

The Political Argument for Safeguard Measures

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The Safeguards provisions of the GATT are a problematic aspect of the free trade regime since on their face they frustrate the economic rationale of trade liberalization. As described in Article XIX and more fully in the Agreement on Safeguards (the Agreement), safeguards seem to have a defined purpose and structured framework for application. I suggest that the measures seem to be used as a protectionist political strategy rather than for the purpose described in the documents. The conditions that need to be demonstrated before safeguards can be imposed appear to contradict the underlying purpose of the measures.

The first point is to examine what is the underlying purpose of safeguard measures. From the preamble of the Agreement, one aspect that is mentioned is the “importance of structural adjustment”¹ and in later sections, the “impairment in the position of a domestic industry”² is used as the definition of the 'serious injury' requirement. But it still is not clear whose interest is being protected: is it the capitalists who have invested in factories that are now no longer profitable, or the employees who are likely to be laid off, or the communities who will lose their primary employer, or perhaps the government which will lose tax dollars as profits decline. Governments have implemented domestic protection schemes directed at some of these scenarios such as retraining programs for the unemployed, and bankruptcy protection to allow companies to restructure. It could be argued that the WTO safeguards regime is an attempt to give a state a chance to implement these domestic schemes under temporary relief from imports. If this is the case, the Agreement fails to identify what steps a state should take after applying the safeguard. The preconditions for safeguards, such as requiring “such increased quantities”³ of imports, could frustrate this purpose in situations where applying a safeguard would allow temporary relief to the domestic industry but preconditions are not met. One such situation is where a domestic industry is competing with foreign producers both domestically and in a 3rd party; applying safeguards would give the domestic industry temporarily better business conditions overall even without the precondition of increasing imports. The

1 Agreement on Safeguards - preamble

2 Agreement on Safeguards - Article 4 - 1(a)

3 GATT 1947 - Article XIX.1(a)

increasing imports requirement is probably an attempt to make safeguards more palatable to the states negatively affected. The apparent inconsistency between the likely direct underlying purpose and the technical requirements of safeguards, adds strength to Sykes' argument that safeguards are part of a political equation to make trade liberalization more agreeable.

While Trebilcock and Howse identify that most of the safeguard measures are imposed by the big developed countries⁴, the latest reports from the WTO Safeguard Committee suggest this might be changing. For example, in 2002, the report states that 26 countries decided to impose safeguards, of which only two are considered developed⁵. There are several explanations for this change. It is possible that the industries of the most developed countries that faced the most competition have either become more efficient or disappeared and therefore no longer require safeguards. A more political explanation could be that consumers in developed countries, who are negatively affected by a safeguard, have become better organized at opposing safeguard requests from domestic industry. The rise in the non-developed country use of safeguards also requires some explanation. One idea is that the countries and their domestic industries have become more technically able to use the tools of the WTO to impose safeguards. Since there are many more non-developed countries than developed countries, all other factors being equal, it is expected that there would be more non-developed country imposed safeguards than developed country imposed safeguards. Another possibility is that countries see safeguards as a method to retaliate against safeguards imposed by the developed nations. For example, if the US has damaged a country's steel industry by imposing safeguards, perhaps the political appetite makes it more likely for other countries to impose safeguards where US goods are seen to hurt a domestic industry. Many of the same political explanations suggested earlier could come into play in non-developed countries as safeguard legislation is implemented. Even though the dominance of the developed countries in the use of safeguards appears to be decreasing, I do not think this means that the political explanation for safeguards

⁴ Trebilcock and Howse - *The Regulation of International Trade* at p 226

⁵ Report (2002) of the Committee on Safeguards, G/L/583

Developed Countries: EU, US

Non-developed Countries: Brazil, Chile, Czech Republic, India, Jordan, Lithuania, Philippines and the Slovak Republic

is any less applicable.

The mismatch between a coherent purpose for safeguards and the required preconditions for imposing the protections, is demonstrated to some of the recent cases. In Argentina- Footwear, for instance, the Appellate Body, combines the 'unforeseen circumstances' and 'increase imports' requirements to conclude that the rise in imports must be, “recent enough, sudden enough, sharp enough, and significant enough”⁶ to cause the serious injury. In the recent US - Steel case, the United States attempted to argue that having imports higher at the end of a period of study compared to the beginning was enough for 'increase imports' but this was soundly rejected⁷. The Appellate Body does not seem to consider whether the industry should have been able to react to the changes or whether the increasing imports were so sudden as to require temporary relief in order to adapt the new competition. From a worker's perspective, it does not matter if a gradual increase in competition led to the industry being non-viable or whether it was a sudden increase since they are still going to be laid off. In contrast, governments or business owners who are better able to monitor the changing business environment, may have more to complain about with a sudden change in imports rather than a long term trend. For this reason, I suggest that the 'sudden increase' test, which the Appellate Body equires before imposing safeguards fails to address the needs of affected workers.

Safeguards are inherently political instruments. As Sykes points out, they make little direct economic sense but can be explained as a political release for liberalization. I agree with this perspective and have point out some inconsistencies between a direct underlying purpose of safeguards and the preconditions necessary to apply them. Because safeguards fail to address the underlying purpose of protecting workers from upheaval and do not make economic sense, I suggest that the political rationale is the only argument that can be sustained.

⁶ Argentina - Footwear (EC) at paragraph 131

⁷ US - Steel at paragraph 341-342