countries argued for special safeguard for special products and for the establishment of a Mechanism as part of S&DT within the

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[91] Submission made by India before the Committee on Agriculture, India's Proposals on Agriculture-I: Food Security, Available at http://pib.nic.in/focus/foyr2001/foapr2001/aoa1.html.

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July Framework Agreement under the heads of improvement in market access[92] for products of export interest to the developing countries.[93] The entire negotiations was feared to be a failure if the States would have failed to agree on a formula for tariff reduction, as it is the application of this formula that would determine the rate of the tariff reduction of a country and also upon the impact on its markets based on which a State is entitled to take safeguard action. India along with other developing countries proposed the Swiss formula for tariff reduction to facilitate market access, which provides for less than full reciprocity through higher tariff co-efficient resulting in higher tariff reduction for developed countries.

The sixth Ministerial Conference of the WTO recently concluded in Hong Kong have heeded to the interests of the developing countries and have provided them with the flexibility to self-designate an appropriate number of tariff lines as Special Products guided by indicators based on the criteria of food security, livelihood security and rural development. Developing country Members will also have the right to have recourse to a Special Safeguard Mechanism based on import quantity and price triggers, with precise arrangements to be further defined. Special Products and the Special Safeguard Mechanism shall be an integral part of the modalities and the outcome of negotiations in agriculture.[94] The Ministerial Conference has adopted the Swiss formula,[95] which would achieve sufficient tariff reductions that would be beneficial to all developing countries.

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[92] Market access is one of the most basic concepts in international trade. It describes the extent to which a good or service can compete with locally-made products in another market. In the WTO framework the term stands for the totality of government-imposed conditions under which a product may enter a country under non-discriminatory conditions.

[93] Doha Declaration, para. 27 and 42. Available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#annexb.

[94] DOHA WORK PROGRAMME, Ministerial Declaration, Agricultural Negotiations, WT/MIN(05)/W/3/Rev.2, 18 December 2005, para. 7.

[95] The Negotiating Group has been required by the General Council to finalize the structure and details as soon as possible on the Formula. The Swiss Formula with coefficients at levels shall achieve (1) reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs and tariff escalation, in particular on products of export interest to developing countries; and (2) Take fully into account the special needs and interests of developing countries, including through less than full reciprocity in reduction commitments.

II. 6. 2. b. Textiles and Safeguards

Article 6 of the Agreement on Textiles and Clothing provided for application of transitional safeguards by Member to whom serious damage or actual threat thereof was caused from import of increased quantities of textile products. The Textiles and Clothing Agreement phased out in 1 January 2005 and now the Safeguards Agreement governs the matters relating to serious injury by imports of textiles as it forms a 'good' that is bound under the Schedule.[96] Textiles and clothing forms the 'bedrock of industrial employment' in many countries and an engine of development to many others especially the developing countries. The liberalization of the textiles sector after 1st January 2005 has given rise to a crisis in international trade of textiles and the WTO is alleged to have been insensitive to such issues by some of the international organizations.[97]

The recent safeguard action taken by the US and the EC against the Chinese imports of women's blouse, sweaters and trousers is one example that shows that the States are resorting to safeguard actions against the import surge in textiles. The argument taken by China for exemption from application of the measures was under Article 9 of the Agreement. But the measures were imposed inspite of it as the imports caused market disruption. China is especially under threat due to the kind of the safeguard clause it has acceded to in its Protocol permitting States to take action in case of proof of 'material injury' which is a much more simple a factor that needs to be proved instead of the 'serious injury' which needs to be proved under the Agreement on Safeguards. It is termed as the fastest growing economy in the world and accounts for the greatest exports into the EC and US. Chinese pose a threat to the world in this sector as they succeed in manufacturing clothes at cheap prizes. The textiles sector is of relevance for the Indian economy too, and much more is the trade relation India has with China.[98]

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[96] The incorporation of the textiles sector in the world trade regime and the application of the safeguards Agreement to it has been awaited by the developing countries from the GATT period. Communication from Brazil, MTN.GNG/NG9/W/3, 25 May 1987, para. 15.

[97] The crisis has been pointed out to be not a mere trade issue but a major threat to the world economy as most of the textile industry economies are facing job loss. Europe has lost 1000 jobs a day, Cambodia and Lesotho last suffered severe loss since 2005. Statement made by Mr. Neil Kearney, General Secretary to the International Textiles, Garment and Leather Workers' Federation (ITGLWF), 'WTO insensitive to crisis engulfing textile industry', *The Hindu Business Line* (Kochi), 31 May 2005.

[98] China is India's second largest exporter with 72.5 per cent in 2004-05 (April-November). 'China and ASEAN: India's emerging markets', *The Hindu Business Line*, 6 May 2005.

Thus any action taken against China in case of textiles can affect other developing countries like India if it has to face reversion of trade from EC and US. The growth of China is advantageous to India since the markets of the west are saturated, thus India and other countries can create new market places in China, which is dependent on India largely for steel.

Thus the Safeguards Agreement is of high importance as most of the developing countries are competitors to the developed countries and would be subject to more restrictions under the safeguards regime if the proper application of the measures is left unchecked. The proper implementation of the Agreement on Safeguards is of great necessity to the States that have a comparative advantage over the traders in the developed States.

II. 6. 2. c. Services and Safeguards

It is necessary to implement the objectives established in the Preamble, and Articles IV and XIX of the General Agreement on Trade in Services (GATS), namely to increase the participation of developing Members in world trade through the negotiation of specific commitments with a view towards promoting their economic growth and development. Article X of the General Agreement on Trade in Services provides for imposition of safeguard measures. The uniqueness of this Agreement as compared to other Multilateral Agreements permitting the use of safeguards measures lies in the fact that it permits members to take action only after determining whether there is a need for an action, based on which, the method of action shall be determined. Unlike the AOS the GATS did not permit for specific actions to be taken, the reason is because of the absence of the proper definition for services.[99]

The developing countries are negotiating for a product specific safeguards or special safeguards mechanism. The safeguard measures under the agriculture, services and the textiles sector are dependant on the nature of commitments given by the States and the determination of the formula that would determine the degree of tariff reduction, which would be beneficial to all. The developing countries are proposing for a 10 per cent cut in the bindings which would bring the tariffs of all

[99] For a general understanding of the safeguards under service sector see Yong - Shik Lee, "Emergency Safeguard Measures under Article X in GATS: Applicability of the Concepts in the WTO Agreement on Safeguards", *Journal of World Trade*, vol. 33, no.4, 1999, pp. 47-59.

the States to the 10 per cent this would ensure that no country is in loss as compared to the other. Yet again the consensus of the developed countries to such a formula is doubtful, as they always want to secure more markets than the developing countries.

II. 7. Conclusion

From the above discussions it is evident that the law dealing with safeguards have been of wide debate all through out the GATT period. The reasons for it to become highly debated were the inbuilt deficiencies in Article XIX of GATT 1947. The escape clause under GATT aimed to grant protection to the domestic industries of any product but was used discriminately and majorly by the developed countries against the developing countries. Apart from using the measures against agricultural products, electronic items, steel products *etc.*, the developing countries were primarily targeted in the textiles sector. On a perusal of the statistics of trade restrictions that was extant during the second half of the 20th century, shows that both tariff and an ever-increasing set of non-tariff barriers restricted international trade. The developed countries negotiated voluntary export restraints and other measures restricting trade which were outside the safeguard measures provided under the GATT with some of the developed and most of the developing countries, in order to protect their trade. The resort to measures outside GATT for the protection of domestic industries, were preferred due to the flexibility it provided in the payment of compensation and also the absence of retaliatory measures by the exporting States, as they were taken with their consent. The States that were adversely affected by the trade restriction sought the removal of the illegal measures as they prevented the developing States from expanding their trade. At the Tokyo Round of trade negotiations the States were well prepared with a set of recommendations to restructure the escape clause. It was finally after decade long negotiations that the matter was settled in the Uruguay Round of trade negotiations wherein the States concluded the Agreement on Safeguards. At the conclusion of the Uruguay Round, the Members recognizing the need to resolve the prevalent issues within the GATT incorporated into the Final text of the Round the General Agreement 1947 as it then existed, as GATT 1994. This was done as they found it

difficult to renegotiate and amend the entire provisions of the old GATT. The Members decided to resolve the issues by bringing into effect new Agreements and Understandings on the Interpretations of the various Articles that would clarify and reinforce the necessary provisions under GATT 1994. This is true in the case of all the new Agreements relating to the areas of antidumping, countervailing duties, textiles and clothing, balance of payments, and the like. The Agreement on Safeguards which has been analyzed in this study was also concluded to clarify and reinforce the rules for the implementation of the safeguards measures, understood as those measures taken under Article XIX of GATT 1994. Further the expansion of the system into other sector specific Agreements reveal the intent of the States towards the sound establishment of the remedy under the rubric of international trade law.

CHAPTER III

IMPLEMENTATION OF THE SAFEGUARDS MEASURES UNDER THE WTO

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IMPLEMENTATION OF SAFEGUARD MEASURES UNDER THE WTO

After having analyzed the inception of safeguard measures into the trading system, this Chapter analyzes the evolving jurisprudence of the same under the WTO. The Dispute Settlement Body (DSB) of the WTO is empowered to interpret the Uruguay Round Agreements in consonance with the interpretations agreed upon by the parties, in accordance with the customary rules of interpretation of public international law[1]. Its purpose is to provide security and predictability to the multilateral trading system. The Member States of the WTO have welcomed the rule-based character of the multilateral trading system, which is reflected in the significant number of disputes that have been brought before the DSB.[2] After the establishment of the WTO, the Member States especially the Southern States (developing countries in the context of the North-South economic division), have discovered through most of the cases the value of a rule-based trading system, which fosters predictability and mitigates the effects of unilateralism in trade actions.[3]

The AOS, seeks to establish rules for the application of safeguard measures under the GATT.[4] Thus the satisfaction of the conditions as mentioned under Article XIX 1 (a) of GATT gains importance for the application of safeguard measures under the AOS. The adverse effects of the bilateral and the measures outside the GATT framework practiced by the States, lead the States to demand an elaborate set of norms for the governance of the safeguards regime. The Agreement can be summed up as an aggregate of the various pre-existing

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[1] Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

[2] Mike Moore, "The WTO, Looking Ahead", *Fordham International Law Journal*, vol. 24, no. 1, 2000, pp. 1-9, at p.3. For a list of the cases that have been brought before the WTO DSB visit www.wto.org

[3] Ambassador Celso L.N. Amorim, "The WTO from the Perspective of A Developing Country", *Fordham International Law Journal*, vol. 24, no. 1, 2000, p. 95.

[4] Article 1of the AOS, 1994.

rules within the nations that were players in international trade and also of the decisions rendered by the predecessor to the WTO, the GATT Panel.[5]

The cases that appeared before the DSB in relation to safeguard measures numbered to 26 out of which only ten cases[6] have been finally decided by either the Panel or the Appellate Body (AB) and around ten cases[7] are left undecided by non-establishment of the Panel after a request for consultation being made by the injured State or were settled mutually. This Chapter seeks to highlight the interpretational problems created by the WTO DSB in the application of the safeguards measures through the decisions rendered by the same.

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[5] For example the rule that the measures if taken in the form of quantitative restriction be applied on MFN basis incorporated in Article 5 (2) of the AOS, was taken from decision rendered by the GATT Panel in *Honk Kong v. Norway* (Norway - Restrictions on Imports of certain Textile Products), Report of the Panel adopted on 18 June 1980, (L/4959 - 27S/119).

[6] *Costa Rica* v. *United States*, (United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear), WT/DS24/AB/R, 10 February 1997; *India* v. *US*, (United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India), WT/DS33/AB/R, 25 April 1997; *EC* v. *Argentina*, (Argentina — Safeguard Measures on Imports of Footwear) WT/DS121/AB/R, 14 December 1999; *EC* v. *Korea*, (Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products), WT/DS98/AB/R, 14 December 1999; *EC* v. *US*.(United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities), WT/DS166/AB/R. 22 December 2000; *Australia* v. *US* and *New Zealand* v. *US*, (United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia), WT/DS178/AB/R, WT/DS177/AB/R respectively,1 May 2001; *Argentina* v. *Chile*, (Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products), WT/DS207/AB/R, 23 September 2002; *Korea* v. *US*, (United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea), WT/DS202/AB/R. 15 February 2002; *Chile* v. *Argentina*, (Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches), WT/DS238/P/R, 14 February 2003; *Brazil* v. *US*, (United States — Definitive Safeguard Measures on Imports of Certain Steel Products), WT/DS259/AB/R, 10 November 2003; *EC* v. *US*, WT/DS248/AB/R;*China* v. US WT/DS252/AB/R; *Japan* v. *US*, WT/DS249/AB/R; *Korea* v. US, WT/DS251/AB/R, *New Zealand* v. *US* WT/DS258/AB/R, *Norway* v. *US*, WT/DS254/AB/R. *Switzerland* v. *US*, WT/DS253/AB/R. See Table 5 of Annex 1 for a summary of the above cases.

[7] *Indonesia* v. *Argentina* (WT/DS 123, 1998), (Safeguard Measures on Import of Footwears); *Thailand* v. *Columbia* (WT/DS181, 1999), (Safeguard Measures of Imports of Plain polyester Filaments from Thailand) this dispute was regarding the measures imposed on import of textiles from Thailand under Article 2 of the Agreement on Textiles and Clothing. The communication of termination of the measures by Chile before the Textile Monitoring Body (TBM) warranted no settlement by the Panel; Czech *Republic* v. *Hungary* (WT/DS159, 1999), (Safeguard Measures on Import of Steel Products From the Czech Republic; *Argentina* v. *Chile* (WT/DS226, 2001), (Provisional Safeguard Measures on Mixtures of Edible Oil); *Columbia* v. *Chile* (WT/DS230, 2001), (Provisional Safeguard Measures on Modification of Schedules Regarding Sugar) this case replaced another dispute WT/DS228 brought by Columbia against Chile; *Argentina* v. *Chile* (WT/DS278, 2002), (Definitive Safeguard Measures on Import of Fructose); *Chile* v. *Ecuador* (WT/DS303, 2003), (Definitive Safeguard Measures on Import of Medium Density Fireboard); *Chile* v. *EC* (WT/DS326, 2005), (Definitive Safeguard Measures on Salmon); *Norway* v. *EC* (WT/DS328, 2005), (Definitive Safeguard Measures on Salmon); the only case notified as mutually settled as Poland agreed for the removal of the quantitative measures imposed on Czech Republic - *Poland* v. *Slovakia* (WT/DS235, 2002), (Safeguard Measures on Import of Sugar).

Be it the GATT 1994 or the Agreement establishing the WTO (hereinafter referred to as the WTO Agreement) both are agreements entered into by the States and are bound by the rules of treaty interpretation. In accordance with the rules of interpretation of general international law a special law shall prevail over a general.[8] From a plain reading of the Agreement it is clear that the drafters intended to make the Safeguards Agreement more consistent than the GATT Article XIX. This is evident from the Agreement, which states that the States shall not take or seek to impose any emergency action on imports of particular products under the GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.[9] This very application has lead to a confusion among the States in the present times, leading to several disputes being brought before the WTO DSB. The confusion arose as the States started to rely on the GATT provisions while applying the safeguard measures under the AOS.

Several difficulties persist even after the GATT period, which lacked an institution to govern international trade. The safeguard actions taken by the States have been challenged before the DSB on the basis of the violation of the various provisions of the WTO AOS. Most of the disputes relate to the non-satisfaction or non-determination of the conditions laid down for the application of measures,[10] for the investigations,[11] the determination of the serious injury,[12] the levels of concessions,[13] and upon the conditions for notification and consultation.[14]

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[8] The maxim "*generalia specialibus non derogant*" or "*lex specialis derogate legi generali*" lays down the rule to resolve a conflict between two norms. The solution is that in case of such conflict the interpretation should result in the application of the more special norm over the more general norm. See Joost Powleyn, *Conflict of Norms in Public International Law – How WTO Rules Relates to other Rules of International Law*, (New York: Cambridge University Press, 2003) for a detailed understanding of the rules of interpretation of the norms of the WTO in resolving 'Conflict in the Applicable law', pp. 385-418.

[9] Emphasis added. Article 11 of the AOS, 1994.

[10] Article 2, Article 5 and Article 11 (1) (a), ibid.

[11] Article 3, ibid.

[12] Article 4, ibid.

[13] Article 8, ibid.

[14] Article 12, ibid.

III. 1. Necessity for Unforeseen Developments Clause

The most contentious matter in the Safeguards Agreement has been on the basis of initiation of the measures upon satisfaction of the conditions as laid under Article XIX 1 (a) of the GATT. The questions raised by the States in relation to the application of the safeguard measure under the Safeguards Agreement concern –

- Whether the unforeseen developments clause present in the Article XIX of the GATT 1994 is applicable as creating an additional legal requirement?

- Whether the AOS should be regarded as the sole legal authority for the implementation of the safeguard measures?

The second question is resolved as Article II:2 of the Agreement establishing the WTO provides that all Members are bound by all the Agreements covered within the Agreement and also the interpretative note to the Annex 1A Agreements which are agreed upon by the Members, expressly states that in case of a conflict between the provisions of the GATT 1994 provision and a provision of another agreement in Annex 1A to the Agreement establishing the WTO, the provision of the latter shall prevail to the extent of the conflict. [15] A review of the cases decided by the DSB would render an answer to the first query as well as an affirmation of the interpretation to the second answer stated above.

[15] Emphasis added.

III. 1. 1. *Korea - Dairy Products* Case[16]

It is the first among the safeguards cases decided by the WTO DSB and gains importance in relation to the interpretation given to the conditions to be satisfied for the initiation of a safeguards measure. The EC (complainant) claimed before the Panel that the Korea (respondent) has not satisfied the unforeseen developments clause as required under Article XIX: 1(a) of the GATT 1994. The Panel held that the clause was a mere explanation of why a safeguard measure would be required and that it did not constitute an additional obligation to be proved on the part of the parties while imposing the measures.[17] On appeal against the decision EC argued that as confirmed by Article 3.2 of the DSU, the Panel cannot diminish the rights of the European Communities by deleting one of the requirements, which should be fulfilled before a safeguard action can be imposed. It also relied on the argument that "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".[18] The EC argued that a treaty should be interpreted in terms of its context, which sheds light to Article XIX 1 (a) on 'unforeseen developments' clause.[19]

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[16] EC v. Korea, Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, (herein after referred to as the *Korea - Dairy Products* Case), WT/DS98/AB/R, 14 December 1999. Facts - On 12 August 1997, the EC requested consultations with Korea in respect of a definitive safeguard measure in the form of QRs imposed by Korea on imports skimmed milk powder preparations (certain dairy products) after the investigation for determination of injury by the Korean Trade Commission and finding of injury to the domestic i..dustry. The EC considered that this measure is in violation of Articles 2, 4, 5 and 12 of the Agreement on Safeguard Measures, as well as a violation of Article XIX of GATT 1994. Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm accessed on 7 September 2005.

[17] WT/DS98/R, para. 7.45 and WT/DS98/AB/R, para. 71.

[18] WT/DS98/AB/R, para. 37. The principle of effective interpretation of the treaties is a fundamental tenet of the treaty interpretation found in the maxim *ut res magis valeat quam pereat* was argued by EC and considered by the AB also while deciding the case. The content of the same is incorporated under Article 31 and 32 of the Vienna Convention on the Law of Treaties, 1969.

Article 31 (1) states that the terms of a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty, (2) provides that the context of the treaty includes the full text, the preamble, the annexes and any mutually agreed interpretative language.

Article 32 provides that it is appropriate to refer to the negotiating history of a treaty provision in order to conform to the meaning of the terms as interpreted pursuant to the application of Article 31.

[19] The EC claimed that the requirement that increased imports must result from "unforeseen developments" and the other fundamental requirements like the commitments including the tariff

Countering the argument of EC, Korea argued that by excluding the clause, the drafters of the AOS intended to strike a new balance between the situations under which the clause was included in the GATT and the present situation wherein States realize the importance of being the member of WTO. As a result of this, the drafters moved beyond the unforeseen developments clause under Article XIX 1 (a) of the GATT, which had proved to be difficult to be applied in practice. Korea argued further that Article 2 of the AOS, which lays out the "conditions" for taking safeguard measures, has removed both the "unforeseen developments" language and the requirement to show that the difficulties were because of "the effect of the obligations incurred by the contracting party under this Agreement, including tariff concessions."[20] Korea also contended that, contrary to the European Communities' assertions, the removal of any pre-existing obligation regarding "unforeseen developments" was intended to strengthen the multilateral safeguards regime by ensuring the resort by Members to emergency action under the AOS, rather than the use of trade-disruptive and non-transparent "grey area" measures. Korea also relied on the ground of the rule of *lex specialis* and *lex generalia* to justify its action stating that as far as the safeguard measures are concerned the applicable law is the Agreement and since it does not mention of the unforeseen developments it need not be proved as an additional

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concessions were not expressly repeated in the AOS because they did not need to be clarified, added to or modified.

EC also requested the Appellate Body to conclude that the "as a result of unforeseen developments" requirement should be applied cumulatively with the requirements set out in the AOS and further the AOS does not supersede or replace Article XIX:1(a) of the GATT 1994, since there is no formal conflict between the provisions of Article 2.1 of the AOS and Article XIX:1(a) of the GATT 1994, and that both must be complied. The omission of "unforeseen developments" in the AOS does not support the "logic" of the interpretation advanced by the Panel.

Further that the object and purpose of the AOS is inherently linked with Article XIX of the GATT 1994, which is entitled "Emergency Action on Imports of Particular Products". Safeguard measures are by definition a mechanism based on "emergencies". The aim of the safeguard mechanism lies in the unpredictability of an event and the possibility to take swift measures which safeguard the relevant domestic industry. The argument that the "as a result of unforeseen developments" requirement is still valid as a requirement for the safeguard mechanism is supported by recent texts of national legislation, which have been notified by a number of WTO Members under Article 12.6 of the AOS. Korea, Costa Rica, Norway, Panama and Japan have all incorporated the phrase in their safeguards legislation.

[20] See n. 6 at p. 60, WT/DS98/AB/R, para 51.

obligation.[21] It also stated that the Appellate Body was not required to look into the factual analysis of the case as limited under Article 17.6 of the DSU and is entitled only to review the issues of law and legal interpretations raised by the European Communities that Korea violated the provisions of Article XIX:1(a) of the GATT 1994 by failing to examine whether the alleged increase in imports was "as a result of unforeseen developments."[22]

After hearing both the parties the WTO Appellate Body (AB) reversed the decision rendered by the Panel[23] as to the non-applicability of the unforeseen developments and ruled that while taking any safeguard measures after the entry into force of the WTO Agreement, the States must comply with the provisions of both the Safeguards Agreement and Article XIX of the GATT 1994.[24] The AB considered the rules of treaty interpretation in length for the case. The reasons stated to substantiate that the provisions of both the treaties are to be applied cumulatively, was by relying on the interpretative note of the WTO Agreement and the various provisions of the Safeguards Agreement.[25] The AB stated that Article II:2 of the WTO Agreement provides that the agreements and the associated legal instruments included in Annexes 1, 2 and 3 are integral parts of the WTO Agreements, binding on all Members.[26] The effect of this provision is that it makes both the GATT and the AOS binding on the Members to the WTO as both were negotiated at the same time and between the same parties. The AB

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[21] The Panel's view was that the adoption of the AOS without the "unforeseen developments" clause was "logical" as the Uruguay Round negotiators "understood that since reference to 'unforeseen developments' did not add to the rest of the paragraph (but rather describes its context), there was no need to insert it explicitly in the AOS." The Panel thus rejected the EC's argument that Korea was wrong in failing to examine whether the import trends of the products under investigation were the result of "unforeseen developments" contrary to Article XIX:1(a), as we consider that Article XIX of GATT does not contain such a requirement. WT/DS98/AB/R, paras. 71-72. Emphasis added.

[22] ibid, para. 79.

[23] The Panel decided that those safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements, which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT.

[24] WT/DS98/AB/R, paras. 79-82

[25] Article 1 and 11.1 (a) of the AOS, ibid, para. 76.

[26] Emphasis original cited in Panel Report of the *Korea –Dairy Products* case, para. 7.38 and Appellate Body Report, WT/DS98/AB/R, para. 74.

relying on the arguments laid by the EC, in accordance with the principle of effective interpretation of the treaties, concluded that the unforeseen developments clause of Article XIX 1 (a) of the GATT 1994 describes certain circumstances which must be demonstrated as a matter of fact in order to apply the safeguard measures consistent with the provisions of the GATT. The AB considered whether there exists any conflict[27] between the two treaties in terms of the parties or the subject matter. The conflict as mentioned above relates to the simultaneous performance of the obligations by the parties to both the treaties. The AB to resolve the conflict analyzed certain provisions of the AOS.[28]

After considering these provisions, the AB was satisfied beyond doubt that the Agreement did not seek to prohibit the application of GATT provision rather it favoured a harmonious construction of the both the provisions, by its cumulative application. The AB, while interpreting the provisions in the Agreement that cites Article XIX GATT several times, decided that the unforeseen developments clause has to be satisfied for the application of a safeguard measure and that since Korea has not proved whether the increase in imports was the result of unforeseen developments, the safeguards measure taken was in violation of the Agreement. It

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[27] Despite the Appellate Body, the issues of conflict between the two treaties have been studied by some scholars and concluded that there exists no conflict as far express application of both the treaties are provided for in the latter treaty. The author provides the reader with a detailed analysis of the legality of the unforeseen development clause and explains the absence of a conflict among the provisions in the two treaties as that they do not curtail the cumulative application quoting similar examples from the other Covered Agreements in WTO viz., Article 10 of the Agreement on Subsidies and Countervailing Measures, which states that 'Members shall take all necessary steps to ensure the imposition of countervailing duty...is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement' and Article 2.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, which states the '.....measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of the GATT 1994.....in particular the provision of Article XX (b).' Felix Mueller, "Is the General Agreement on Tariffs and Trade Article XIX "Unforeseen Developments Clause" Still Effective Under the AOS?", *Journal of World Trade*, vol. 37, no. 6, 2003, pp. 1119-1151.

[28] The Preamble - Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Actions on Import of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control.
Article 1- This Agreement establishes rules for the application of safeguards which shall be understood to mean those measures provided for in Article XIX of GATT 1994.
Article 11.1 (a) A Member Shall not take or seek any emergency action on imports of particular products 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. And
(c) "This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994."

also ruled that it was not in a position to complete the analysis and determine as to whether Korea acted inconsistently with its obligations under Article XIX 1 (a) of GATT.[29]

This decision was followed by the Appellate Body in the *Argentina - Foot Wears* case[30] where it followed that the negotiators never intended to subsume the requirements under Article XIX of GATT within the AOS thus making the *cumulative application* of both the provisions for the application of a safeguard measures under the WTO, inevitable. The Panel and the Appellate Body reiterated the same decision in the *US-Lamb Meat* case,[31] the *US-Wheat Gluten* case,[32] the *US-Line Pipe* case,[33]the *Argentina - Preserved Peaches* case[34] and the *US – Certain Steel Products* case[35] respectively. This decision has made applicable a rule that has been omitted by the Agreement thus questioning the rule of *generalia*

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[29] WT/DS98/AB/R, para. 92

[30] See n. 5 at p. 60, WT/DS121/AB/R. The European Communities (EC) asserted that the requirement that increased imports result from "unforeseen developments" is a fundamental characteristic of safeguard measures, and lies at the beginning of the "logical continuum" of events justifying the invocation of the safeguard mechanism. See WT/DS121/AB/R, para. 39 The EC also argued before the Appellate Body that it has confirmed in *Brazil - Desiccated Coconut* and *Guatemala - Antidumping Investigation Regarding Grey Portland Cement from Mexico* ("*Guatemala - Cement*") that provisions of the GATT 1994 and the relevant Agreement in Annex 1A of the WTO Agreement represent a package of rights and disciplines that must be considered in conjunction. European Communities thus submitted that the AOS does not supersede or replace the GATT 1994, and that it is possible to apply the conditions in the GATT 1994 and the AOS together, because there is no formal conflict between them. See WT/DS121/AB/R, para 41.

Indonesia (third party to the case) adds that, by reading the "unforeseen developments" requirement out of the WTO system altogether, the Panel removed an important protection against abuse of the safeguard mechanism. ibid, para.52 On the other hand the US (third party) argues before the AB to uphold the decision of the Panel in excluding the application of the clause in the use of safeguards measures. US submitted that the Agreement had rebalanced the situations filled with GATT illegal measures and established comprehensive rules which alone should be followed when the clause has expressly been omitted. With respect to the Hatters' Fur case of 1951, the United States considers that, while this case cannot contradict the substantive rebalancing that took place in the Uruguay Round, it does help to clarify the legal interpretation of "unforeseen developments" under the GATT 1947, the reasons why negotiators were willing to omit this concept from the Uruguay Round results, and how a determination which fully satisfies the requirements of Article 2.1 may also satisfy the "unforeseen developments" requirement. ibid, para.63

[31] See n. 5 at p. 60, WT/DS178/AB/R and WT/DS177/AB/R.

[32] ibid, WT/DS166/AB/R.

[33] ibid, WT/DS202/AB/R.

[34] ibid, WT/DS238/P/R, para. 7.12.

[35] ibid, WT/DS259/AB/R. para. 10.36.

specialibus non derogant under the general principles of treaty interpretations. By reverting back to the GATT provision the Appellate Body discussed and differentiated the GATT concept of unforeseen development to unforseeability under the WTO which burdens a State to prove that the importing State *could or should have foreseen* the increase in imports at the time when concessions were negotiated.[36] The above trend in the decisions followed by the DSB, the answer to the second question posed at the beginning of the discussion becomes clear that the AOS is not the only agreement that governs the application of the measures.

Despite the large number of decisions rendered, the DSB has not been able to guide the States in determining as to what constitutes those aspects that would have been foreseeable by the national authorities imposing the safeguard measures. Ever since the first case brought before the DSB under the AOS all the subsequent cases brought by the States have been declared to be in violation of the rules set out under the Agreement.[37] The decisions have been the subject of criticism on the grounds that on the one hand it lays down difficult thresholds for the States to be met and on the other it fails to define those very thresholds.[38] The ambiguous decisions put the States at the same situation as they found themselves in defining the term of serious injury about five decades ago.

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[36] The AB interpreted the unforeseen development clause to mean those unexpected circumstances, which the negotiators cannot foresee at the time of the negotiations. The AB rejected the Panels finding that the unforeseen developments clause "does not add conditions for any measure to be applied pursuant to Article XIX but rather serves as an explanation of why an Article XIX measure may be needed" and also objected to the explanation that this clause "only describes generally the situations where the binding nature of the obligations contained in Articles II and XI of GATT may need to be set aside (for a certain period)." WT/DS98/AB/R, para. 86

[37] For a list of the cases decided by the DSB see n. 6 at p. 60. An analysis of these decisions are available in the following literatures Alan O. Sykes, "The Safeguard Mess: A Critique of WTO Jurisprudence", *World Trade Review*, vol. 2, no. 3, 2003, pp. 261-295; Cliff Stevenson, "Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations?", *Journal of World Trade*, vol. 38, no. 2, 2004, pp. 307-329; Yong Shik Lee, "Review of the First WTO Panel Case on the AOS – Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products and its Implications for the Application of the Agreement", *Journal of World Trade*, vol. 33, no. 6, pp. 27-46; Lee, "Safeguard Measures: Why Are They Not Applied Consistently With The Rules?", *Journal of World Trade*, vol. 36, no.4, 2002, pp. 641-673; Felix Mueller, "Is the General Agreement on Tariffs and Trade Article XIX "Unforeseen Developments Clause" Still Effective Under the AOS?", *Journal of World Trade*, vol. 37, no. 6, 2003, pp. 1119-1151.

[38] Yong Shik Lee, "Critical Issues in the Application of the WTO Rules on Safeguards: In the Light of the Recent Panel Reports and the Appellate Body Decisions", *Journal of World Trade*, vol. 34, no.4, 2000, pp.131-147; Lee, "Destabilization of the Discipline on Safeguards? Inherent Problems with the Continuing Application of Article XIX after the Settlement of the AOS", *Journal of World Trade*, vol. 35, no. 6, 2001, pp. 1235-1246.

The Agreement is subject to innumerable criticisms due to the lack of definite interpretations of its various provisions. For instance the unforeseen developments clause have been criticized by many as being outdated and that it needs to be changed considering the change in the trade scenario from the time the ITO was negotiated and the establishment of WTO. Some are of the opinion that the clause should be removed; as it was with the purpose of compelling States to enter into the GATT that it was included. Some scholars argue that with the changed circumstances when almost all the States are party to WTO and are willing to provide competitive tariff cuts to their trading partners the clause serves no purpose as the States cannot be allowed to take a safeguard action on the basis that it was due to the commitments under WTO that there was increase in imports. The result of accepting such interpretations would be detrimental to the achievements of the AOS and would end in questioning the very existence of WTO. The other issues that have been decided by the WTO DSB other than the unforeseen developments clause are briefly dealt hereunder.

III. 2. Standard of Review

In some cases the WTO DSB has face difficulties in assessing the credibility of the evidence relied upon by the national authorities for their findings of serious injury or threat thereof. The national authorities are required to make findings of serious injury to the domestic industry after assessing all the relevant factors having a bearing on the conditions of the industry as mentioned under Article 4.2 (a) of the AOS. When a case is brought before the Panel its role is to determine whether the States have applied the measures in accordance with the provisions of the Agreement. For this it relies on the evidence produced before it by the parties and the report of the national authorities play a crucial role in this regard. The Panel cannot do away with the report, as that is the only evidence, which proves that the State has caused injury to the complainant. However it is also not required to go beyond the facts laid before it by the parties in the determination of a case.

The decisions rendered by the DSB show a shift in the interpretation given to the standard of review to be followed by the national authorities. In the *Korea – Dairy Products* case the Panel ruled that the authorities are required to examine all

facts that are in their possession whether or not those facts support their conclusion decide a case. Subsequently the DSB has stated that the authorities should make a reasonable estimate when actual data is not available.[39]

In *Argentina – Footwears* case, Argentina alleged though the Panel rightly identified the standard of review as provided under Article 11 of the Dispute Settlement Understanding (DSU) it erred in applying that standard of review, by conducting a "de facto de novo review" of the findings and conclusions of the Argentine authorities.[40] It further argued that the Panel had read into the Agreement meaning not present in it, in particular, relating to the conditions of increased imports, serious injury and causation that must be satisfied before a safeguard measure may be applied. Whereas the AB rightly pointed out that the Panel has not conducted the de novo review undermining the report of the national authorities whereas it has just performed its responsibility of making an objective assessment of the facts in hand as required under the DSU.[41]

In the *Lamb – Meat* case Australia alleged against the Panel in appeal that it failed to fulfill its responsibility of conducting objective assessment of the report submitted by the USITC by taking at face value, the data and reasoning contained in the USITC's report whereas the Panel should have assessed objectively whether the USITC Report contained an adequate explanation of how the facts supported its determination of "threat of serious injury.[42] To these averments raised the AB ruled that a panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the authorities explanation does not seem adequate in the light of that alternative explanation. The AB had followed the same position in other cases by mentioning that the authorities shall consider other facts, which are essentially not submitted

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[39] WT/DS98/AB/R, para. 7.82.

[40] WT/DS121/AB/R, para. 115.

[41] ibid, para.121.

[42] It further stated that the Panel overlooked the fact that the USITC has not conducted a threat analysis to examine whether serious injury would occur unless safeguard action was taken, the Panel ignored the fact that the USITC never undertook such an examination. WT/DS177/AB/R, para. 42 and 46.

before in order to determine the injury. They were required to seek out pertinent information necessary to assess the injury to the domestic industry.[43]

The inference to be drawn from the rulings is that the DSB does not intend to substitute proceedings by the national authorities rather they intend to judge the adequacy of the investigation and the determinations of the national authorities and while doing so they have been lenient towards the developing countries. This is due to the fact that they would not be in a situation to obtain all relevant information of quantifiable nature of the representative period or of the period subject to investigation.[44]

III. 3. Determination of 'Serious injury'

The safeguard measures are taken against the exporters of products that cause serious injury to the producers of the same product in the domestic industry of the importing State. The determination of serious injury is the core criteria to be satisfied for the application of a safeguard measure.[45] The provisions of the Agreement show that an action can be taken to prevent or remedy[46] the serious injury under Article 2 only upon proof of increased imports, causing serious injury or threat thereof, in an investigation conducted by the national authorities based on objective evidence as per Article 4 of the Agreement.[47] The authorities are also required to provide cogent reasoning for the decision reached as to how it has

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[43] WT/DS166/AB/R, paras. 53-55.

[44] Youg Shik Lee, "Safeguard Measures: Why are they not Applied Consistently with the Rules? Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards", *Journal of World Trade*, vol. 36, no. 4, 2002, p. 645.

[45] A safeguard measure can be taken by a Member only after complying with all the necessary provisions of the Agreement viz. Article 2 which permit action to be taken when increased imports of a product causes serious injury, Article 3 of the Agreement provides that a Member shall apply a safeguard measure only upon investigating...include public notice...as to whether or not the application of a safeguard measure would be in public interest and Article 4 lays down the criteria's to be relied on to determine serious injury and evidence of a causal link between the increased imports and serious injury or a threat of serious injury.

[46] Article 5.1 of the AOS.

[47] Article 4. 2 (a) of the Agreement requires that the competent authority should evaluate *all the relevant factors* of an objective and quantifiable nature *having a bearing on the situation of that industry*, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by the increased imports, changes in the level of sales, production productivity, capacity utilization, profits and losses, and employment.

identified that serious injury exists in order to justify the imposition of safeguard measure.

One of the advantages of the Agreement is that it defines 'serious injury' as a significant overall impairment in the position of a domestic industry,[48] unlike its counterpart the GATT 1994. It has also defined the term 'domestic industry' as constituting the producers of like or directly competitive products in the territory.[49] The Agreement does not permit States to show increased imports as independently satisfying the unforeseen developments and then initiating a safeguard action against the exporters. Rather the States have to establish a 'causal link' between the increased imports and the serious injury. The rationale behind this clause is to prevent States from taking defence on the ground that the mere increase in imports of a particular product was unforeseeable at the time of allowing the concessions. Such an interpretation would run counter to the intent of the drafters of the Agreement. In practice the States have found the determination of serious injury by the authorities on proof of the causal link difficult to be satisfied. This is evident, as every action, so far taken by the States have been rejected by the DSB due to the non-satisfaction of the causal link by the States.

In both the *Korea Dairy Products* case and the *Argentina-Footwear* case the AB found that the measure taken with out demonstrating the existence of a causal link between the increased imports and injury as required under Article 4. 2 (b) were violative of the rules under the Agreement identified during the investigations. In *Argentina - Footwear* case the AB held that Argentina failed to evaluate all the relevant factors[50] set in Article 4. 2 (a) of the Agreement so as to demonstrate on the basis of objective evidence the existence of a causal link, which would permit it to take action against EC. The Panel in this case evolved a three pronged test to determine whether the States have satisfied the injury test as the EC argued that the USITC did not deal with the relationship between wheat

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[48] Article 4.1 (a) of the AOS, 1994.

[49] Article 4. 1 (c) of the AOS, 1994.

[50] The relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry include the rate and amount of the increase in imports of the products concerned in absolute or relative terms, the share of the domestic market by the increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses and employment.

protein premiums and prize which was a determinant factor to establish injury by increased imports. EC also stated that the US used a preponderance test based on the determination as to the substantial cause of injury, which was unknown to the WTO law. The test utilized was to analyze -

(i) Whether the upward trend in imports coincide with the downward trends in injury?

(ii) Whether the conditions of competition between the imported and domestic product demonstrate the existence of the causal link between imports and any injury?

(iii) Whether other factors were analyzed, and whether it was established that injuries caused by other factors were in fact attributed to other imports?[51]

The Panel highlighted that the factor existing for taking action should be increased imports and factors other than increased imports should not be considered in the investigation. It stated that the investigation should demonstrate the increase as "sudden and recent – at least of the past 5 years.[52] The AB deferring from the Panel stated that the increase should not be just any increase rather it should be "*recent enough, sudden enough, sharp enough, and significant enough, both qualitatively and quantitatively, to cause or threaten to cause serious injury.*"[53] It also ruled that for the investigation to be efficient it should be done in the recent past and should be based on the consideration of the available data of those imports that show a consistent increase in imports from the date of initiation of the investigation to the date of its completion.[54] Based on such analysis the Panel found that the USITC Report does not explain as to how the facts relied upon support its finding with respect to the causation of serious injury through increased imports. On appeal by the US the AB concurred upon the finding of the Panel and held that the USITC's investigation was in violation of

[51] WT/DS121/P/R, para.8.91.

[52] WT/DS121/P/R, para. 8.31.

[53] WT/DS121/AB/R, para. 131.

[54] WT/DS121/P/R, para. 8.156

the Agreement as it failed to prove that it has not considered factors other than increased imports as grounds to impose safeguard action.[55]

In a subsequent case the *US- Wheat Gluten* case, the AB found that the US has failed to prove that it did not ensure that injury caused by other factors were not attributed to imports to determine injury. This case is also important on other grounds as it deals with the violation of the fundamental aspects of the safeguard measures, i.e., the MFN rule, as required under Article 2 (2).[56] It provides for the exclusion of the Members from the application of measures if that State is a Member of a Customs Union. The AB found that the measures taken were inconsistent with Article 2.1 and 4 of the Agreement and thus in violation of the obligations under the AOS.

In *US - Lamb Meat* case the action imposed against Australia and New Zealand initiated as action by determining serious injury being caused to the packers and breakers of meat as constituting domestic industry as defined under Article 4 (1) (a) of the Agreement, which requires protection. This issue has been dealt with in detail in the following parts of this Chapter.

However, the Panel in the subsequent case namely *Argentina – Preserved Peaches* case deviated from the reasoning given by the AB in the *Korea - Dairy Products* case and *Argentina- Footwear* case as to the unforeseen character of increased imports. Argentina in the *Preserved Peaches* case argued that the increased production as a result of an exceptional Greek harvest, which was unforeseen, caused substantial increase in imports resulting in injury warranting a safeguard action. The Panel ruled that the increased imports as such couldn't be the ground for invoking safeguard actions and that it and the unforeseen developments clause are distinct elements and are to be treated differently.[57] The safeguard actions thus taken against the import of peaches were declared as being in violation of the Agreement.

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[55] WT/DS121/P/R, para. 59.

[56] Discussed below.

[57] WT/DS238/P/R, para. 7.18- 7.24.

In the *US- Certain Steel Products* case[58] the Panel concluded that all the safeguard measures taken by the US at issue were inconsistent with at least one of the following WTO pre-requisites for the imposition of a safeguard measure: lack of demonstration of (i) unforeseen developments; (ii) increased imports; (iii) causation; and (iv) parallelism.[59] The Panel thus requested the United States to bring the relevant safeguard measures into conformity with its obligations under the AOS and GATT 1994. The Panel stated that it would be improper to reduce the obligation to a nullity to explain how unforeseen developments resulted in increased imports causing or threatening to cause serious injury.

The AB also observed in *US - Line Pipe* case that serious injury does not generally occur suddenly and that all relevant factors as mentioned under Article 4 have to be satisfied before an action is taken.[60]

III. 4. Domestic industry

Among the cases so far decided the *US – Lamb Meat* case[61] is the only case where the WTO DSB has determined as to the identification of injured

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[58] This is the only case in the history of the WTO in relation to the safeguards measures were it was brought by eight countries against the US. On 7 March arch 2002, the European Communities requested consultations with the United States regarding the definitive safeguard measures imposed by the US in the form of an increase in duties on imports of 10 steel products inclusive of certain flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire and in the form of a tariff rate quota on imports of slabs effective as of 20 March 2002. The European Communities considered that the aforementioned US measures were in breach of US obligations under the AOS and GATT 1994, and in particular Articles 2.1, 2.2,3.1, 3.2, 4.1, 4.2, 5.1, 5.2, 7.1 and 9.1 of the AOS and Articles I:1, XIII and XIX:1 of GATT 1994. The other States that challenged the US action were Korea, Japan, China, New Zealand, Brazil, Norway and Switzerland. A large number of literatures are available criticizing the US Steel safeguards. Chad P. Bown, "How Different are Safeguards from Antidumping? Evidence from US Trade Policies Toward Steel", July 2004. Available at http://www.ppl.nl/bibliographies/wto/files/2752.pdf accessed on 5 August 2005; Youngjin Jung and Ellen Jooyeon Kang, "Towards an Ideal WTO Safeguards Regime – Lessons from U.S.- Steel", *The International Lawyer*, vol.38, no. 4, 2004, pp. 919-944; Christy Ledet, "Causation of Injury in Safeguards Cases: Why The US Can't Win, *Law and Policy in International* Business, vol. 34, no. 3, 2003, pp. 713-46.

[59] Parallelism means the requirement by the States to maintain consistency in the application of the safeguard measures. The agreement requires the importing State to conduct investigations to determine serious injury by analyzing the imports of the most recent period for which data is available and to apply the measures against all those States whose imports have been investigated and revealed to be the cause of serious injury. The issue of parallelism 1st arose in the *Argentina Footwear* case (1999) when Argentinean action of excluding the MERCOSUR States from action was challenged by the EC but the Panel did not rule on it. Later it arose in *Wheat Gluten* case (2000) when US exempted Canada from the safeguard action when it had included the Canadian imports for investigation.

[60] WT/DS202/AB/R, para.21.

producers that constitute the injured domestic industry. The Agreement defines domestic industry as the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.[62]

In this case the USITC included in its investigation growers and feeders of live lambs, as well as packers and breakers of lamb meat, within the definition of industry mentioned under Article 4.1(c) of the AOS. The reason provided by the US ITC was that there was a "continuous line of production from the raw to the processed product", and that there was a "substantial coincidence of economic interests" between and among the growers and feeders of live lambs, and the packers and breakers of lamb meat, which can be read to include the producers making the primary contribution to the value of the finished product who can be protected under the Agreement.[63]

They argued that a definition of "domestic industry" that excluded the growers and feeders would, be artificial, and would render the determination of serious injury or a threat thereof meaningless as most sheep and lambs are meat-type animals kept primarily for the production of meat and the value added by the growers and feeders of live lambs accounts for about 88 per cent of the wholesale cost of lamb meat in the United States. Further that to limit the domestic industry only to breakers and packers would have required the USITC to examine only the portion of production responsible for approximately 12 percent of the value of the

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[61] This case was initiated by New Zealand and Australia. On 16 July 1999, New Zealand requested consultations with the US in respect of a safeguard measure imposed by the US on imports of lamb meat from New Zealand (WT/DS177). New Zealand alleged that by Presidential Proclamation under Section 203 of the US Trade Act 1974, the US imposed a definitive safeguard measure in the form of a tariff-rate quota on imports fresh, chilled, or frozen lamb meat effective from 22 July 1999. New Zealand contended that this measure is inconsistent with Articles 2, 4, 5, 11 and 12 of the AOS, and Articles I and XIX of GATT 1994. On 23 July 1999, Australia requested consultations with the US in respect of a definitive safeguard measure imposed by the US on imports of lamb (WT/DS178). Australia alleged that by Presidential Proclamation under Section 203 of the US Trade Act 1974, the US imposed a definitive safeguard measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat from Australia effective from 22 July 1999. Australia contended that this measure is inconsistent with Articles 2, 3, 4, 5, 8, 11 and 12 of the AOS, and Articles I, II and XIX of GATT 1994.

[62] Article 4. 1 (c) of the AOS, 1994.

[63] WT/DS178/AB/R, para. 77.

like product, and to ignore the effects of the imports of lamb meat on producers whose economic interests were closely intertwined with those of the breakers and packers and whose financial health was similarly likely to be affected by lamb meat imports.[64]

On the other hand Australia (respondent) submitted that the meaning of "producer of a like product" is clear and simply means those who make that article. Australia argued that term "as a whole" in Article 4.1(c) of the AOS refers to the comprehensiveness of the investigation that must be conducted once the domestic industry has been identified, but does not go to the issue of how to define the scope of the domestic industry. Australia objected the acceptance of the standard of interpretation relied by the US to define a domestic industry. It stated that if such interpretations are accepted then the Appellate Body would leave it to the discretion of importing Members to choose "how far upstream and/or downstream [in] the production chain of a given 'like' end product" they could go to define the "domestic industry".[65]

New Zealand, the other complainant contended that there was no dispute that the "like product" in this case was lamb meat, and that the function of the USITC was to determine the domestic industry based on the producer of the lamb meat. It stated that the USITC had failed to prove this. New Zealand adds that the term "as a whole" in Article 4.1(c) relates to a quantitative requirement for the application of a safeguard measure and does not justify extending the scope of the domestic industry beyond those who produce the like product.

The Panel decided that the US has acted inconsistently with Article 4.1(c) of the AOS because the USITC, in the lamb meat investigation, defined the domestic industry by including input producers as producers of the like product at issue (i.e. lamb meat). The Panel after examining the definition of the term "domestic industry" as provided in the Agreement concluded that there is no basis in the text for considering that a producer that does not itself make the product at issue (lamb meat), but instead makes a raw material or input that is used to produce that product and can thus nevertheless be considered a producer of the product. On appeal the Appellate Body concurred with the finding of the Panel

[64] ibid, para. 15.

[65] ibid, para. 25.

and held that the USITC had improperly interpreted the term "domestic industry" by extending the ambit of the definition.[66]

III. 5. Who are excluded?

The Agreement apart from providing for the application of the measures against all imports irrespective of the source also provides for an exception to the Customs Union Members if the Union is taking action on behalf of a Member State.[67] As every exception to a rule is subject to misuse the one provided under Article 2 of the Agreement faces a similar problem. The exclusion of some of the exporter States from the application of measure was considered by the DSB in a few cases which shall be dealt with hereunder.

III. 5. 1. *Argentina - Footwear* case[68]

In this case Argentina imposed a safeguard action against all States exporters of footwear into its territory except the MERCOSUR States.[69] This was challenged by the EC before the Panel and later appealed to the Appellate Body.

The complainant, EC stated that by taking into consideration imports from MERCOSUR countries for the purposes of making its injury determination, even though it never intended to impose measures on those imports, Argentina violated its obligations under the AOS and Article XIX of the GATT 1994.[70] They also argued that Article XIX of the GATT 1994 also requires parallelism. A liberalization obligation must give rise to increased imports, which in turn must cause serious injury. Under Article XIX, the authorized remedy for that serious injury can only be the suspension of the relevant GATT or WTO liberalization obligation. Accordingly, obligations incurred by Argentina within the framework

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[66] ibid, para. 78.

[67] Article 2 footnote 1 of the AOS, 1994.

[68] See n.5 at p. 60.

[69] States that entered into an economic integration Agreement in 1991 otherwise known as the Common Market of the South constitute the members of MERCOSUR. They are Argentina, Brazil, Paraguay and Uruguay.

[70] WT/DS121/AB/R, para. 27.

of its Customs Union cannot justify a safeguard measure, and imports subject to such obligations must be excluded from the analysis. The European Communities thus notes that there is no WTO obligation on Argentina not to impose safeguard measures on its MERCOSUR partners, other than an internal MERCOSUR commitment.[71]

The third parties to the case also questioned whether Article XXIV is applicable to MERCOSUR, as the members of MERCOSUR did not notify the customs union under Article XXIV of either the GATT 1947 or the GATT 1994 and that the parties to MERCOSUR have chosen to notify it instead exclusively under the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause").[72]

The Appellant justified its stand under Article XXIV of the GATT and certain national legislations, which require it to exclude the FTA members from safeguard action. Argentina alleged that the Panel erred in law by imposing a "parallelism requirement" between the determination of injury and the application of the safeguard measure that is not found in the AOS. Argentina stated that Article 5, which sets out the requirements for the application of safeguard measures, makes no reference to any requirement of "parallelism", except to the extent that a measure may not exceed what is necessary to remedy the injury. Similarly, it relied on Article 9, which exempts developing countries from the application of safeguard measures in certain circumstances, and stated that the former too does not impose a requirement that parallel modifications be made as part of the injury determination. In Argentina's view, the only "parallelism" on which the Members agreed was on the application of the safeguards measures to the market which is subject to investigation and where an injury is finally determined.

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[71] WT/DS121/AB/R, para. 29.

[72] Indonesia and America submitted that Argentina cannot take the defence of Article XXIV to escape the obligation under Article 2.2 (MFN application) of the AOS, ibid, para.53 and para. 65 respectively.

The Panel ruled that it does not agree with the Argentina in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, and concluded that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports 'from all sources' of supply from 'within and outside a customs union.'

The Appellate Body decided that the footnote one to Article 2 of the AOS applies only when a customs union applies a safeguard measure "as a single unit or on behalf of a Member State" while in this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports 'from all sources' on the Argentine domestic industry. The Appellate Body thus concluded that Argentina, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States.[73]

III. 5. 2. *US – Wheat Gluten* case[74]

In January 1998, the USITC determined that import of wheat gluten is increasing and is a substantial cause of serious injury to the domestic wheat gluten industry and imposed safeguard action in the form of QR for a period of three years excluding the NAFTA countries (Canada). The justification given was the same as that given in the Argentina case mentioned above. The EC argued that such exclusion was not permitted under Article 4.2 of the Agreement.[75]

The Panel found that the text of Articles 2.1 and 4.2 contains a requirement of symmetry between the scope of the imported products subject to the investigations and the scope of the imported products subject to the application of the measure. It held that the defence under Article XXIV couldn't be used in

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[73] The Appellate Body however mentioned that wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure. ibid, para. 114.

[74] WT/DS166/P/R, para. 8.155-8.183

[75] ibid.

violation of the fundamental criteria for the application of the measures enshrined in both the GATT Article XIX and the AOS and that they must be applied cumulatively. It also stated that there is no basis in Article 4.2 for a distinction to be drawn on the basis of the origin of a product when examining the element of causation in safeguards investigation

III. 5. 3. *US – Certain Steel Products* case[76]

In this case the USITC had while imposing safeguard measures excluded imports from Canada, Israel, Jordan, and Mexico into the US. The Panel found the safeguard measures to be inconsistent with Articles 2.1 and 4.2 of the AOS, because the United States did not, with respect to any of the product categories at issue, to establish explicitly that imports from the sources included in the relevant safeguard measures, alone, satisfied the conditions for the application of a safeguard measure. On appeal the US requested that this decision be reversed as it gives effect to language absent in the text of the provision.[77]

The Panel required that the USITC repeat its findings on non-NAFTA imports "word for word in a section specifically addressing non-FTA imports".[78] It also stated that parallelism requires authorities to focus separately on imports from sources that are not excluded from the safeguard measure. However, the United States argued that the AB has not set conditions on how an authority must conduct its parallelism analysis in the cases previously dealt by it. The US also submitted that the Panel incorrectly interpreted the requirement that the competent authorities must establish "explicitly" that imports covered by the measure satisfy the conditions for the application of the measure. The United States pointed out to what it considers to be low import levels from Israel and Jordan, as well as to the USITC's finding that "exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners."

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[76] See n. 5, at p. 60, WT/DS259/AB/R.

[77] WT/DS259/AB/R, para. 31.

[78] ibid, para. 51.

The respondents[79] agreed with the Panels finding and mentioned that the decision was in consonance with the AB jurisprudence, as set out in *US - Wheat Gluten* and *US - Line Pipe*, and requested that the AB dismiss the United States' appeal on grounds of parallelism.

The AB decided in accordance with its decision in the *US - Line Pipe* case that, if a Member were to impose measures excluding some of the States included in the investigation from the action, there would be a "gap" between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure. It was stated that such a "gap" can be justified under the AOS only if the Member establishes "explicitly" that imports from sources covered by the measure "satisfy the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the AOS." [80]

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[79] Brazil stated that The Panel did not read into the AOS a new requirement that the effects of NAFTA imports be considered on their own or as an alternative cause, or that an authority must specifically analyze the effects of excluded products; rather, the Panel, in Brazil's view, stated what was necessary to ensure a proper assessment of the effects of included products.

China argues that, even if imports from Israel and Jordan were small-or sometimes even "quasi-inexistent"-this fact does not "release" the United States from conducting a proper parallelism analysis. China believes that there "cannot be a double standard", depending on the level of imports. ibid, para. 80

The European Communities disagrees with the United States' contention that, because imports from Israel and Jordan were non-existent or infinitesimal, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan. The United States is, in effect, invoking a non-existent de minimis exception. Finally, the European Communities submits that, in the event the Appellate Body reverses the Panel's findings, there is sufficient factual basis for the Appellate Body to complete the analysis. ibid, para 107

In Japan's view, the Panel correctly applied existing Appellate Body jurisprudence concerning how authorities must conduct their analysis and explain their findings in imposing safeguard measures on a non-MFN basis. The USITC did not make a specific causation finding for non-NAFTA imports of CCFRS or any other product. Thus, the USITC failed to ensure that its NAFTA-inclusive causation findings were consistent with the NAFTA-exclusive scope of the safeguard measures. para. 127. The point is not the quantity of the imports, but whether the USITC performed the required analysis. Japan submits that the USITC did not do so. para. 128. The other respondents also submitted similar arguments against the US.

[80] See n. 55, para. 441.

The Appellate Body concluded in the examination of whether increased imports were a cause of serious injury that the USITC had relied on data for all imports for each product category. It is undisputed that USITC and considered imports from all sources-including imports from Canada, Israel, Jordan, and Mexico for investigation and nevertheless, excluded imports from Canada, Israel, Jordan, and Mexico in the application of the safeguard measures at issue. Based on the above grounds the AB found that there is a gap between the imports that were taken into account in the investigation and the imports falling within the scope of the measures as applied. The AB held that the Panel had rightly found that the action was inconsistent for those nine categories of steel and that the United States has failed to comply with the parallelism requirement, because it did not establish that imports covered by the safeguard measures at issue, alone, satisfy the requirements for the imposition of a safeguard measure, and the United States has, in effect, acknowledged that it has failed to do so.

III. 6. Safeguards under the Textiles and Clothing Regime

The significance of the Agreement on Textiles and Clothing (ATC) cannot be negated as it regulates the textiles sector by over ruling the MFA that existed during the GATT period. The relevance of this Agreement in relation to this study is due to the fact that the Agreement has been phased out as on 1st January 2005. Now, the textiles sector is free to be traded without the quota system and any restriction against the trade in textiles can be initiated only under the safeguards measures. After the post World War II period the textiles sector has been one of the highly regulated areas of international trade by the developed countries.[81] The reason is that had it been liberalized most of the textile-related employment in the developed countries would have been wiped off due to the shift in the production base to the developing countries.[82] As the safeguards system under the ATC has already been explained in detail in the previous Chapter, this section concentrates on the cases that have been brought before the WTO DSB. Mentioned below are

[81] The divide between the developed and the developing States lead to the conclusion of the Multi Fibre Agreement in the 1960s, which was initially intended to be for a Short Term. See John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs Merill, 1969), pp. 572- 73.

[82] Sara Dillon, *International Trade and Economic Law and the European Union* (Oxford: Hart Publishing, 2002), p. 229.

the cases that were brought before the Panel for the improper application of the safeguards provision under the Agreement on Textiles and Clothing (ATC).[83] This is the only Agreement among the other multilateral Agreements within the WTO that has been contested in terms of its safeguards clause as compared to the Agreement on Agriculture or GATS, which have also included safeguards clauses separate from those provided under GATT, 1994 and WTO AOS.

III. 6. 1. *Costa Rica* v. *United States*[84]

The decision of this case is relevant as it called for the settlement of the dispute by the application of the provisions of GATT which again reaffirms the trend in the WTO jurisprudence that the obligation of Members under the WTO are cumulative with all the Agreements under it and not exclusive. In this case the US had adopted a system of permitting the re-importation of goods assembled abroad from US the components of this kind, at extremely low or tariff free rates, and as long as only assembling was done abroad no charges were made on the re-import of the product.[85] This was initiated to encourage co-production with the Caribbean Basin Initiative to create closer trade links with the Caribbean, Mexico and the Andean countries of which Costa Rica was a member. The USITC found that the re-imports from seven countries inclusive of Costa Rica caused serious injury and initiated a safeguard procedure under Article 6 of the ATC.[86]

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[83] The GATT sought to keep textiles out of trade regulation keeping in mind the critical role it plays in the development of an economy, especially those of the developing world. While the MFA discriminated the developed against the developing the WTO ATC gave protection to the developing States by seeking to avoid 'market disruption' and in the end aiming to integrate the sector into the trading system where all States can trade on equal footing.

[84] United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear. WT/DS24/AB/R, 10 February 1997.

[85] From 1990 the US underwear manufacturing industry began production and cutting of components and then getting them assembled them into the final product and re-importing them back to the US.

[86] Article 6.2 of the ATC stated that '....a safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing the like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference.

The matter was referred to the Textiles Monitoring Body (TMB), which identified that there was no serious injury, but failed to identify whether there was threat of injury and recommended the parties to reach satisfactory solution. The TMB similarly failed to make any findings on the effective date of application of the United States restraint. Accordingly, the TMB recommended United States and Costa Rica to hold further consultations with a view to resolve the matter. In the absence of any settlement, the parties reverted to the TMB, which confirmed its earlier findings and considered its review of the matter to be completed. Despite this a Panel[87] was established to consider a complaint made by Costa Rica relating to a transitional safeguard measure imposed by the United States on imports of cotton and man-made fibre underwear from Costa Rica and recommended the prompt removal of the measure inconsistent with the obligations of the United States.

Costa Rica submitted that the re-imports were not causing damage to the industry and that the US was trying to restrict its import under safeguard measure.[88] India being a third party to the case agreed with Costa Rica anon

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[87] The Panel Report, 8 November 1996, found that the action taken by US was not in consonance with law and ruled that

(i) The United States violated its obligations under Article 6.2 and 6.4 of the *ATC* by imposing a restriction on Costa Rican exports without having demonstrated that serious damage or actual threat thereof was caused by such imports to the United States' domestic industry;

(ii) The United States violated its obligations under Article 6.6(d) of the *ATC* by not granting the more favourable treatment to Costa Rican re-imports contemplated by that sub-paragraph;

(iii) The United States violated its obligations under Article 2.4 of the *ATC* by imposing a restriction in a manner inconsistent with its obligations under Article 6 of the *ATC*; and

(iv) The United States violated its obligations under Article X:2 of the *General Agreement on Tariffs and Trade 1994* (the "*General Agreement*") and Article 6.10 of the *ATC* by setting the start of the restraint period on the date of the request for consultations, rather than the subsequent date of publication of information about the restraint.

[88] Costa Rica argues that the United States retroactively applied the restriction in violation of Article 6.10 of the ATC as the provision does not provide for the same. The restriction was introduced on 23 June 1995 for a period of 12 months starting on 27 March 1995, which was the date of the request for consultations under Article 6.7 of the ATC. Although Article 6.10 of the ATC allows the importing country to "apply the restraint, ... within 30 days following the 60-day period for consultations", it is silent about the initial date from which the restraint period should be calculated. Costa Rica also cited Article 3.5(i) of the Multifibre Arrangement (MFA) and stated that under it the restraint could be instituted "for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries". Thus, the question before the Panel was whether the silence of the ATC in this regard should be interpreted as prohibition of a practice, which was explicitly recognized under the MFA, and if so, what

submitted that since it was the US manufacturers who were exporting to US though from Costa Rica the US cannot claim damage to the same industry of which the Costa Rican manufacturers were a part. Both the States argued that the US did not show actual damage and hence the action taken was violative of US's obligation.[89] The Panel further suggested that the United States bring the measure challenged into compliance with United States' obligations under the *ATC* by "immediately withdrawing the restriction imposed by the measure. On appeal by the US the Appellate Body had to decide –

1. Whether or not backdating of the effectivity of a transitional safeguard measure is permitted by Article 6.10 of the *ATC*;

2. Whether or not Article XIII:3(b), *General Agreement*, is applicable to a transitional safeguard measure taken under Article 6, *ATC*;[90] and

3. Whether or not Article
safeguard measure taken under Article 6, *ATC*.[91]

The Appellate Body agreed with the Panel in identifying that Article 6.10 of the *ATC* makes no express reference to backdating the effectivity of a safeguard restraint measure to some date prior to the promulgation or imposition of such measure. This was due to the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operative effect of a restraint measure, and strongly reinforced the presumption that such retroactive application is no longer permissible. The AB decided in relation to the retrospective application that the ATC under Article 6.11 does provide for the provisional application of safeguard

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should be the appropriate date from which the restraint period is to be calculated under the ATC. WT/DS24/R, para. 18

[89] Under Article 6.4 of the ATC the safeguards could be initiated upon damage assessed on a member-by-member basis. The US had failed to prove that the imports Costa Rica alone caused damage.

[90] The AB did not have to rule on it as it would have been necessary only if they had found that Article 6. 10 permit retrospection. However, it ruled that there is nothing in this provision, which runs counter to our conclusion that backdating, is prohibited under Article 6.10 of the *ATC*.

[91] The AB ruled that where no authority exists to give retroactive effect to a restrictive governmental measure, publishing the measure sometime before its actual application does not cure that deficiency. The necessary authorization is not supplied by Article X:2 of the *General Agreement*. Thus concluded that the safeguard restraint measure here involved is properly regarded as "a measure of general application" under Article X:2 does not conflict with, and does not affect our conclusion under the first issue above that backdating the effectivity of a restraint measure is prohibited by Article 6.10 of the *ATC*.

measures and hence such application was unwarranted. It also decided that the US has read into the ATC meaning, which has been disregarded by the Members while drafting the ATC superceding the MFA.

III. 6. 2. *India* v. *United States*[92]

The United States on 14 July 1995 imposed transitional safeguard action pursuant to Article 6 of the ATC after bilateral consultations with India in April and June 1995, which failed to reach a mutually agreed solution. As required by Article 6.10 of the *ATC*, the United States referred the matter to the TMB, which concluded and confirmed upon review that the transitional safeguard action in this case was imposed in accordance with the requirements of the ATC as it found that "actual threat of serious damage had been demonstrated" and that "this actual threat could be attributed to the sharp and substantial increase in imports from India". The restraint was effective as from 18 April 1995 for one year and was later extended to 17 April 1997. The Panel was established on 17 April 1996 to consider a complaint by India against the United States relating to a transitional safeguard restraint imposed on imports of woven wool shirts and blouses from India.[93]

India agreed with the overall conclusions of the Panel Report, but alleged that the Panel erred in law while making its findings on the burden of proof, in the findings of the TMB and on the issue of judicial economy. India argued that the US failed to consult on the value of the proposed safeguard action and also to obtain endorsement fr m the TMB before imposing its safeguard action.

The Panel concluded that the US restraint applied as of 18 April 1995 on imports of woven wool shirts and blouses, category 440, from India and its

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[92] United States - Measure Affecting Imports of Woven Wool Shirts and Blouses From India, WT/DS33/AB/R, 25 April 1997. The Appellate Body also commented on the judicial economy of the DSB to consider aspects that have not been presented before them in order to determine a case based on the rights vested upon it under the Dispute Settlement Understandings and upon the role of the TMB.

[93] After the release of the interim report of the Panel, the United States announced that it would withdraw the transitional safeguard measure, effective as of 22 November 1996, "due to a steady decline in imports of woven wool shirts and blouses from India and the adjustment of the industry". Nevertheless, India requested that the Panel continue its work and produce a comprehensive report on the dispute. The Panel Report was circulated on 6 January 1997.

extensions violated the provisions of Articles 2 and 6 of the ATC.[94] This conclusion was reached after analyzing whether US had considered all the relevant economic factors such as productivity, wages, inventories, investments etc before the application of the Safeguard measure.

III. 7. Norms on Investigation

While dealing with the aspects as to the conduct of investigation the Appellate Body has stressed on the central role of the interested parties. The authorities are required as per law to focus on the interested parties who should be given notice and an opportunity of being heard.[95] The AB stated that in order to carry out a full investigation a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2 (a) was necessary. It also mentioned that the authorities are not limited to assess the information provided by the Parties alone rather they are entitled to undertake additional investigative steps, when circumstances so require, in order to fulfill their obligation to evaluate all relevant factors. In the *US – Lamb Meat* case the AB mentioned that it is necessary that the report published by the authorities demonstrate clear facts as to the existence of unforeseen developments, which form the fundamental criteria to be satisfied for the initiation of the safeguard measure[96]. In relation to the classification of information submitted by the parties as confidential the authorities were granted discretion to decide as to which information is to be treated as confidential and as to whether the information does need any such protection.[97]

The Panel while making such references stated that a party should not be permitted to keep certain aggregate data as confidential within the meaning of Article 3.2. It also pointed out that the importance of this provision is to ensure

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[94] The Panel also stated that since Article 3.8 of the DSU provides that "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment", we conclude that the said US measure nullified and impaired the benefits of India under the WTO Agreement, in particular under the ATC. The Panel recommended that the Dispute Settlement Body make such a ruling. WT/DS33/R, para. 8.1.

[95] *US – Wheat Gluten* case, WT/DS166/AB/R, paras. 53- 54

[96] WT/DS178/AB/R, para. 76.

[97] Article 3.2 of the AOS, 1994.

greater transparency while respecting the confidentiality of the qualifying information. The AB held in the *Wheat Gluten* case that the refusal by a member to provide the requested information would impair the interests, as the DSB would be unable to render a decision upon objective assessment of the facts of the matter.

III. 8. Notification[98]

The Panel ruled on the aspects of notification that it should be done on urgent basis going by the meaning of the term 'immediately'.[99] The nature of notification to be followed by the States as interpreted by the DSB include the following –

(1) The provisions make clear that the notification shall precede the consultation referred to in Article 12. 3.
(2) The requirement for a minimum level of information in a notification against the immediate notification cited in the provision.
(3) The notification should refer at a minimum, to the injury factors required to be evaluated under Article 4.2[100] as well as items given under Article 12.2.[101]
(4) Immediate notification is that which would allow the Members the fullest possible period to reflect upon and react to the ongoing investigation.
(5) Immediate notification is satisfied when the Committee and the Members are given sufficient time to review that notification.
(6) Prohibit undue delay. All Members are to be kept informed with out delay, of the various steps of investigation, as any action based on the investigation would affect them.

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[98] Article 12 of the AOS, 1994.

[99] The Panels in the Korea Dairy Products and the Wheat Gluten case held a delay of 14 and 16 days between the date of initiation of the investigation and its notification as insufficient and violating the provisions of the Agreement. A 6 weeks delay in notification after the decision on the proposed measure.

[100] Such evidence should not include all the details contained in the report of the national authorities.

[101] Details of matters under Article 12.2 of the AOS would provide the exporters to engage in meaningful consultations as envisaged under Article 12.3 of the AOS.

(7) The degree of urgency required to be identified on a case-by-case basis considering the administrative difficulties that a Member would face. e.g. Translating the notice into one of the official language.

III. 9. Discriminatory Application of Measures

As the safeguard measures aim towards the application of their non-discriminatory application among the trading partners sufficient evidence exist which reveal that conditions exist at the multilateral level for their discriminatory application. Discussed below are the provisions within the AOS and that of the other international trade agreements, which show a clear violation of the fundamental requirement of the measures.

III. 9. 1. Agreement on Safeguards

The Safeguards Agreement was drafted with an intend to establish multilateral control over the bilateral and discriminatory safeguard measures that were entered into by the States outside the framework of the GATT 1947. Though the Members welcomed the conclusion of the Agreement it still carries with it the element of discrimination in the manner of treatment of the various countries that are subjected to the safeguard measures, be it in giving special treatment at time of implementing the actions or in exempting them from the actions or even in the kind of the measure to be applied. Scholars like Bown and McCulloch have pointed out this inbuilt defect in the Agreement and mention that the Agreement still carries vith it the defects of that of its predecessor. To begin with they, state that the primary rule of the non-discriminatory application[102] of the safeguards is violated by Article 5.2 (a) of the Agreement by permitting the States to allot quotas in accordance with the shares of the imports of those countries that are principal suppliers and have a substantial interest in the import of those products.[103]

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[102] Article 2.2 of the AOS.

[103] This is evident from the following wordings of the Article '...Members...seek agreement with respect to allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned' and in cases were reaching an agreement is not possible 'the Member can allot to *Members* having a *substantial interest* in supplying the product *shares based upon proportions*, supplied by such Members during a previous representative period.

The preference given to a particular group of countries based on their share tends to discriminate against those having a smaller share and relates to countries that have recently entered the GATT/WTO as compared to the old players in international trade. This is so because the Agreement does not provide any protection to the latter while applying the safeguard measure. Moreover even for the allocation of the shares the provision does not define 'previous representative period' whose imports need to be considered. Assistance has to be taken from Article 5.1, which provides for allocation of quota by not reducing the quantity of the imports below the average of imports in the last of three representative years for which statistics are available. This difference in treatment is seen only in the case of quotas and not for the tariffs, which also form a measure to be used as safeguard action.[104]

Article 5.2 (b) also explicitly discriminates between exporting countries whose trade has grown too quickly which is termed as disproportionate increase in imports in relation to the total increase in the representative period. They further analyzed on the explicit and implicit discrimination by taking into consideration the safeguard measures imposed by the States from 1996-2000 and concluded that when compared to the safeguards measures applied in the form of tariff, those applied through quantitative restrictions discriminate in favour of suppliers whose market shares have risen over a prior representative period. Further they have studied the changes in market share that are effected by the safeguards measures on the fast-growing established suppliers and the new suppliers

Other provisions present in the Agreement that make discrimination possible are those which provide exemption to countries that are Members of Preferential Trade Agreements[105] and the total exemption given to the developing countries and small countries whose total imports does not cross beyond the 3 per

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[104] See Chad P. Bown and Rachel McCulloch, "Nondiscrimination and the WTO AOS", *World Trade Review*, vol.2, no.3, 2003, pp. 327-348 and Chad P. Bown, "Why are Safeguards Under the WTO so Unpopular?", *World Trade Review*, vol.1, no.1, 2002, pp. 52-6.

[105] Act of Members exempting their preferential trade partners from the application of safeguard actions after including the imports from them in the investigation to determine injury example *Argentina - Footwear* case, *US- Wheat Gluten* case.

cent limit individually or when taken collectively if the import does not exceed the 9 per cent limit.[106]

III. 9. 2. US – Canada Softwood Lumber Agreement.

The US domestic law Section 201 of the Trade Act of 1974 dealing with safeguards has been the most contentious of all the safeguard actions.[107] Being one among the first nations with domestic laws to govern the safeguards system the US has been criticized for the extensive protection it provides for its steel industry. Other than that it is subject to international scrutiny for the Agreement entered into with Canada which required Canada to control its export of soft wood lumber into US and also the imposition of certain fees on the quantity of its softwood lumber exports to the US over a certain set annual amount. The Softwood Lumber Agreement (SLA) provides that -

> "Canada shall place softwood lumber on The Export Control List under the Export and Import Permit Act, as amended, and require a federal export permit for each exportation to the United States ..."[108]
>
> Article 11.2 provides that Canada shall collect a fee on issuance of a permit for export to the United States of softwood lumber ....the fee shall be determined in accordance with the schedule..."

From the above provisions it is clear that the agreement runs counter to the prohibition of grey area measures under the AOS.[109] This is so because the Agreement provides that no State shall seek or maintain any VER and OMA or any other similar measures on the export or the import side. The SLA is a clear violation of the Safeguards Agreement. Though the Agreement had expired in 2001 States are trying to renew the same. The only option to prevent the re-emergence of the grey area measures through the revival of the Agreement is by effective monitoring, requiring the States to report their proposed arrangements

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[106] Article 9.1 of the AOS.

[107] Actions taken under US law have been challenged in the *US – Wheat Gluten* case (2000), *US - Lamb Meat* case (2001), *US - Certain Steel Products* case, (2002).

[108] Article 11.1 of the Softwood Lumber Agreement, 1996.

[109] For details of the Agreement, its history and the countervailing duties initiated against the same see Young Shik Lee, "Revival of Grey - Area Measures? The US –Canada Softwood Lumber Agreement: Conflict with the WTO AOS" vol:36, no. 1, 2002, pp. 155-165.

either bilateral or multilateral to the Committee on Safeguards so as to ensure that no treaty is created circumventing the rules of the Safeguards Agreement. In other cases the Committee on Safeguards is required to advise the States not to enter into agreements inconsistent with Article 11 of the AOS keeping in mind the achievements of the Uruguay Round agreements.

III. 9. 3. China and Transitional Safeguard Mechanism

Another case that shows the re-emergence of the grey area measure is the Protocol of Accession of China, 2001. The Republic of China entered the WTO compromising on a very crucial aspect of its trade interest, entailing restriction its trade abroad. Section 16 of the Protocol provides for the initiation of transitional product specific safeguards against the imports from China upon proof of *material injury*. This clause is a clear violation of the safeguards system, as it permits deviation from the traditional practice of initiation of a safeguard measure.[110].

Even though during the GATT period Members permitted a safeguard action to be taken against a single State, whose imports increased in greater quantities, it was done so only upon proof of serious injury unlike in the case of the China's Protocol.[111] The inclusion of such a clause permits the States to take action on satisfaction of lesser degree of injury as provided for under the antidumping or countervailing duties case. The safeguard mechanism under the Protocol has laid down a different standard, as it requires no satisfaction of the unforeseen developments clause, which is considered fundamental to the safeguard action. The Protocol places in effect a trade diversion clause that permits that once a State initiates an action against China that shall be a ground for other States to take action against China and not the other way round where the States are required to apply the action on all countries exporters of a product. The effect of this is that the trading partners of China can succeed in discriminating against China despite the fact that imports form other States also contribute to the increased imports resulting in serious injury. If States start taking

[110] Under GATT 1994 which succeeded the GATT 1947 and the WTO AOS, States are permitted to initiate a safeguards action only upon proof of serious injury. See Article XIX of the GATT and Article 2.1 of the AOS.

[111] Paragraph 4 and paragraph 5 of The Protocol of Accession of Poland, Romania and Hungary respectively, permitted restriction of imports originating from their territory to be restricted if such imports caused or threatened to cause serious injury action

action against China, which they will, considering the fast growing economy they would end up using the safeguard measures as frequent as possible leaving States in a position filled with confusion as in the case of other trade remedies.

China has taken its first safeguards action against US in retaliation to the action of imposing such measures on steel imports from China. With sufficient safeguards being incorporated through the Protocol, for the protection of the industries against the imports from China, States have co-operated in violating the fundamental rules of the safeguard system. The action results in a clear case of discrimination against China, which could take retaliatory action against the action of importing countries. It is interesting to note that the safeguards system is relying on criteria's as under other trade remedies. Scholars like Hoekman and Kostecki point out that even in the case of antidumping where States need prove only material injury, States are resorting to VER like measures as the exporters tend to shift to other areas of production diversifying away from targeted suppliers once the investigation are initiated that permit imposition of duties on them. The safeguard system is recognized to be the best way out to help industries which are competing with the importers of the like or directly product. Hoekman and Kostecki suggest the abolition of laws governing measures other than safeguards.[112] Hence, resort to criteria's outside the safeguards regime is not considered to be the best method for the resolution of increased competition from competitive producers.

III. 10. Conclusion

From the afore mentioned analysis it is clear that the DSB has interpreted the Agreement at length in the cases brought before it, but the critics argue that the decisions rendered have not been efficient enough to establish concreteness in the Agreement. This is based on the ground that in all the cases the Panel or the AB has found the actions to be in violation of the basic requirements of the Agreement. To begin with the Panels and subsequently the Appellate Bodies in the various cases found that the actions taken did not conform to the unforeseen developments clause, a clause not mentioned anywhere in the text of the

[112] Bernard Hoekman and Michel M. Kostecki, "The Political Economy of the World Trading System: The WTO and Beyond" (New York: Oxford University Press, 2001), p. 330.

Agreement, but finding strength in the various provisions that govern the application of the measures understood as those taken under Article XIX of GATT and specifically under Article XIX 1 (a) of GATT. Some scholars have criticized the rulings of the AB as destabilizing the entire Safeguards system by the revival of old provisions and aggravating the problems by not stating the standards for the adequate demonstration of the unforeseen developments clause. If the DSB wants the satisfaction of such clauses then they would best be achieved by amending the provisions and by making clear rules to such effect. The States resorted to safeguard measures deriving authority from their national legislations and the declaration of the actions taken by the State as violative of the provisions, questions the sovereign right of a State to take such measures. The other criticism leveled against the evolving jurisprudence is that the DSB is reading into the Agreement additional obligations that are not present in it. The DSB has ruled that the discrepancy in the data used to determine injury would entail the investigation report to be rejected by them. It has rendered decisions that entail higher responsibility on the developing countries, as they are required to submit all the statistics of the relevant factors that are considered to have a bearing on the industry. Such directions are difficult for them to satisfy as such detailed analysis requires sophistication, which not all the developing countries are fortunate to obtain unlike the developed countries. Thus on the basis of the aforementioned analysis, through this Chapter it can be concluded that, the integrity of the safeguard system lies in the consistent interpretation rendered by the DSB and the subsequent State practice.

CHAPTER IV

INDIA AND SAFEGUARDS MEASURES

CHAPTER IV

INDIA AND THE SAFEGUARD MEASURES

This Chapter deals with the national system of implementation of the safeguards measures. Like many of the developing countries, India has evolved a safeguard system to protect its domestic industry from surge in imports after the establishment of the WTO in 1995.[1] Unlike other developed countries like the US, Canada, Australia and European Community; India does not have a history of imposition of safeguards measures during the GATT period. India started the use of safeguards measures to protect its industries only in the post WTO period.[2] The number of safeguard actions initiated by India since 1995 is 15, and India is the only country that has imposed the maximum number of safeguard measures against its trading partners when compared to other developed and developing countries.[3] The domestic law that governs the use and implementation of safeguard actions and duties are the Customs Tariff Act 1975 as amended and the relevant Rules. Under the Act, the safeguard measures are imposed by the Central Government upon determination of serious injury to the domestic industry of the product imported in increased quantities into India.

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[1] India notified under Article 12.7, 10 and 11. 1(b) of the AOS, to the Committee on Safeguards that it does not maintain any pre-existing GATT Article XIX measures. See G/SG/N/2/IND, G/SG/N/3/IND, dated 31.8.95. Available at www.docsonline@wto.org accessed on 25 September 2005.

[2] The first safeguard action taken by the Indian Government was on the import of Acetylene Black from Belgium, Peoples Republic of China, Japan, France, Singapore, Philippines and South Africa for which it imposed a duty at the rate of 18 per cent and 15 per cent for a period of 2 years. For a list of safeguards actions initiated see Table 5 of ANNEX I.

[3] Chile, Jordan and the United States followed, with 10 initiations each. The Czech Republic was third with 9 initiations. The 4 initiations reported for the most recent period (January-June 2005) were by Canada, Jordan, Morocco and Pakistan. Concerning the application of new final safeguard measures, since 1995, India reported the largest number (8), followed by Chile and the United States (6 measures each), followed by the Czech Republic and the Philippines (5 measures each). During the period January-June 2005 Chile, the European Communities and Indonesia each notified one new measure, on wheat flour ("vegetable products"), salmon ("animal products") and ceramic tableware ("ceramic/glass products"), respectively. The European Communities subsequently notified in April 2005 that the measure on salmon was terminated. See, WTO Secretariat announces statistics on safeguard measures, 2005 NEWS ITEMS 18 November 2005. Available at http://www.wto.org/english/news_e/news05_e/safeg_nov05_e.htm, accessed on 25 November 2005.

IV. 1. Customs Tariff Act 1975[4]

The Act 1975, governs the levy of duty on the goods that cross the borders of India. Section 8 and Section 8A of the Act provides for the increase in the levy of the export and import duty by the Central Government on exported and imported goods (mentioned in First Schedule of the Act) after notifying in the Official Gazette. This could be done in cases of necessity where such circumstances existed, which render it necessary to take immediate action. The Act did not provide for any provisions that would help the national authorities to act in tune with the remedies against injury caused by increased imports as provided for under the GATT 1947. After the establishment of the WTO, the Act was amended to include provisions that would permit the Central Government to take actions like safeguard actions and antidumping or countervailing measures that would protect an industry within India against outside competition.[5]

The Act was amended in 1997 vide Notification No. Cus. 5/97 dated 28 February 1997, as mentioned in The Finance Bill [Bill no. 25 of 1997] 1997 with provisions that would empower the imposition of safeguard duties.[6] An additional provision Section 8C was inserted in the 1975 Act through an amendment by the Finance Act 2002, which empowers the imposition of safeguard duties against, imports from China on proof of market disruption. The safeguard duty is levied for those goods, which show an increase in imports in such quantities so as to cause serious injury to the domestic industry of the like or directly competitive products. Prior to the amendment of the Act, the Central Government, was empowered to increase the import duty leviable on any product under, section 12 of the Customs Tariff Act 1962 but the new provisions made possible for India to impose duties additional to any duty imposed under the Act or any other law[7] and exceeds the bound rate in the Schedules of Concessions to the GATT.

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[4] Herein after referred to as the Act 1975.

[5] Section 8B and Sections 9, 9A, 9AA, 9B and 9C were included to permit the Central Government to impose safeguard duties and countervailing duties and antidumping duties respectively.

[6] Section 8B of the Act 1975.

[7] Section 8B (3) and Section 8C (4), ibid.

The Central Government is empowered to impose safeguard duty on an article, after conducting enquiry as it deems fit, upon satisfaction that such article is imported into India in such increased quantities and under such conditions so as to cause or threaten to cause serious injury to domestic industry, by notification in the Official Gazette.[8] The Government has also established Rules that would lay down the manner in which an article liable for safeguard duty may be identified, for the determination of serious injury or cause of threat of serious injury and the method of assessment and collection of such safeguard duty.[9] The law permits exclusion of the imports from developing countries unless their share individually exceeds 3 per cent or in the case of a group of developing countries importing into India their aggregate imports should not exceed 9 per cent.[10] The Central Government can exempt such quantity of article as it may specify in the notification from payment of the whole or part of the duty leviable.[11] The products for which has taken safeguard measures include mainly chemicals.[12]

The Central Government is also empowered to take provisional action for a period of 200 days if a preliminary determination of increased imports is shown and is liable to return the duty levied if upon final determination there is no proof of serious injury.[13] The provision also exempts goods imported by 100 per cent export-oriented units (EOU) undertaking or free trade zones (FTZ) or special economic zones (SEZ).[14] The maximum time period permitted to impose a safeguard duty is four years, which can be extended to 10 years for the developing

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[8] Section 8B (1), ibid.

[9] The Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 (hereinafter referred to as Rules 1997) notified under Ntfn. 35 (N.T.) dated 29.07.1997 as amended by 61/99-Cus. Dated 11.05.99; and the Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002 (hereinafter referred to as Rules 2002) notified under Ntfn. 34 (N.T.) dated 11.06.2002 of the Customs Tariff Act, 1975 were established pursuant to Section 8B (5) and Section 8C (6), ibid. The rules mentioned in parenthesis to the earlier rules relate to correspond to the relevant provisions in the Rules 2002.

[10] India has submitted a list of 135 developing countries to the Committee on Safeguards whose imports shall be governed under the safeguards law, G/SG/N/1/IND/2/Suppl.1, dated 20.8.99.

[11] Section 8B of the Act 1975.

[12] For details visit http://www.cbec.gov.in/cae/safeguards/list_cases_investigated_summary.html.

[13] Section 8B (2), ibid.

[14] Section 8B (2A), ibid.

countries as per the AOS. Every notification of the Central Government taken in relation to the application of the safeguard measures has to be laid before both the Houses of the Parliament for approval.[15]

IV. 1. 1 The Director General of Safeguards

For the effective implementation of newly amended provisions a Director General of Safeguards has been appointed pursuant to the 1997 and 2002 Rules.[16] The appointment of the Director General must be done by notification in the Gazette and should not be below the rank of the Joint Secretary to the Government of India.[17]

IV. 1. 1. a. Duties[18]

The duties of the Director General include –

(1) To investigate the existence of "serious injury" or "threat of serious injury" to domestic industry as a consequence of increased import of an article into India;

(2) To identify the article liable for safeguard duty;

(3) To submit his findings, provisional or otherwise to the Central Government as to the "serious injury" or "threat of serious injury" to domestic industry consequent upon increased import of an article from the specified country.

(4) To recommend:

(i) the amount of duty which if levied would be adequate to remove the injury or threat of injury to the domestic industry;

(ii) the duration of levy of safeguard duty and where the period so recommended is more than a year, to recommend progressive liberalization adequate to facilitate positive adjustment.

(5) To review the need for continuance of safeguard duty.

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[15] Section 7, ibid.

[16] Rule 3 of the Rules 1997 and 2002.

[17] ibid.

[18] Rule 4 of the Rules 1997 and 2002.

IV. 1. 1. b. Investigation[19]

The investigation for identification of serious injury or threat thereof by increased imports of a product is conducted by the Director General of Safeguards on receipt of a written application[20] by or on behalf of a domestic producer of a like or directly competitive product or *suo moto* on satisfaction of the information produced before him by the Commissioner of Customs appointed under the Customs Act, 1962.[21] He is authorized to investigate upon the matter and submit a report inclusive of the final findings and recommendations. The Director General shall not initiate an investigation unless he satisfies himself of the evidence of serious injury and in its accuracy and adequacy.[22] He is empowered to impose safeguard measures in the form of safeguard duties under Section 8B, and special safeguard duties under Section 8C[23] of the Act and the relevant 1997 and 2002 Rules. The final finding as to whether there is injury to the domestic industry as required under law to impose safeguard measure is to be made to the Central Government and if it is affirmative then the report should also suggest the temporary measures to be taken.

IV. 1. 1. b. i. Procedure

The Director General is required to issue a public notice notifying his decision to investigate. The notification has to include details of the industry, which would be subject to investigation.[24] A copy of it shall be forwarded to the Central Government in the Ministry of Commerce and Ministry of Finance and to the exporters and the government of the exporting countries and other interested

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[19] Rule 5, ibid.

[20] Rule 5 (2), ibid, the written application must be supported by evidence of increased imports, serious injury or threat thereof, the causal link between the both and a statement on the efforts being taken, or planned to be taken, or both, to make a positive adjustment to import competition. Under Section 6 (3) the Director General is also required to provide a copy of the application to the Ministry of Commerce, affected exporters their governments and any other interested party, ibid.

[21] Rule 5 (4), ibid.

[22] Rule 5 (3), ibid.

[23] Section 8C of the Customs Tariff Act 1975 relate to the safeguard action taken against China alone in case of proof of market disruption.

[24] Rule 6 (1), of 1997 and 2002 Rules.

parties. He is also required to provide a copy of the application requesting the investigation to the known exporters or concerned trade association, the governments of the exporting countries, thee Ministry of Commerce and also to any other interested party.[25] He can call for additional information from the exporters, foreign producers and their governments, which shall be furnished within thirty days from the date of receipt of the notice among others.[26] The parties can request any information provided to be kept confidential and the Director General shall disregard the same if the request for confidentiality is not satisfactory.[27]

IV. 1. 1. b. ii. Determination of Injury

The Director General while conducting the investigation to determine injury shall evaluate all relevant factors of an objective and quantifiable nature having a bearing upon the industry. These factors include the rate and amount of the increase in imports of the article concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[28] The determination shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the article concerned and serious injury or threat thereof. The Director General is precluded from considering factors other than increased imports that cause injury to the domestic industry at the same time. If upon investigation it appears that factors other than increased imports cause injury the Director-General may refer the complaint to the authority for anti-dumping or countervailing duty investigations, as appropriate.[29] The injury

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[25] Rule 6 (3), ibid.

[26] Rule 6 (4)-(8), ibid.

[27] Rule 7, ibid.

[28] Annex to the 1997, Rules.

[29] ibid.

caused by imports of articles from China is determined on the basis of the degree of the market disruption caused in the above lines to the domestic industry.[30]

After the investigations a copy of the preliminary findings shall be publicly notified and a copy of the same sent to the Ministry of Commerce and Finance who shall implement the safeguards action, if required.[31] The Director shall give a final finding of the investigation within 8 months of initiation of investigation and send a copy to the concerned Ministries. He shall recommend the amount of duty which if levied would prevent or remedy the injury and to facilitate adjustment, the duration of levy and if the period is more than 1year then recommend progressive liberalization adequate to facilitate positive adjustment.[32]

IV. 1. 1. b. iii. Implementation

This report is submitted to the Standing Board on Safeguards under the chairmanship of the Commerce Secretary. The views of the Board are then placed before (i) the Finance Minister for approval if the measure to be taken is a safeguard duty and (ii) to the Commerce Minister for imposition of quantitative restrictions. If the Central Government is satisfied with the report then it shall impose the measures by notifying it in the official Gazette. The duty shall be applicable to all imports of the article, irrespective of the source found to cause serious injury.[33] The duty applied shall not exceed 4 years unless revoked earlier. The Director General is required to review the continued imposition of the safeguard duty and request the revocation if the industry is found to be adjusting. If the period of application exceeds 3 years he shall review the situation not later than the mid-term of such imposition and recommend withdrawal or increase in liberalization of the duty.[34]

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[30] The proof of serious injury against imports from China is determined and governed by 2002 Rules.

[31] Rule 9 of 1997 and 2002 Rules. Provisional duty shall be levied under Rule 10, if action is necessary and shall not exceed a period of 200 days, ibid.

[32] Rule 9-11, ibid.

[33] Rule 13, ibid.

[34] Rule 18, ibid.

Mentioned below are the national laws of the most important States that have been users of the safeguards measures during the GATT period viz. the US and the EU. A comparison of these national laws and its compatibility with the WTO AOS has also been done.

IV. 2. American law on Safeguards Measures

Legislation of the United States permitting imposition of safeguard measures consist of Section 201-204 of the Trade Act 1974 and Section 330(d) of the Tariff Act 1930 and the Safeguard Investigation Rules and the chapter Eight of the North American Free Trade Agreement (NAFTA)[35]1994. Chapter Eight is implemented in the US through Section 201 of the Trade Act of 1974 as amended in 1994. Chapter Eight sets forth the procedures and remedies available to the domestic industries that have sustained, or are threatened by, serious economic injury due to increased imports.

Under NAFTA the Member States are entitled to take two kinds of safeguard actions viz. bilateral safeguard actions amongst the members themselves under Article 801 and the other global safeguard actions under Article 802 against imports from all sources.[36] The escape clause actions on bilateral grounds against Canada alone require the finding of actual injury and not merely threat of serious injury. Though the safeguard actions are taken as per the domestic laws in case of the NAFTA States they practice a criteria different from the general international norm as laid down in the GATT or WTO AOS.

IV. 2. 1. Bilateral Action

The prerequisites recognized for a bilateral action under the NAFTA are –

(i) Increased quantity of imports in absolute terms alone and not on the basis of a relative increase as is also permitted under WTO/ GATT.

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[35] The member states of the NAFTA are the United States, Canada and Mexico.

[36] Article 801 permits action for Mexico-US and Mexico-Canada trade. Annex 801:1 provides for action to be taken between US and Canada. The action for trade between US and Canada are also regulated by Article 1101 of the Canada-United States Free Trade Agreement (CUSFTA).

(ii) The imports must originate in the territory of the NAFTA Party as opposed to the MFN application of the action under the GATT or Section 201 of the Trade Act, 1974.

(iii) The increase must result from reduction or elimination of a duty as provided in NAFTA, this is similar to Article XIX 1 (a) GATT obligations.

(iv) The imports from the NAFTA member alone should constitute a substantial cause of serious injury or threat to the domestic industry.

IV. 2. 2. Global Action

The conditions for the initiation of global actions are -

(i) ...

(ii) ...

(iii) ...

(iv) ... similar to those mentioned above.

(v) Exception - permit exclusion of the other NAFTA members if imports from either of them are not a significant part of the problem thus exempting them from the general rule of MFN application as provided under the GATT/WTO. The reason was in order to prevent the members from undermining the benefits they would accrue to being party to the Free Trade Agreement (FTA).[37]

[37] The inclusion of such an exception was necessitated as Canada and Mexico suffered from extensive use of actions by the US. Most of the developing countries consider this exception as excessive protection being awarded to the NAFTA members and also violative of GATT principles of reciprocity and MFN rule.

However the exemption are conditional on the satisfaction of

- Article 802: 1 (a) criteria that is considered individually a NAFTA Party should account for a substantial share of total imports and
- secondly Article 802: 1 (b) considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury or threat thereof.

(vi) Limitations –

a) Party intending to take action must deliver without delay written notice to the other Parties of the institution of the action.

b) Party intending to take action must deliver prior written notice to the NAFTA Free Trade Commission and provide adequate consultation to the Parties whose goods will be affected by the action and far in advance of practically taking the action.

c) Any global action taken against goods from another Party should not reduce the imports from that Party below the recent trend in import from that Party.

d) The party taking action should provide to the other Parties against whom action is taken mutually agreed compensation in form of concessions having substantially equivalent trade effects.

IV. 2. 3 Procedure for application of safeguard measures

The action can be initiated in three ways, which include

- *suo moto* action by the USITC,
- the executive branch through the President or the United States Trade Representative (USTR) may request the ITC to commence a case,
- the legislative branch may request in the form of a resolution from the House Ways and Means Committee or the Senate Finance Committee.

In the United States an action for the safeguard measures are initiated on the basis of a petition filed to the International Trade Commission (ITC) by an

entity – 'representative of an industry'[38] for the purpose of facilitating positive adjustment[39] to import competition. Upon receiving a petition the ITC forwards a copy to the USTR. The petitioner is required to provide details of the petitioners, import data, domestic production, proof of injury, description of the relief sought etc. Upon receipt of the petition the ITC has to initiate immediate investigation as to the determination of injury to the domestic industry. It is required to file the recommendation within 120 days of the petition. If the ITC finds no injury the case would be closed and the President would have no authority to invoke an escape clause action.

If it finds injury then the ITC should recommend to the President the remedies that would address the harm and those that would be most effective in facilitating the efforts of the domestic industry to make a positive adjustment. It may recommend the adjustment of tariffs, imposition of quotas or tariff rate quotas, the adjustment assistance to the workers or firms or a combination thereof or may suggest the President to initiate international negotiations to address the under lying cause to alleviate the injury. The President is free to act in accordance with the recommendations of the ITC or can order adjustment assistance by not considering the USITC Report.

IV. 3. European law on safeguard measures

The domestic law of the European Community authorizes the European Commission to take safeguard measures under Council Regulation (EC) 3285/94 and 519/94[40] (for state trading and former state trading nations) which have been amended by Regulation 2474/2000 and 427/2003 accordingly. Regulation 517/94 permits action to be taken in case of textile products and the former relate to non-textile products and for other third countries. They concern with the increased

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[38] The representative of an industry could be a firm, certified or recognized Union, group of workers or trade association.

[39] Positive Adjustment under U S Code 2251 (b) (1) means

(i) the ability of an American industry to compete successfully with the imports, or the orderly transfer of that industry's resources to other productive pursuits, and

(ii) the orderly transfer of dislocated workers in that industry to other productive pursuits.

[40] Regulation 519/94 apply to Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajkistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

import of non-textile products. The decision of the Commission shall be communicated to the Council and to the Members and the action can be taken by either of them. The factors that are analyzed for the determination of serious injury mentioned under Article 10 include the effects on the volume of imports, the prices of imports, the consequent impact on the Community producers of similar or directly competitive products and factors other than trends in imports which are causing or may have caused injury to the Community producers concerned. The latter is not permitted under Regulation 519/94 for the non-textile products.

For the imposition of safeguard measures the Commission has to satisfy itself that a product is imported in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to Community producers of the like or the directly competing products. The kind of actions that can be taken include the imposition of quantitative quotas, specific quotas under Regulation 519/94 and surveillance measures that relate to the determination of the threat of the injury for which investigations need not be conducted. The factors that are taken into consideration for determination of injury include the effects on production, capacity utilization, stocks, sales, market shares, prices, profits, return on capital employed, cash flow and employment.[41]

A comparative study of the Indian, American and European law on Safeguards is given in a tabular form hereunder. It can be seen from the table that the national laws of the countries compared below are consistent with the WTO AOS. Most of the national laws that are enacted for the implementation of the AOS derive its content from the latter. The definitions of the terms like 'serious injury', 'threat of serious injury', 'domestic industry' etc have been verbatim reproduction of the definitions in the Agreement.

Comparison of the National Safeguard Legislations of Three Countries

[41] Available at http://www.dti.gov.uk/ewt/antidump.htm accessed on 7 August 2005.

Criteria's of comparison	WTO	India	US	EC
Legislations	AOS	Customs Tariff Act 1975, The Customs Tariff Identification and Assessment of Safeguard Duty Rules, 1997 and The Customs Tariff Transitional Product Specific Safeguard Duty Rules, 2002	Section 201-204 of the US Trade Act 1974; Article 801 – 805 of NAFTA; Chapter 12-- Trade Act 1974 sec. 2251-2254	Council Regulation (EC) No 3285/94 Council Regulation (EC) No 519/94
Authority involved	Council for Trade in Goods. Committee on Safeguards.	Directorate General of Safeguards Director General of Safeguards	United States International Trade Commission United States Trade Representative President	European Commission on Advisory Committee
Number of actions taken under WTO	Actions notified under in total 139.	15	10	3
Action taken at request of	-	Domestic industry	Domestic industry	Member State
National law has Unforeseen developments	Unforeseen developments not mentioned specifically	No	No	No
Serious Injury	Article 4.1	Section 8B(1) and 8C (1) for market disruption	Chapter 12- Trade Act 1974 Sec. 2252.(c) 1. A	Article 16

Factors to be examined for serious injury	Inclusive of the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.	Inclusive of the rate and amount of the increase in imports of the article concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.	Significant idling of productive facilities in the domestic industry; the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit; significant unemployment or underemployment within the domestic industry;	Article 10 of EC 3285/94 And Article 8 of EC 519/94 Volume, prices , consequent impact on producers and factors other than trends in imports which cause or threaten serious injury.
Exemption from imposition of action	Does not provide.	Article 8 B (1) of the 1975 Act.	Article 802. 1 of NAFTA	Title V of the Regulation 519/94
Provisional Measures	Article 6, 200 days	Section 8B (2), rule 10 of 1997 Rules	Chapter 12- Trade Act 1974 Sec. 2252.(d) 2. D	Article 8
Transitional Safeguards against China	Article 16 of the Protocol of Accession of China	Section 8C of the Act 1975 and 2002 Rules	Section 421 of The Trade Act 1974	Regulation (EC) No 427/2003
SDT for Developing Countries	Article 9 (1)	Section 8 B (1) of the Act 1975		Article 19
Separate law for textiles	Can be protected under Agreement	Nil	Article 80.1(5) and 803. 4 actions Exclusion of application of measures to textiles	Regulation (EC) No 517/94

IV. 4. Compatibility with WTO Agreement

The Indian laws on safeguards like most of the national legislations have derived the wordings present in the provisions of the AOS for defining 'serious injury', 'threat of serious injury' and 'domestic industry'. A comparison of the Indian law with that of the US law reveals that the US safeguards system has a system of double application. Indian law does not differentiate between the trade partners with which it has bilateral Agreements unlike the case of US law which has separate provisions for the application of the measures for its bilateral and global partners. India has, on the other hand, incorporated safeguard clauses in the bilateral and the regional trade agreements concluded by it. As the unforeseen developments have been .

All the Member States of the WTO are bound by the interpretations rendered by the General Council and the Members in the DSB. The General Council being the highest decision making body has so far not made any coherent interpretation of the AOS inspite of the confusion created by the WTO DSB in the various cases brought before it by the Parties to resolve the disputes relating to the faulty application of the Agreement. In this context it is of importance to note that when States like the EC and the US contest over the satisfaction of the unforeseen developments clause some of the Members have incorporated them in their domestic legislations. Those include Korea,[42] Norway,[43] Japan,[44] Costa Rica[45] and

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[42] Article 43-9 of the Customs Act provides for the withdrawal or suspension of concessions, "if, as a result of a decline in price of a product in a foreign country, or other *unforeseen developments*, or the performance of the obligations under any treaty, any product is being imported in such increased quantities and under such conditions that it causes or threatens to cause a serious injury to domestic producers of like products or the products with a direct competitive relation, the Government may take any of the following measures...", See G/SG/N/1/KOR/1, dated 6.04.1995.

[43] The Norwegian Storting [Parliament] Section 4. "Customs-related safeguard measures, (1) Customs-related safeguard measures may be applied if, as a result of *unforeseen developments*, a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to Norwegian producers of like or competitive products.

(2) The King may, in conformity with the provisions of GATT 1994 and the WTO Agreement, apply such safeguard measures. A decision to apply safeguard measures pursuant to this section shall be notified without delay to the Storting (Norwegian National Assembly). The notification shall include a detailed account of the matter." See G/SG/N/1/NOR/3, 2.02.1996.

[44] Notice is hereby given that, pursuant to paragraph 1 of Article 3 of the Import Trade Control Order (Cabinet Order No. 414 of 1949), the undersigned has established the following regulations to govern emergency measures to be taken in response to an increase in the importation of goods, which regulations shall become effective from and including the day when the Marrakesh Agreement Establishing the World Trade Organization becomes effective and binding on Japan [1 January 1995], dated 28.12.1994.

Panama.[46] The fact that the unforeseen developments clause has been included in the domestic laws of some of the countries simultaneous to the conclusion of the WTO Agreement shows the will of the States to conduct the safeguard measure in tune with the requirements of the Article XIX of GATT. In the given circumstances it can be stated that the countries that argue for the satisfaction of the clause should amend their laws as per the requirement for the proper implementation of the measures by the national authorities within their territories. This especially relates to the US, which has been frequently required to make changes in its domestic law (Section 201) to make the system effective and law abiding. The changes in the laws and the State compliance of the same can alone maintain the integrity of the safeguards system. The role of the developed countries like the US in the integration and the smooth functioning of the trading system is crucial as it is one of the largest players in the world trade. One of the solutions to maintain coherence in the application of the measures could be by a firm decision of the General Council so that the States could amend their domestic law in accordance with it. But for this to happen the Council should take up this matter in its Agenda. One of the suggestions given has been the incorporation of

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Article 2. (Measures concerning emergency import quotas) - The Minister of International Trade and Industry shall comply with the provisions set forth in Article 3 through 20 hereof when he or she, based on the fact that a particular product is being imported into Japan in increased quantities (or in an increased ratio relative to the total domestic production) due to a decrease in the market price of such particular product in any foreign market or of any other *unforeseen* change in the circumstances... and that the importation into Japan of such particular product in such increased quantities is causing or threatening to cause serious injury to the "Domestic Industry Concerned"... producers whose collective output of like products an ' those other products which directly compete with such particular product in terms of their use...constitutes at least a major proportion of the total domestic production of Like Products... finds that it is urgently necessary for him or her to do so for the national economy, and, pursuant to paragraph 1 of Article 3 of the Import Trade Control Order, makes such particular product subject to an import quota ...." Foreign Exchange And Foreign Trade Control Law, (Law No. 228, 1 December 1949), See G/SG/N/1/JPN/2, dated 17.07.1995.

[45] Article 40- " The regulations on safeguard clauses are intended to provide the industry of the Central American countries with objective and temporary protection against massive imports of identical, like or directly competitive products, as a result of *unforeseen developments* and the effect of international obligations incurred or regionally agreed measures, including tariff liberalization, which cause or threaten to cause serious prejudice in any of those countries." Chapter VI, Notification of laws, regulations and Administrative procedures relating To safeguard measures Costa Rica, See G/SG/N/1/CRI/1, dated 30.03.1995.

[46] Title IV: "Safeguard Measures", Chapter I, Article 91. Object. "The provisions of this Title are intended to provide domestic products with objective and temporary protection against massive imports of identical, like or directly competitive products, as a result of *unforeseen developments* or the effect of international obligations incurred or unilaterally agreed measures, including tariff

safeguards into the Doha Development Agenda since it has taken up the task of discussing the modalities of interpretation of the Uruguay Round Agreements. The developing countries had included in their proposals the demand for the special and product specific safeguard mechanism. Though India has not incorporated the unforeseen developments clause in its domestic legislation it has so far not faced a problem with the implementation of the same. However, it has been extensively used by the exporting State in their defence before the Director General of Safeguards.

IV. 5. Safeguards under the Trade Agreements

India has after recognizing the importance of world trade and realizing that it can achieve more of market access for its goods, entered into several bilateral and multilateral agreements with various countries. India has entered into bilateral trade agreements with Bangladesh, Bhutan, Ceylon, Maldives, China, Japan, Korea, Mongolia and Sri Lanka and Preferential Trade Arrangements with Afghanistan, Chile and MERCOSUR. India has included the safeguard clauses in most of them.[47] The Comprehensive Economic Cooperation Agreement Between The Republic of India and The Republic of Singapore[48] (CECA), The Framework Agreement on Comprehensive Economic Cooperation Between The Republic of India and The Association of South East Asian Nations (ASEAN),[49] The Framework Agreement For Establishing Free Trade Area Between The Republic of India and The Kingdom of Thailand,[50] the Framework Agreement on Economic

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liberalization, which cause or threaten to cause serious prejudice to the domestic industry or production", See G/SG/N/1/PAN/1, 9.04.1998.

[47] Mentioned here are the provisions in the various Agreements, which state the safeguard clause. Article 6 of the India-Bhutan Trade Agreement (28.2.1995); Article 9 of the India-Nepal Agreement (6.2.1991); Article 8 of the India-Sri Lanka Trade Agreement (23.12.1999). Article 8 of the India-Afghanistan Preferential Trade Agreement, Article 15 and 16 and Annex IV of the India-MERCOSUR Preferential Trade Agreement refer to the safeguard clause. CEC Agreement Chapter 2 deals with the safeguard measures to be taken for goods and Chapter 7 deals with the safeguard measures to be taken for services available at http://www.commerce.nic.in/ceca/ch2.pdf, and http://www.commerce.nic.in/ceca/ch7.pdf, respectively.

[48] Article 2.9 (1) – (5) of the CECA permits for bilateral and global safeguards to be taken against the import of products from Singapore.

[49] Article 3. 8 (f) recognize that the parties shall negotiate on the safeguard measures based on the WTO Agreement in the RTA. Available at http://www.commerce.nic.in/agree_asean.htm.

[50] The negotiations between the Parties to establish the India-Thailand FTA covering trade in goods shall also include, but not be limited to the following: Article 3. 6 (vi) Safeguards based on the GATT/WTO principles.

Cooperation was signed between India and Chile on 20 January 2005[51] all have incorporated the safeguards clause to take action in case of increased imports from the Members to the Agreements.

The inclusion of the safeguards clause in almost all the Agreements concluded by India and the recommendation for the negotiation of the same in the Framework Agreements are proof of sufficient care being taken by India to control surge in imports while expanding its trade relations with its trading partners. India being rich in its resources needs protection guaranteed by the multilateral regime on safeguards measures, as that alone would permit it to compete in the international market to protect its domestic industry.

IV. 6. Implications for India

The necessity for an effective safeguards system for developing countries including India is of great significance, as it would aid in the demand for greater market access in the Non Agricultural Market Access (NAMA) and agricultural negotiations. The group of developing countries demanding for special products and special safeguard mechanism as integral elements of special and differential treatment for developing countries. Ministers at the G-20 Meeting in March 2005 reiterated their commitment to work together with the G-33 and other interested Groups to render effective and operationalise these instruments.[52]

The developing countries pointed out that their interests are being eroded by both regional and multilateral liberalization. Ministers agreed that preference erosion should be addressed in the negotiations, in accordance with the provisions of the 'July Framework', and requires mainstreaming the development dimension in the multilateral trading system through (i) expanded market access for products which are of vital export importance to the preference beneficiaries; (ii) effective

[51] Article 3. 4 (iii) the Parties are required exchange information on the safeguards measures to be applicable to them among other remedies.

[52] The G-20 include countries like Argentina, Brazil, Bolivia, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, Zimbabwe. The countries state that agriculture is vital for all developing countries and is central to the Doha Development Agenda. Our common goal is to put an end to trade-distorting policies in agriculture maintained by developed countries thus, contributing to growth and development of developing countries and their positive integration into the world trading system. This would be a major contribution to the development objectives of the Round. The G-20 Meeting Declaration at New Delhi, 19 March 2005,
Available at http://www.commerce.nic.in/wto_sub/g20/min_decln.htm accessed on 5 May 2005.

utilization of existing preferences and (iii) additional financial assistance and capacity building to address supply constraints, promote diversification and assist in adjustment and restructuring.[53]

The prior efforts of the developing countries to obtain special safeguard for special products and the establishment of a Mechanism as part of SDT within the July Framework Agreement have come into fruition in the Hong Kong Ministerial. The adoption of the Swiss formula in the Ministerial will achieve the reduction of tariff barriers taking fully into account the special needs and interests of the developing countries, including through less than reciprocity in reduction commitments through higher tariff co-efficient resulting in higher tariff reduction for developed countries. The interests of India and other developing countries in the expansion of trade and total integration of all products can only be possible after the Members agree to more of protection under the product specific safeguard mechanism.

IV.7. Conclusion

The Indian law on safeguards, though evolved gradually when compared to other developed countries, has seen a comparative rise in the use of the safeguard measures during the post WTO period. India and other developing countries have to bargain hard on agricultural and non-agricultural issues, sectors in which they hold higher stakes. In relation to agricultural products, the access to more markets would ensure security to the livelihood issue in most of the developing countries including India. Even in case of a lesser bargain, with the general application of safeguards measures under the WTO AOS, the developing countries can still succeed in underpinning their trade counterparts for any action taken against them in defiance of the established rules. Such an argument holds ground in the statement made by India to the Committee on Agriculture, which states that in relation to safeguard actions for agricultural products, the AOS would apply, as India cannot make use of the safeguards provision under the Agreement on Agriculture due to the lesser tariffication. Similar is the case for the services sector, which faces the difficulty of definition of services as goods. The role of the Committee on Safeguards to conduct proper surveillance can be used to check the

[53] ibid.

discrepancies in the laws created by the State whether it be a bilateral or regional trade Treaty or an Agreement. Thus the coherent and consistent application of the safeguard rules is central to the use of safeguards measures, if States are to avoid more troubles that would circumvent the purpose of the Agreement.

CHAPTER V

CONCLUSION

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The necessity for the inclusion of safeguard measures as one of the major remedies in international trade law could be attributed to its underlying principle, *ie* protection of the domestic industries from the serious injury caused by the increased imports of a like or directly competitive product. This measure is highly significant among the various remedies available under International trade law, as it provides a temporary protection of the domestic industry aiding towards market adjustment. The salience of this measure is accentuated by its role in providing a level playing field for the Member States, which are inevitably unequal in economic terms as trading partners. This remedy available to the States is unique when compared to the other remedies available under trade law that seek to protect the industry. The uniqueness in the remedy of safeguards measures is due to the fact that it protects a State against the absence of a violation of a right incumbent on a State and for the reason that it could be used against all States irrespective of whether they have caused damage or not.

Law in general, provides a remedy for every right (obligation) that has been violated, as clearly stated in the legal maxim *ubi jus ibi remedium* (every right has a remedy). International law also serves the same purpose of protection of the rights of the States, as subjects of international law. The nature of the obligation of States under international trade law relates to the performance of the commitments in the level of concessions given by them to their trading partners and thereby progressing towards free and fair trade. Under trade law, MFN rule (principle of non-discrimination) has the effect of treating the commitments of a particular State as binding against all States that are involved in international trade with it irrespective of whether the commitments are made to them individually. The safeguard measures provide remedy to the States in case of serious injury suffered by the domestic industry of a particular product against the increase in imports of its trading partner. This remedy is provided to the importing State against the fair trade practice of all its trade partners unlike the case of other remedies, which are available against the cause of unfair practices like dumping or subsidising a product. The importing State can as a safeguard measure, withdraw, modify or suspend the obligation incurred by it towards its trading partners. The

role of the US in the incorporation of the escape clause in the GATT has been crucial as it aimed towards the protection of the trading interests of the developed countries. The developed countries, in particular, those that had higher stakes as they traded in their products in international market used the safeguards measures.

The evolutionary history of the safeguards measures and the reasons for its frequent application by the States during the GATT period reveals that it provided for an adjustment period for the industry in the importing State as it becomes unable to compete with the imports from other States. All through the GATT period the safeguards measures have been imposed extensively by the developed countries against the developing countries. The difference in the economic development between the developed and the developing countries was the reason for the seldom resort of the developing countries to the use of safeguard measures under the GATT. Further, States resorted to bilateral measures termed as grey area measures, to protect their domestic industries instead of their multilateral application. The reasons for the use of the such measures outside the GATT regime lies in the fact that it permitted the restriction of the imports, causing serious injury, by negotiating voluntary agreements with the exporters. The safeguard measures under the GATT is replete with the use of such voluntary restraint measures negotiated between the governments of the importing States and those of the exporting State.

The discriminatory application of the measures for the protection of the domestic industry resulted in the restriction of international trade. This affected the developing countries, which were new entrants in the field of international trade. The study of the cases brought before the GATT Panels reveals that it supported the use of 'non-discriminatory' application of the safeguards measures upon proof of 'serious injury'. However, the Panel made no statements as to the prohibition of the grey area measures in spite of the numerous submissions made by the parties against the discriminatory application of the measures. The decision rendered by the Panel in relation to the application of safeguards measures for causing 'serious injury' upon satisfaction of the 'unforeseen developments' has acted as a guideline to the States even under the present multilateral trading system. The application of the measures under Article XIX were minimal due to the requirement of satisfaction of the stringent clauses like the unforeseen developments criteria and of the necessity to pay compensation to the exporting

country against which action is taken. A study of few cases that have been brought before the Panel, reveals that the actions taken by the States during the GATT period to protect their industries were challenged on the grounds of insufficient allocation of quotas after the remedies were intended to be taken.

Other issues that came up before it, related to the selective application of the measure against the exporting State. During the 1970s the States demanded the prohibition of the selective application and of the protective measures outside the GATT. The GATT Members negotiated for restructuring the escape clause and their efforts came to fruition at the Uruguay Round of GATT negotiations. Transparency in the use of the measures by the prohibition of the grey area measures, the prescription of a time limit, the application to all products and above all the proper definition of 'serious injury', which alone legitimises the use of a safeguard measure were among the elements proposed in the negotiations for the new rules. The Agreement on Safeguards established a new regime concluded by the States, with elaborate rules for the application of safeguards measures under Article XIX of the GATT. It is pertinent to note that the expanding scope of the safeguards measures from the GATT and the AOS towards the special safeguard mechanism as provided under the various sector specific Agreements viz. the Textiles and Clothing Agreement, the Agreement on Agriculture and the GATS.

A review of the cases decided by the WTO DSB, reveals that the decisions were rendered by relying extensively on the rulings of the GATT Panel and the interpretation given to Article 40 of the Havana Charter. The DSB has relied on the former to determine the legality of the measures alleged to be in violation of the rules. The cases decided by the DSB are relevant in this context as it provided for a cogent understanding of the interpretations of the various terminologies referred in the Agreement. The number of disputes dealt by the DSB in relation to the safeguards measures is remarkably greater when compared to the cases decided by the GATT Panel. The post WTO period is marked by instances of initiation of safeguard actions against the developed countries by the developing countries. The various cases decided by the DSB have applied the GATT provisions to determine serious injury despite the clear definition included in the AOS. The nature of cases decided by the DSB relate to the determination of the satisfaction of the unforeseen developments, to determine whether the use of the

measure was for the protection of the domestic industry as defined by the Agreement, the selective application of the measures etc. Ever since the first case decided by the DSB it has ruled that every action taken under the Agreement should be on the proof that the increased imports determined by the national authorities to cause serious injury to the domestic industry was unforeseeable to the importing State at the time when the concessions were granted. Further, in relation to serious injury it has ruled that it is necessary to demonstrate a causal link between the increased imports and serious injury. While deciding on this term the DSB has been cautious in holding that the mere increase in imports are not taken by the States as grounds for the use of safeguards measures. In relation to the issue of selective application of the measures against some countries especially by the members of regional arrangements (MERCOSUR and NAFTA), the Panel has stated that the exclusion of members party to regional arrangements from the application of the measures once their imports have been included in the investigation for the determination of serious injury as violating the fundamental requirements of the measure to be applied to the product irrespective of its source of origin. The DSB has also ruled in terms of the standard of review incumbent on it as not constituting a *de novo review* of the investigation report submitted before it. In some other cases the Panel has been alleged to require the States to fulfil conditions for the application of safeguard measures that are absent in the Agreement. The decisions rendered by the DSB has been greatly criticized by scholars as being inconsistent with the AOS especially for the reason that it requires the satisfaction of the unforeseen developments criteria which has been excluded in the Agreement. Thus it can be concluded from a study of the cases decided by the DSB that the safeguards measures available under the WTO have been frequently used by the States to protect their industries irrespective of the remedies available under the various Agreements. The nature of the safeguards taken under the WTO relate not only to the measures taken by the States under the AOS but also those available under the ATC. The initiation of safeguards measures by the developing countries to protect their textiles sector is sufficient proof of this trend.

The multilateral regime of safeguards available under the WTO has as its fundamental principle, the non-discriminatory application of the measures. The current practice under the trading system reveals that States are resorting to the

application of the measures in defiance of this principle under some of the bilateral agreements entered into by them. The imposition of safeguard measures on proof of *material injury* by India and other countries against the increased imports from China specially, is a glaring example of the deviation from one of the fundamental requirements of the Agreement. This shows that the States are circumventing the rules that permit the application of the temporary remedial measure. Further, the inconsistency in the national laws of countries in relation to the incorporation of the unforeseen developments clause adds to the lack of coherence in the safeguard system.

A perusal of the Indian laws and the use of safeguard measures by India reveal that it does not require for the satisfaction of the unforeseen developments criteria. The actions taken by India shows that it seeks to protect the industries relating to the production of chemicals to be used in the pharmaceuticals industry, rubber industry and the protection of these chemicals used foe industrial application.

In the light of the above-mentioned observations and analysis, this study concludes that the safeguard measures have often been used and are still continuing to be used by the developed and the developing countries. Unlike the GATT period wherein the developed countries' used these measures, a shift in the trend can be seen in the extensive use of these measures by the developing countries under the WTO. The number of actions notified to the Committee on Safeguards and also the disputed brought before the WTO DSB reveals that the States have the tendency to revert back from their commitments to protect their producers by using the safe guard measures. However, the AOS also encounters similar difficulties that were faced by Article XIX during the GATT period. The interpretation of the Agreement given by the WTO DSB has in turn made it more difficult for the States to make use of this measure by ruling that the causal link between the unforeseen developments criteria and serious injury has to be satisfied for the application of the safeguards measure.

The need for the clarification of the rules is inevitable as the States are entering into new obligations with their trading partners. It is especially important for the developing countries as they are negotiating for greater market access for their products in the various sectors. The safeguard measures would become meaningless if the measures adopted by them are declared by the DSB as violative

of the provisions of the AOS. If the DSB wants the satisfaction of the various clauses under the Agreement, then they would best be achieved by amending the provisions and/or by making clear rules to that effect. The role of the WTO DSB is therefore crucial in this aspect as it alone can rule on the modalities of the application of the measure instead of suggesting the satisfaction of the additional conditions in the cases brought before it. The other remedy to resolve the difficulties in the interpretation of the Agreement could be obtained if the WTO Council takes the matter to decide on its implementation. Further, the Committee on Safeguards, which is empowered to check on the notifications and application of the measures, can achieve coherence in the adoption of the national laws made by the States. The effectiveness of international law depends upon the equal application of the rules and principles based on consistent and coherent interpretations. In summation, it is all the more necessary for the Member States to make sufficient modifications to the inadequacies in the existing rules on safeguard measures, in order to strike a balance between their national interests for protection of their domestic industries vis-à-vis their commitments under international trade regime.

ANNEXURES
ANNEX I

Table 1

List of safeguards measures taken under GATT

Serial no.	Year in which action was taken	Product	Country which took the safeguards measure	Country against which action is taken	Compensation paid or not	Retaliation
1	1950	Women's fur felt hats and hat	US	Austria, Czechoslovakia, France, Italy, UK	France, Italy	—
2	1958	Hatters' fur	US	Argentina, Belgium, France; Benelux	—	—
3	1952	Dried figs	US	Greece, Italy, Turkey.	Compensatory reductions made	—
4	1954	Alsike clover	US	Canada, Belgium	—	—
5	1955	Apples	Greece	Canada,	Yes	—
6	1955	Bicycles	US	Austria, Belgium, AIR/77, 79 and 214 reneg.1 as well as floors and Netherlands, Germany, UK	Yes	—
7	1956	Towelling of flaxhemp or ramy	US	Belgium, Japan, Netherlands, United Kingdom.	Benelux and UK	—
8	1956	Electric refrigerators	Greece	US	Yes	
9	1957	Strawberries	Canada	US	—	—

10	1957	Spring clothes-Pins	US	Benelux, Denmark, Hong Kong, Sweden.	Denmark, Sweden,	—
11	1957	Safety-pins	US	Germany, Japan, United Kingdom.	Germany, UK	—
12	1958	Frozen peas	Canada	US	—	—
13	1958	Printed cotton textiles	Australia	Japan	—	—
14	1958	Clinical thermometers	US	Japan	—	—
15	1958	Hard coal and hard. Repeal of general license.	Germany	Norway, US, EC.	Yes	—
16	1958	Lead and zinc	US	Canada, Mexico, Peru; Australia, South Africa, Yugoslavia.	—	—
17	1959	Porcelain	Austria	Czechoslovakia, Germany,	Yes	—
18	1959	Footwear	Australia	Japan, Hong Kong	—	—
19	1959	Stainless steel flatware	US	Japan	—	—
20	1960	Motor mowers and engines	Australia	UK , US	—	—
21	1960	Cotton typewriter ribbon cloth	US	Germany, Japan, UK	UK	—
22	1961	Piece-goods, non-file	Australia	Italy, United Kingdom,	Yes	—

		fabrics, woollens		France, Germany, Japan Benelux. EEC		
23	1961	Cement	Nigeria	Germany, Israel, United Kingdom	—	—
24	1962	Sheet glass (principally window glass)	US	EEC, UK, Japan	Japan	—
25	1962	Wilton and velvet carpets	US	EEC, Japan, Sweden, UK	UK Japan	—
26	1962	Timber	Australia	Canada, Brazil, British Malaya, UK	—	—
27	1962	Parts of. refrigerating appliances	Australia	UK, US	—	—
28	1962	Antibiotics	Australia	France UK US	—	—
29	1962	Forged steel flanges	Australia	Germany	—	—
30	1962	Cotton and rayon piece goods	Rhodesia Nyasaland	n.a	—	—
31	1963	Linseed oils	Australia	Argentina, India	—	—
32	1963	Lead arsenate and valves respectively	Peru	US	—	—
33	1964	Chicken eggs	Austria	n.a	—	—
34	1964	Foundry pig-iron	France	Benelux, Australia, Canada, Germany, Norway Spain, Sweden,	—	—

				Finland, United Kingdom		
35	1964	Foundry pig-iron	Italy	Germany, Spain	—	—
36	1964	Heat-resisting. glassware of a minimum price	Australia	France, United Kingdom US; EEC	EEC	—
37	1964	Petroleum shale oils etc.	Germany	n.a	—	—
38	1965	Copper, brass sheet and strip	Australia	n.a	—	—
39	1965	Tyres	Greece	US Norway	US	—
40	1966	Polyethylene twine, cordage rope and cable	Australia	Japan	—	—
41	1966	Alloy steels	Australia	JAPAN	—	—
42	1966	Cheese	Spain	EEC, Norway	—	—
43	1967	Synthetic rubber	Spain	US Canada EC	Yes	—
44	1967	Used 4-wheel drive	Australia	US	—	—
45	1967	Matches	Austria		—	—
46	1967	Turkeys	Canada	US	—	—
47	1967	Knitted coats and the like	Australia	Japan	—	—
48	1968	Polypropylene twine, cordage and	Australia	Japan, US	—	—

		cable				
49	1968	Horse meat	France	Poland, Spain Argentina, Canada,	—	—
50	1968	Oilcakes	Austria	Argentina; US	—	—
51	1968	Potatoes	Canada	United State	Yes	—
52	1968	Corn	Canada	United State	—	—
53	1969	Raw silk	Italy	EEC	—	—
54	1969	Knitted shirts	Australia		—	—
55	1970	Pianos	US	Japan, EEC		—
56	1970	Motor Gasoline	Canada	US		—
57	1970	Men's and boy's woven fabric shirts	Canada		—	—
58	1971	Radio equipment	Israel		—	—
59	1971	Fresh and preserved frozen strawberries	Canada	US, Mexico		—
60	1971	Men's and boy's shirts, woven or knitted	Canada	Hong Kong, Japan, Korea, Macao, Malaysia, Poland, Romania, Singapore, Trinidad and Tobago.		—
61	1972	Ceramic tableware articles	US	Japan, EEC		—
62	1973	Tape recorders	EEC2	Japan, Korea		—
63	1973	Fresh cherries	Canada	US	Yes	—
64	1974	Ball bearings	US	Japan, Canada,		—

				EEC		
65	1974	Cattle, beef, veal	Canada	US	—	Yes
66	1974	Certain footwear	Australia	EEC, Japan, Korea, Malaysia, Spain, India, Hong Kong, Portugal	—	EEC
67	1975	Motor vehicles	Australia	EEC, Japan, US	—	—
68	1975	Hot rolled and cold rolled sheets and plates of iron and steel	Australia	Japan, US	—	—
69	1975	Certain apparel	Australia	Canada, EEC, Egypt, Hong Kong, India, Japan, Pakistan, Romania, Sweden, Switzerland, US.	—	—
70	1975	Ophthalmic frames, sunglass frames and sunglasses	Australia	EEC, Japan	—	—
71	1975	Woven polyester fabrics	Australia	Japan, US	—	—
72	1976	Worsted spun acrylic yarns below a certain price	Canada	Japan, Korea.	—	—
73	1976	Sand boots and shoes; parts of footwear	Australia	Korea; Germany, Italy, Portugal	—	—
74	1976	Files and rasps	Australia	US	—	—
75	1976	Speciality steel	US	Japan, Argentina, Austria,	—	—

				Sweden, Canada, Finland, France, UK, Germany, Korea, Mexico, Spain, Norway		
76	1976	Knitted and woven dresses	Australia	Canada, EEC, Egypt, Hong Kong, India, Japan, Pakistan, Romania, Sweden, Switzerland, US.	—	—
77	1976	Work gloves	Canada	Hong Kong	—	—
78	1976	Textured polyester filament yarn	Canada	US	—	—
79	1976	Electrical chest freezers	Australia	EEC	—	—
80	1976	Double knit fabrics	Canada	Japan, US, Singapore, Hong Kong, Malaysia	—	—
81	1976	Beef and veal	Canada	New Zealand	—	—
82	1976	A range of clothing items	Canada	Austria, US, Hong Kong, Korea		
83	1976	Women's panty hose	Finland	Singapore, UK	—	—
84	1977	Footwear	US	Korea	—	—
85	1977	Passenger motor vehicles	Australia	EEC, Jaoan	—	EEC
86	1977	Portable TV sets from Korea	EEC1	Korea, other suppliers: Japan, Singapore	—	—
87	1977	Brandy	Australia	EEC (France, Germany, F.R., Italy), Cyprus, Greece, Spain, Yugoslavia	—	—
88	1977	Fixed resistors	Australia		—	—
89	1977	Thongs,	Australia	EEC	—	—

		gumboots and spring footwear				
90	1977	Footwear, other than footwear of rubber or canvas	Canada	US, Korea, Poland, Romania, Spain, US, EC	—	EC
91	1978	Wool worsted yarns	Australia	EEC	—	—
92	1978	Round blunt chainsaw files	Australia	EEC	—	—
93	1978	CB Radio receivers	US	Japan, Korea	—	—
94	1978	Double edged razor safety blades	Australia		—	—
95	1978	Preserved cultivated mushrooms	EEC	Hong Kong, Spain	—	—
96	1978	Hot and cold rolled and galvanized sheets and plates of iron and steel	Australia		—	—
97	1978	High carbon ferro-chromium	US	South Africa, Rhodesia, Japan, Yugoslavia, Brazil (bound to Canada and Rhodesia)	—	—
98	1979	Various textile items	Norway	Hong Kong, US	—	—
99	1979	Lag crews or bolts	US		—	—
100	1979	Furniture, cupboards and cabinets, windows and doors	Iceland		—	—
101	1979	Clothes pins	US	Poland, Germany, Romenia, Netherlands	—	—

102	1980	Porcelain-on-steel cooking ware	US	Japan, Spain, Korea, France (Mexico)	—	—
103	1980	Yarn of synthetic fibres	EEC (UK)	US, Canada, Japan	US	—
104	1980	Cultivated mushrooms in brine	EEC	Hong Kong, Spain	—	—
105	1980	Cheeses	Spain	EEC, Austria, Finland	—	—
106	1980	Cultivated mushrooms	EEC	Hong Kong, Spain	—	—
107	1980	Certain works, trucks and stackers	Australia	EEC, Japan	—	—
108	1980	Preserved mushrooms	US	Canada	—	—
109	1981	Non- leather footwear	Canada	EEC, US, LDCs (Korea).	—	EEC proposed retaliation twice.
110	1981	Frozen cod fillets	EEC		—	—
111	1982	Leather footwear	Canada	EEC, Brazil, Spain, US	—	EEC proposed retaliation twice.
112	1982	Hoop and strip of iron and steel	Australia		—	—
113	1982	Dessert grapes, fresh	Switzerland	EEC	—	—
114	1982	Yellow onions	Canada	US	—	—
115	1982	Dried grapes	EEC	Australia, US	Compensatory taxes granted	
116	1983	Tableware and other articles ... of stoneware	EEC (France, UK)	Korea	—	—
117	1983	Heavyweight motorcycles	US	Japan	—	—
118	1983	Specialty steel	US	EEC, Brazil, Korea and	OMAs concluded	Canada EEC

				Austria, Argentina, Canada, Japan, Poland, Spain	with all except the first three.	
119	1983	Certain filament Lamps	Australia	Hungary, US,	—	—
120	1983	Non-electrical domestic refrigerators	Australia	Hungary, US, others	—	—
121	1984	Certain electronic piezo-electric quartz watches with digital display.	EEC (France)	Hong Kong, Japan, Korea, Macao	—	—
122	1984	Sugar	Chile	Not available (n.a)	Tariff surcharge	—
123	1984	Certain footwear Increased duties	South Africa	n.a	—	—
124	1984	Wheat Additional specific duties	Chile	n.a	—	—
125	1985	Fresh, chilled and frozen beef and veal	Canada	Australia, EEC, New Zealand, Nicaragua	—	EEC
126	1985	Morello cherries Countervailing duties charged on imports below a price	EEC	Hungary	Yes	—
127	1985	Malic acid Increased duties	South Africa	n.a	—	—
128	1985	Edible	Chile	n.a	—	—

		vegetable,				
129	1986	Provisionally preserved raspberries	EEC	n.a	—	—
130	1986	Sweet potatoes	EEC	n.a	—	—
131	1986	Tall oil fatty acids Certain pipettes, flasks etc. Certain high carbon steel wire Certain sparking plugs	South Africa	n.a	—	—
132	1986	Porous fiberboard impregnated with bitumen	Finland	n.a.	—	—
133	1987	Broken rice	Austria	EEC (Italy)	Yes	—
134	1987	Certain steel products	EEC (Spain)	n.a	—	—

Source : www. worldtradelaw.net.

Table 2

List of Grey Area Measures maintained under GATT

Serial no.	Product	Actions taken by country	Country against which action taken	Year of action
1	Steel	EEC	Austria Brazil Bulgaria Czechoslovakia Finlan hungary Japan Korea, Norway Poland, Romania, Venezuela	All the actions taken in 1987
		US	Argentina Australia Austria Brazil Bulgaria Czechoslovakia EEC Finland GDR Hungary Japan Korea Mexico Poland Portugal Romania S.Africa Spain Venezuela Yugoslavia Taiwan	1985-89 1984-89 1985-89 1985-89 1985-89 1985-89 1984-89 1984-89 1985-89 1985-89 1984-89 1984-89 1984-89 1985 1986 1985 1984 1984 1985 1986-89 1987
2	Machine Tools	EC	Japan twice in 1987	1984 –1989
		US	Japan EEC for (Germany) Switzerland Taiwan	1986-1991 1987 1987 1987 1987
3	Automobiles and road Transport equipment	Canada	Japan	1986-87
		EEC	Japan twice in 1987	1970, 1977 (Italy) 1977, 1982 (France) twice in 1975, 1980 (UK)
		US	Japan	1981-87
4	Electronic Products	EEC	Japan	1983-86 for sets, tubes, tape recorders. 1970 for car radios

			Korea	and tape recorders (Italy). 1983 (France) 1986-87 for video tape recorders 1985 for TV (UK)
		US	Japan	1986-1991 for semi-conductors
5	Footwear	Canada	Rep. of Korea Taiwan	1986-1987 1987
		EEC	Rep. of Korea	1977 (UK) 1982
6	Textiles	Canada	Maldives Vietnam	1986-1990 1986-1991
		EEC	Egypt Malta Turkey Tunisia Morocco	1987 for cotton threads, 1987-89 for cotton fabrics. 1987 1987 1987-89 1987-89
		Japan	Rep. of Korea Pakistan China	1974 for raw silk 1986-87 for Silk yarn, 1987 for certain apparel. 1987 for cotton goods. 1986-87
		US	Costa Rica Haiti Maldives Mauritius Taiwan Trinidad and Tobago	1984-1987 1987-1989 1985-1991 1986-1990 1986-1991 1986-1989
7	Agricultural And Food Products	EEC	Argentina, Australia, Live sheep or Export quota 1980-Austria, Bulgaria, goats and meat Czechoslovakia, Hungary, thereof Iceland, New Zealand, Poland, Romania and Yugoslavia	1980
			Austria, Finland, Norway	1985-1986

			Chile/other non-member countries	1980
			Rep. Of Korea	1978
			New Zealand	1986-1988
			Thailand	1987-1990
			Uruguay	1985-1988
		Japan	Rep. of Korea	1976
8	Other	EEC	Rep. of Korea Poland Sweden	1987 (UK,BNL) for Metal flatware 1987 (Denmark) for Porcelain. 1986 for Kraftliner.
		Norway	Rep. of Korea	1978-1989 for leather apparel. 1985 for ceramic wear.
		United States	Rep. of Korea	1987 for Stuffed toys, Auto-limitation 1987-pianos, leather bags, fishing rods, tarpaulin products and brasswar

Source : www. worldtradelaw.net.

Table 3

Summary of Cases Decided by the WTO DSB

Case citation	Decision
United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear (WT/DS24/AB/R)	Costa Rica alleged that US restrictions on textile imports from Costa Rica were in violation of the ATC agreement. The Panel found that the US restraints were not valid. The Appellate Body Report, on appeal by Costa Rica, modified one aspect of the Panel report.
United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India WT/DS33/AB/R	India complained that transitional safeguard measures imposed by the US is inconsistent with Articles 2, 6 and 8 of the ATC. The Panel found that the safeguard measure imposed by the United States violated the provisions of the ATC. The Appellate Body Report, on appeal by India, modified some aspects of the Panel report.
Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products WT/DS98/AB/R, 14 December 1999.	EC complained against a Korean safeguard measure imposed on imports of certain dairy products, which thus allegedly violated Articles 2,4,5 and 12 of the AOS. The panel found that Korea's measure is inconsistent with Articles 4.2(a), and 5 of the Agreement on Safeguards, but rejected the EC claims under Article XIX of GATT 1994, Articles 2.1, 12.1, 12.2 and 12.3 of the Agreement on Safeguards. The Appellate Body reversed the panel's conclusions on the interpretation of Article XIX of GATT 1994 and its relationship with the AOS, reversed another of the panel's interpretations of Article 5.1 of the Agreement on Safeguards and concluded that Korea violated Article 12.2 of the AOS, thereby reversing in part the panel's finding.
Argentina — Safeguard Measures on Imports of Footwear WT/DS121/AB/R, 14 December 1999	EC complained that Argentina's provisional safeguard measures on import of footwear was violative of Articles 2,4,5,6 and 12 of the AOS. The panel found that Argentina's measure is inconsistent with Articles 2 and 4 of the AOS. The Appellate Body upheld the panel's finding that Argentina's measure is inconsistent with Articles 2 and 4 of the AOS, but reversed certain findings and conclusions of the panel in respect of the relationship between the Agreement on Safeguards and Article XIX of GATT 1994 and the justification of imposing safeguard measures only on non-MERCOSUR third country sources of supply.
United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities WT/DS166/AB/R, 22 December 2000.	The EC complained that the US imposed definitive safeguard measures in the form of a quantitative limitation on imports of wheat gluten from the EC is violative of Articles 2,4,5 and 12 of the AOS; Article 4.2 of the Agreement on Agriculture; and Articles I and XIX of GATT 1994. The panel found that the

	United States had not acted inconsistently with Articles 2.1,4 and 12 of the AOS or with Article XIX:1(a) of the GATT
Case citation	**Decision**
	1994. On appeal by the US, the Appellate Body report upheld the Panel report modifying certain aspects of it.
United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia WT/DS178/AB/R, WT/DS177/AB/R	Australia and New Zealand complained that the US safeguard measure on import of fresh chilled or frozen lamb meat is inconsistent with Articles 2,3,4,5,8,11 and 12 of the AOS; and Articles I, II and XIX of GATT 1994. The Panel held that the US had acted inconsistently with Articles 2 and 4 of the OS and Article XIX of GATT 1994. On appeal by the US, the Appellate Body upheld the findings of the Panel.
Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products WT/DS207/AB/R	Argentina complained that the safeguard measures of Chile are inconsistent with Articles 2,3,4,5,6 and 12 and Article XIX of GATT 1994. The Panel held that Chile had acted inconsistently with Article XIX of GATT 1994 and Articles 2,3,4 and 5 of the AOS.
United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea WT/DS202/AB/R,	Korea complained that US safeguard measures on the import of line pipe is inconsistent with Articles 2.3.4.5.11 and 12 of the AOS and Articles I, XIII and XIX of GATT 1994. The Panel found that the US acted inconsistently with its obligations under Articles 3,4,8,9 and 12 of the AOS as well as Articles XII and XIX of GATT 1994. The Appellate Body upheld most of the findings of the Panel but it also modified and reversed some of its findings.
Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches WT/DS238/P/R	Chile complained that Argentina's safeguard measures on import of preserved peaches is inconsistent with Articles 2,4,5 and 12 of the AOS and Article XIX of GATT1994. The Panel held that the measures are inconsistent with Articles 2 and 4 of the AOS and Article XIX of GATT 1994.
United States — Definitive Safeguard Measures on Imports of Certain Steel Products WT/DS259/AB/R, WT/DS248/AB/R, WT/DS252/AB/R WT/DS249/AB/R WT/DS251/AB/R WT/DS258/AB/R WT/DS254/AB/R, WT/DS253/AB/R	EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Malaysia and Brazil complained that US safeguard measures on imports of certain steel products are inconsistent with Articles 2,3,4,5,7,8,9 and 12 as well as Articles I, II, X,XIII, XVI and XIX of GATT 1994. Malaysia later withdrew its complaint. The Panel held that all the US safeguard measures are inconsistent with at least one WTO pre-requisite for the imposition of a safeguard measure. The Appellate Body upheld the Panel's conclusions.

Source: www.wto.org

Table - 4

List of Safeguard Measures Initiated by Members under the WTO

(1995-2005)

Serial No.	Reporting Member	Total
1	Argentina	5
2	Australia	1
3	Brazil	2
4	Bulgaria	6
5	Canada	2
6	Chile	10
7	China, P.R.	1
8	Colombia	3
9	Costa Rica	1
10	Czech Republic	9
11	Ecuador	7
12	Egypt	3
13	El Salvador	3
14	Estonia	1
15	European Community	3
16	Hungary	3
17	India	15
18	Indonesia	1
19	Jamaica	1
20	Japan	1
21	Jordan	10
22	Korea, Rep. of	4
23	Latvia	2
24	Lithuania	1
25	Mexico	1
26	Moldova	2
27	Morocco	3
28	Pakistan	1
29	Peru	1
30	Philippines	6
31	Poland	5
32	Slovak Republic	3
33	Slovenia	1
34	Turkey	5
35	United States	10
36	Venezuela	6
TOTAL		139

Source : www.wto.org

Table -5

Safeguards measures taken by India under the WTO

Year of action	Product Imported into India	Domestic industry	Country against which action is taken	Period of action	Action taken by the Finance Minister on recommendation by the Director General of Safeguards in the form of Duty/QR
1998	Styrene Butadiene Rubber	M/s. Synthetic and Chemicals Ltd.	Nil	Nil	The investigations were suspended on 26.02.98 and terminated on 1.05.98 consequent to initiation of anti-dumping investigations by the Ministry of Commerce vide their F. No. 30.01.97 ADD dated 7.04.1998
1998	Acytelene Black	Represented by Association of Dry Cell Batteries Manufacturers	Japan Singapore Philippines France Belgium S. Africa	2yrs 9.12.1999 to 9.12.2000	Safeguard Duty of 18% subject to a maximum (max.) of Rs. 12950/- MT and a duty of 5% Rs. 8830/- MT.
1998	Carbon Black	Association of Carbon Black Manufacturers representing four of the Indian companies producers of carbon black. Oriental Carbon & Chemicals Ltd. (OCCL), CABOT India Ltd.(CABOT), Hi Tech Carbon Ltd.(HTC), Philips Carbon Black Ltd.(PCBL).	S. Korea Thailand Japan Australia Egypt Indonesia	2 yrs 1998-2000	Safeguard duty of 16% advalorem on CIF was imposed for the first year and a duty of 5% advalorem on CIF for the second year imposed for threat of serious injury.
1998	Propylene Glycol	M/s Manali Petrochemicals Ltd. (MPL). Chennai and M/s Spic Organics Ltd. (SORL)	Belgium Chinese Taipei, Denmark, German FR, Japan, Mexico, Singapore, USA	For a period of 18 months. First.	Safeguard duty of 22% when imported up to and inclusive of 23rd day of Dec., 1999 (1st 12 months) and 11% when imported from 24th Dec. 1999 to 23rd June, 2000 (both days inclusive) for the next 6 months was imposed for the threat of serious injury.
1998	Flexible Slabstock Polyol	M/s Manali Petrochemicals Product Ltd. And M/s Spic Organics Ltd.	Japan Singapore Germany Netherlands USA	For a period of 18 months form 23.12.1999 To	Safeguard duty of 20% was imposed when imported for the first 12 months and a duty of 5% for the next 6 months was imposed for serious injury and threat thereof.

				23.06.2000.	
1998	Hard Board (High Density Fibre Board)	All India Fibre board Manufacturers Association representing three Companies – M/s Western India Plywood Ltd. (WIP), M/s Jolly Board Ltd.(JBL), M/s National Board Ltd.(NBL).	Thailand S. Africa Italy Malaysia Pakistan	Nil	The Government of India increased the import duty by 10% once there was increase in imports and also increased the protection for the producers from 35%- 45%. No further recommendation to increase the existing level of protection by imposing safeguard duty was made by the Director General as it would not prevent or remedy the injury nor would the action be in public interest.
1999	Phenol	Hindustan Organic Chemicals Ltd., Mumbai Herdillia Chemicals Ltd., Mumbai Neyveli Lignite Corporation Ltd	China, Chinese Taipei, France, Germany, Indonesia, Italy, Japan, Korea DPR, Korea RP, Kuwait, Malaysia, Netherlands, New Zealand, Russia, Saudi Arabia, Singapore, South Africa, Spain, United Kingdom and United States of America	For a period of two years	Duty of 22% when imported up to and inclusive of 29th Feb 2000 and 15% when imported from 1st March 2000 to 29th June 2001 (both days inclusive) Notfn. No. 82/99 dated 30.06.99 a.a. 98/99 dated 23.07.99 for the threat of serious injury caused by the imports.
1999	Acetone	Hindustan Organic Chemicals Ltd. (HOC) and Herdillia Chemicals Ltd. (HCL).	Germany Japan S. Korea S. Africa Netherlands Russia Taiwan USA	2 1/2 years from 1999-2002 .	Safeguard duty imposed on proof of threat of serious injury for 28% advalorem or Rs. 3000/PMT whichever is lower for the period. 21% advalorem or Rs. 2250/PMT whichever is lower for the period 9% advalorem or Rs. 965/PMT whichever is lower for the period 27.01.2002 to 26.07.2002 .
1999	White / Yellow Phosphorus	United Phosphorus Limited (UPL), Phosphorus and Chemicals Travancore Limited (PACT), Excel Industries Limited, Star Chemicals Limited, and	Bulgaria; Chinese Taipei (Taiwan); China, P.R.; Hong Kong, China;	Nil	No recommendation to increase the existing level of protection was made even after identification of serious injury.

		Search Chem. Industries Limited (SCIL). The two companies who have filed the present application (supported by UPL who have transferred their plant and capacity to SCIL) account for the total Indian production of White/Yellow Phosphorus as the other producers have suspended their production.	Germany; Japan; Korea, Rep. of; the Netherlands; United Kingdom and the United States.		
2000	Gamma Ferric Oxide / Magnetic Iron Oxide	Herdillia Oxides and Electronics Ltd.	Japan Korea USA	2 ½ years	Safeguard duty of 23% adv. up to 23.01.2002. 20% from 24.01.2002 to 23.01.2003. 15% w.e.f. 24.01.2003 to 23.07.2003 for serious injury and threat thereof.
2000	Methylene Chloride	Gujarat Alkalies and Chemicals Ltd., Gujarat (GACL) and Chemplast Sanmar Ltd., Chennai (CSL)	Belgium; Brazil; Chinese Taipei; France; Germany; Hong Kong, China; Hungary; Israel; Italy; Japan; the Netherlands; Russia; Spain; Switzerland; the United Kingdom and the United States.	For one year	Prima facie proof that imports have threatened to cause serious injury to the domestic and safeguard duty of 11% in addition to existing level of protection recommended. Decision of the Government is awaited.
2001	Phenol (Review)	Hinuduatan Organic Chemicals Ltd. (HOCL) and Herdillia Chemicals Ltd. (HCL) and Neyveli Lignite Corporation Ltd.,	China P.R., European Community, Israel, Japan , Korea DPR, Mexico, Republic of Korea , Russia, South Africa Singapore	Extended for a period of 2 yrs .12% and 9% during the First Year and Second Year of extended	Safeguard duty of 10% Advalorem from 30.06.2001 to 29.06.2002 (both days inclusive) and 7% Advalorem from 30.06.2002 to 29.06.2003 (both days inclusive) imposed for the continued threat of serious injury from imports of Phenol

			Saudi Arabia Switzerland Chinese Taipei , USA	period and a quantity of 12000 MT & 12500 MT (excludint the quantity of Phenol imported for use in export productio n) respective ly to be exempted from levy of Safeguard Duty.	
2002	Acetone (Review of exemption from imposition of safeguard duty on imports of acetone into India from notified developing countries)	Hinuduatan Organic Chemicals Ltd. (HOCL) and Herdillia Chemicals Ltd. (HCL).	S. Africa ad Singapore alone subjected to duty as their imports increased to more than 3% limit under the Customs Tariff Act 1975.		Imports of Acetone into India from South Africa and Singapore alone be subjected to levy of Safeguard Duty.
2002	Epichloroh ydrin	Tamilnadu Petroproducts Ltd.	Belgium Germany Japan, Republic of Korea, USA	For 3 years recommen ded 22%, 15% and 9% respective -ly in addition to existing level of protection	Imposing Safeguard Duty @ 12% ad valorem fror 30.10.2002 to 29.03.2003 issued for cause of serious injury and threat thereof.
2002	Vegetable Oils (Edible Grade)	The Solvent Extractors' Association of India.	Argentina, Australia, Brazil, Canada, East Europe, European Union, Indonesia,	Nil	Proof of increased imports of Vegetable Oil having caused/threatened to cause serious injury to the domestic producers. No recommendations to increase the existing level of protection was made.

			Malaysia and the United States.		
	Industrial Sewing Machine Needles (ISMN)	Altek Lammertz Needles Ltd., TVS Needles Ltd., Schmetz (I) Private Ltd., Groz Beckert Asia Limited.	China	Specific Safeguard duty @ Rs. 1.50 per needle for a period of three years proposed.	DG recommended imposition of SSD upon proof of market disruption but the Ministry of Finance not in favour of imposition of Specific Safeguard Duty.
2003	Bisphenol A	Kesar Petroproducts Ltd. And Maharashtra Petrochemicals Corporation Ltd.	Taiwan, Japan Netherlands, UK, USA, Belgium, Singapore, Slovania, Nigeria, Germany Senegal, Spain	For 2years 15% for first year and 10% for the Second Year.	Director General recommended the imposition of duty for threat of serious injury posed by the increase in imports but the Ministry of Finance was not in favour of imposition of Safeguard Duty.
2005	Starch; Manioc (Cassava, Tapioca) based Sago and Modified Starches)	Farmers & Farmers Association of Tamil Nadu and Tamilnadu Sago and Starch Manufacturers Welfare Association, (TASSMA)	Thailand and Vietnam	For a period of three years form 2005. duty at the rate of 33% for the First year and 23% for the Second year and 13% for the Third Year .	Safeguard duty recommended as imports of tapioca have threatened to cause serious injury to the domestic producers. No safeguard duty is recommended on imports of Sago based on Tapioca (Sabudana) and Modified Starches falling under Chapters 1903 and 3505 of the Customs Tariff Act, 1975, respectively.

Information relied on for the preparation of the table as available at the www.docsonline.wto.org and www.cbec.gov.in

ANNEXURES
ANNEX II

ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement,* including tariff concessions, any product 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.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph *(a)* of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. *(a)* If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 *(b)* of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent obligations or concessions under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph *(a)* of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

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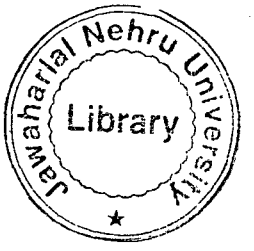

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