

## 16. Conclusions

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In this section on safeguards, we provided an overview of the provisions of the Safeguards Agreement and their interpretation by WTO Panels and the Appellate Body. As noted on a couple of occasions, this Agreement has certain shortcomings. The Appellate Body's jurisprudence has not contributed much to rectifying these shortcomings. To the contrary, on certain occasions it has confused matters even further.

First, the Agreement sets forth the conditions for a lawful imposition of a safeguard measure but does not address two elements that were clearly present in Article XIX GATT (that is, unforeseen developments and tariff concessions) as pre-conditions for the imposition of safeguard measures. This is not to say that the Appellate Body was right in re-introducing these conditions. The Appellate Body actually only contributed to the problem by adding 'unforeseen developments' to the list of conditions of Article 2, but then failing to explain what those developments could be, or by whom and at what time they had to be unforeseen. Nevertheless, it is an important oversight of the Agreement. This is all the more so because these 'forgotten conditions' may have an important role to play in solving what has been exposed as another problem of this Agreement, the need to demonstrate that increased imports are causing serious injury. As argued convincingly in the economics literature, imports can never be the ultimate cause of injury as they are a mere reaction to the forces of supply and demand. They can perhaps constitute the proximate cause, the ultimate cause being the granting of a tariff concession or some other, unforeseen, exogenous variable.

Second, the Agreement does not contain many of the important due process provisions of other trade remedies instruments as the AD Agreement or the SCM Agreement. These procedural obligations play a very important role in the AD and CVD context in ensuring an investigation which is as transparent, objective and fair as possible. The Appellate Body intervened to give more body to this Agreement and showed a great willingness to conclude a lot from very little, incorporating almost all of the procedural safeguards of the AD/SCM Agreement into the one paragraph of the Safeguards Agreement dealing with the investigation. Its contribution in this respect was welcome.

Third, the Agreement fails to explain in a satisfactory manner what a situation of serious injury is and in which way it differs from the material injury

standard in the AD/CVD context. While the Appellate Body emphasized the exceptional emergency nature of these measures, it has unfortunately failed to give specific meaning to these terms.

Fourth, the Appellate Body has turned one of the more innocent provisions of this Agreement into a very important limitation on the level of any safeguard measure by limiting the level of the safeguard to that part of the injury caused by increased imports in isolation from other factors. It is noteworthy that the Appellate Body, in the context of a causation and non-attribution analysis, had been very lenient requiring the authority merely to separate and distinguish the injury caused by other factors to examine whether imports contributed to the situation of serious injury. However when dealing with the question of the application of the measures, the Appellate Body, unexpectedly, became very demanding. In other words, the Appellate Body seemed willing to take a more deferential approach when it came to the question of whether a right to impose a measure existed, while being more demanding with respect to the lawful application of such a measure. One may wonder whether this is the correct approach. The explanation offered by the Appellate Body, and its erroneous reading of the AD/CVD parallel provisions, are hardly convincing.

In sum, given these shortcomings, and in light of the controversial Appellate Body jurisprudence in the safeguards area, it is a pity that the Safeguards Agreement does not form part of the Doha mandate, and that we will have to live with this Agreement for many years to come. It remains to be seen whether the result of all this may not be a return of the 'grey area measures' of the 1970s and the 1980s.