

PART I

Foundation of the safeguard mechanism

What is the meaning of ‘safeguards’ in international trade? A ‘safeguard’ is defined as a means of protection or security.¹ While not explicitly stated, this definition implies a measure taken to counter a perceived ‘risk’ or ‘danger’ to some value or interest. In international trade agreements, a safeguard may be seen as a clause permitting a government under certain conditions to suspend, or eventually withdraw, from obligations, for the protection of superior values.²

In the multilateral trading system, the term ‘safeguards’ has a special meaning: ‘those measures provided for in Article XIX of the GATT 1994’.³ In turn, however, Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994 or simply GATT,⁴ depending on the context) does not specify a particular type of measure. However, it contemplates that WTO Members (Members) can deviate from GATT obligations for a reason: to prevent or remedy serious injury (or threat thereof) to the domestic industry caused by increased imports resulting from ‘unforeseen developments’ and the effect of GATT obligations. The deviation is meant to counter that ‘risk’ or ‘danger’: serious injury to domestic producers under specified conditions. These actions are the measures that are commonly known as ‘safeguard measures’, ‘safeguard actions’ or simply ‘safeguards’.

The effect of safeguards is to restrict trade and increase the level of protection afforded to domestic products. However, the objectives of the multilateral trading system are precisely the opposite. Among others, the

¹ The New Shorter Oxford English Dictionary, vol. II, p. 2665.

² Hoekman and Kostecki, 2001, p. 303.

³ Article 1 of the Agreement on Safeguards.

⁴ The text of the GATT 1994 is the same as the General Agreement on Tariffs and Trade 1947 with the addition of some other legal instruments (as specified in paragraph 1 of GATT 1994). When reference is made simply to ‘GATT’, it should be understood as the same text contained in both the GATT 1947 and the GATT 1994. Later references to the ‘GATT Secretariat’ refer to the institutional body that was de facto set up to administer the GATT 1947.

system aims at encouraging the reduction of trade barriers and the elimination of discrimination in international trade.⁵ How could the system allow Members to introduce measures that run against its core values?

This section is aimed at providing some explanation by reviewing the history of the multilateral safeguard mechanism. Particular attention is paid to the manner in which the safeguard clause was introduced, drafted, interpreted and applied under Article XIX of the GATT and, subsequently, the WTO Agreement on Safeguards. This section also explores the theoretical debate on the rationale for the safeguard mechanism.

⁵ Third Recital of the Preamble of the GATT.

1

History of the safeguard mechanism

In this chapter we will review the main facts that led to the establishment of the safeguard mechanism up to its current application in the WTO system. Section 1 explains how the multilateral trading system, under the GATT, and the safeguard mechanism, under Article XIX of the GATT (Article XIX), were introduced. Section 2 describes the basic structure of the GATT and the placement of Article XIX within it. Section 3 explains the general structure of Article XIX. Section 4 gives account of the history of the safeguard mechanism from 1948 up to the Uruguay Round of trade negotiations. Section 5 describes the negotiation history of the WTO Agreement on Safeguards. Section 6 provides an overall conclusion on the negotiating history of the safeguard mechanism throughout the history of the multilateral trading system. Finally, Section 7 outlines some of the main features in the application of the safeguard mechanism, from the entry into force of the WTO to 2013.

1 Introduction of the safeguard mechanism

1.1 *General context*

The multilateral trading system does not have a formal date of birth. However, it de facto came into being on 1 January 1948 with the entry into force of the General Agreement on Tariffs and Trade 1947 (GATT 1947) on a ‘provisional’ basis.¹ The system was the result of a long-term conceptualization process, which started prior to the end of the First World War. As early as 8 January 1918 United States President Wilson, in an attempt to lay the premises for a ‘program of the world’s peace’,

¹ Technically, the GATT 1947 has never entered into force, as the acceptance and deposit requirements under Article XXVI:6 have never been met. The GATT 1947 has been applied provisionally under the Protocol of Provisional Application or subsequent Protocols of Accession to the GATT 1947 (UN Doc. E/PC/T/214.Add.2/REV.1, undated, pp. 1–2). See also WTO, 1995, vol. I, pp. 3 and 6.

called for the removal of trade barriers and the abolishment of discrimination in international trade relations.² However, this and other efforts found echo only after the Second World War. As Kindleberger noted, during the intra-war times there were some dubious attempts made in this regard, but nothing like the efforts that followed the Second World War.³

1.2 *The Atlantic Charter*

On 9 and 10 August 1941 UK Prime Minister Churchill and US President Roosevelt held the Atlantic Conference to explore solutions to the struggles of the Second World War. Their discussions led to the so-called Atlantic Charter. This was a declaration of common principles for a better future for the world.⁴ Market access to raw materials and non-discrimination on a multilateral basis were part of the discussions.⁵ Free trade was proclaimed 'with due respect for [the parties'] existing obligations'.⁶ The phrase was introduced by the United Kingdom to safeguard its imperial trade preferences with its then dominions and colonies. On 24 September 1941 the Atlantic Charter was adhered to by other countries.⁷ On 1 January 1942 twenty-six states (joined subsequently by a further twenty-one) signed the 'Declaration by United Nations' subscribing to the 'common program and principles of purposes embodied in the [Atlantic Charter]'.⁸ At the end of the Second World War there was a generalized conviction that conduct of international economic relations prior to the war was a gigantic failure,⁹ that trade barriers, discrimination, retaliation and monetary uncertainty, as features that characterized that environment, had to be removed.¹⁰

² Kindleberger, 1989, vol. VII, p. 161. ³ Kindleberger, 1989, p. 161.

⁴ While the Atlantic Charter portrays a long-term vision for post-war reconstruction, its existence responded to short-term strategic moves of the United Kingdom and the United States. See O'Sullivan, 2008, p. 159.

⁵ Atlantic Charter of 14 August 1941, available at <http://avalon.law.yale.edu/wwii/atlantic.asp>, last visited 19 May 2013.

⁶ Atlantic Conference: Memorandum of Conversation, by Under Secretary of State (Sumner Welles) of 11 August 1941, available at <http://avalon.law.yale.edu/wwii/at08.asp>, last visited 19 May 2013.

⁷ US Department of State, 1941.

⁸ United Nations, *History of the Charter of the United Nations*, at www.un.org/en/aboutun/charter/history/declaration.shtml, last visited 19 May 2013.

⁹ Hudec, 1975, p. 4. ¹⁰ Jackson, 1998, pp. 35–6.

1.3 *The new economic order after the Second World War*

Despite the initial opposition by some public opinion in the United Kingdom and the United States, the initiative for a global regulatory scheme was scheduled on the post-war reconstruction agenda.¹¹ Priority was given to monetary over trade concerns. It was considered that monetary stability was a precondition for trade commitments; otherwise monetary policies and exchange manipulation could artificially alter the competitiveness of nations.¹² The discussions on an international monetary system took place at Bretton Woods from 1 to 22 July 1944, even prior to the foundation of United Nations (UN).¹³ The main issue discussed at Bretton Woods was the risk of modifying the countries' competitive positions by unilateral manipulation of exchange rate and monetary conditions.¹⁴ These discussions gave birth to the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank and its various subsidiary agencies).¹⁵ While the regulation of trade was not discussed at Bretton Woods,¹⁶ there was a common understanding that an agreement on the reduction of trade barriers and the harmonization of national policies was also necessary.¹⁷

1.4 *Negotiating history of the safeguard clause*

1.4.1 US proposals of 1945

Given the generalized will for international trade negotiations, on 1 November 1945 the United States launched its *Proposals for Expansion of World Trade and Employment*. It stated the need to take advantage of 'the enormous productive powers which lie all about us' through multilateral trade regulation.¹⁸ The United States wanted to profit from the political momentum after the Second World War 'to establish the kind of world

¹¹ Gardner, 1996, p. 619. ¹² Gardner, 1996, p. 623.

¹³ Gardner, 1996, p. 623. ¹⁴ Gardner, 1996, p. 623.

¹⁵ Jackson, 1998, p. 36.

¹⁶ It has been noted that the authorities who attended the conference (i.e. ministries of economy and finances) did not necessarily have the powers to commit their countries on trade-related issues (Jackson, 1998, p. 36).

¹⁷ UN Doc. E/PC/T/C.II/PV/8, 7 November 1946, p.2.

¹⁸ US Department of State, 1945, p. iv. It must be noted that the United Kingdom also endorsed these proposals. See WTO, 1995, vol. I, p. 3.

we want to live in'.¹⁹ Accordingly, it called for a prompt International Conference on Trade and Employment under the auspices of the UN, to take place not later than the summer of 1946.²⁰

The 1945 US proposals reflected its extensive experience in the formulation of thirty-two bilateral trade agreements since 1934 through to 1945.²¹ The document suggested the creation of an international trade organization and the regulation of various areas of international trade, including tariffs, quantitative trade restrictions, subsidies and so on. Among these matters, the United States considered an 'escape' or 'safeguard' clause that would allow for temporary deviations with respect to tariff commitments:

Commitments with regard to tariffs should permit countries to take temporary action to prevent sudden and widespread injury to the producers concerned. Undertakings for reducing tariffs should therefore contain an escape clause to cover such contingencies.²²

The proposal was made in the context of tariff concessions, and reflected the US concern about the impact of tariff commitments on the situation of its domestic producers. Arguably, it was not meant to address other matters of commercial policy (e.g., quantitative restrictions, subsidies). It also implied the 'limit' of its tolerance to tariff commitments: the point at which commitments would give rise to import surges leading to a 'sudden and widespread injury to the producers concerned'.²³

The proposal did not suggest any specific wording. However, it was consistent with the rationale of escape clauses contained in trade agreements concluded by the United States with other countries under the US Reciprocal Trade Agreements Act of 1934. For these agreements, the inclusion of an escape clause was apparently a political requirement imposed by Congress on the Executive Branch. To obtain authorization, the Executive offered to exercise due restraint in the concession of reduced tariffs and the introduction of an escape clause in the negotiated commitments.²⁴

Within the various trade agreements concluded by the United States, it has been claimed that the escape clause contained in the Reciprocal Trade Agreement between Mexico and the United States of 23 December 1942

¹⁹ WTO, 1995, vol. I, p. 1. ²⁰ WTO, 1995, vol. I, pp. iii and iv.

²¹ Jackson, 1969, p. 37. ²² US Department of State, 1945, p. 13.

²³ US Department of State, 1945, p. 13. ²⁴ Jackson, 1969, p. 39.

(the Mexico–US Agreement) was the precursor of the safeguard clause in the GATT.²⁵ This provision read as follows:

If, as a result of unforeseen developments and of the concessions granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury.

The provision was rather short. It allowed the withdrawal or modification only of tariff concessions under specified circumstances: the occurrence of ‘unforeseen developments’ in the frame of tariff commitments, which would result in increased imports causing or threatening serious injury to the domestic producers of articles concerned.

1.4.2 The Suggested Charter

With the 1945 US proposals circulated and following a US request on 18 February 1946, the UN Economic and Social Council (ECOSOC) called for an International Conference on Trade and Employment (the Trade Conference)²⁶ ‘for the purpose of promoting the expansion of the production, exchange and consumption of goods’.²⁷ In preparation for this conference, ECOSOC established a Preparatory Committee with the task of drafting the conference’s agenda and a draft convention based on suggestions made by UN Members and ECOSOC.

To assist in the preparatory work, in September 1946 the United States presented a document entitled *Suggested Charter for an International Trade Organization of the United Nations* (the Suggested Charter).²⁸ It was an elaboration of the 1945 US proposals. In the chapter on general commercial policy, it contained a section called ‘Emergency Provisions – Consultations – Nullification or Impairment’. Article 29 of the Suggested Charter became the first proposed multilateral safeguard clause:

Article 29. Emergency Action on Imports of Particular Products

1. If, as a result of unforeseen developments and of the effect of the obligations incurred under this Chapter, including the tariff concessions

²⁵ Lee, 2003, p. 5; Raychaudhuri, 2010, p. 305; Illy, 2012, p. 13.

²⁶ UN Doc. E/PC/T/33, 27 November 1946, p. 3.

²⁷ United Nations Economic and Social Council, 1948, p. 5.

²⁸ US Department of State, 1946.

granted pursuant to Article 18, any product 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 products, the Member shall be free to withdraw the concession, or suspend the obligation, in respect of such product, in whole or in part, or to modify the concession to the extent and for such time as may be necessary to prevent such injury.

2. Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organization as far in advance as may be practicable and shall afford the Organization, and the other Members having a substantial interest as exporters of the product concerned, an opportunity to consult with it in respect of the proposed action. If agreement among the interested Members with respect to the proposed action is not reached, the Member which proposes to take action shall, nevertheless, be free to do so, and if such action is taken the other affected Member shall then be free, within sixty days after such action is taken, to suspend on sixty days' written notice to the Organization the application to the trade of the Member taking such action, of any of the obligations or concessions under this Chapter the suspension of which the Organization does not recommend against.²⁹

Article 29 drew upon Article XI of the Mexico–US Agreement. However, it had a broader structure. Its first paragraph addressed the right to apply a safeguard, whereas the second paragraph established a mechanism to control the potential abuse of that right. Article 29 covered unforeseen developments and deviations, not only related to tariff commitments, but also to any other commercial policy matter covered by the Suggested Charter (e.g., quantitative restrictions, state trading, subsidies and non-discrimination). There was thus a shift in the US position on the escape clause, from a very discrete tariff-related coverage to a comprehensive one.

The second paragraph of Article 29 introduced a check-and-balance mechanism that had never been suggested before. It provided for: (i) a notification requirement prior to the introduction of a safeguard, (ii) a consultations requirement, also prior to the introduction of the measure, and (iii) if no agreement was reached and safeguard action was still to be imposed, the right to retaliate by the countries affected by the safeguard. All three requirements aimed at restraining a liberal use of safeguards by making affected countries aware of the safeguard (i.e., notification requirement), facilitating a settled solution among all countries concerned (i.e., consultations requirement), and enabling affected countries

²⁹ US Department of State, 1946, pp. 22–3.

to make a credible threat against an abusive use of safeguards, induce a negotiated settlement or 'restore' the balance of obligations and concessions (i.e., retaliation option).

1.4.3 Preparatory Committee negotiations

Based on the Suggested Charter, the Preparatory Committee started its meetings on 15 October 1946 in London. Its first session took place in two locations: London, from 15 October to 26 November 1946, and Lake Success, New York, from 20 January to 25 February 1947. Its second session took place in Geneva, from 10 April to 30 October 1947.

1.4.4 London discussions

On 15 October 1946 the Preparatory Committee started its meetings. Five committees were established, including Committee II on General Commercial Policy,³⁰ which started operating on 18 October 1946.³¹ This Committee was in charge of the question of the safeguard clause. On 1 November 1946 the topic was introduced by the chairman and the US delegate with the following remarks:

THE CHAIRMAN: ... [W]e will consider this afternoon only the remaining items which deal with emergency provisions, etc., and territorial application. We will take first the section dealing with emergency provisions. This is covered in the United States draft Charter by Articles 29 and 30. We might usefully begin by again asking the United States delegate to outline the views of his experts on this matter.

MR. HAWKINS (USA): Mr. Chairman, I will discuss first Article 29, which provides for emergency action on imports of particular products. The purpose of the Article, generally speaking, is to give some flexibility to the commitments undertaken in Chapter IV. Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character. Therefore the Article would provide for a modification of commitments to meet such temporary situations. In order to safeguard the right given and in order to prevent abuse of it, the Article would provide that before an action is taken under an exception, the Member concerned would have to notify the Organization, and consult with them, and with any other interested Members.

It provides, further, if no agreement were reached on the proposed section, any Member who was decisive could take compensatory action by withdrawing concessions from the Member that had invoked the clause.

³⁰ UN Doc. E/PC/T/33, 27 November 1946, p. 3.

³¹ UN Doc. E/PC/T/C.II/1, 19 October 1946, p.1.

That, in essence, is the character of the Article. As I said, it seems to us to be a necessary provision in a document or an agreement or charter of this kind.³²

The chairman treated the safeguard clause (emergency clause under Article 29) and the dispute settlement clause (Article 30) as related issues.³³ The United States described Article 29 as a means to provide flexibility to commercial policy commitments. The justification was that in ‘situations of an emergency character’ the clause would allow governments to take action otherwise barred by the rigidity of commitments. The clause responded, however, to a very narrow factual situation: (i) the occurrence of unforeseen developments in the context of commitments (ii) leading to import surges (iii) causing qualified injury (serious) (iv) to a specific domestic industry. The United States also noted that Article 29 contained a built-in mechanism to counter any potential abuse in the exercise of safeguard action.

Various countries reacted in different ways to the proposed safeguard clause. The following is a summary of the positions by specific topics:

- (i) **Need for a safeguard clause:** Norway challenged its very existence, as the clause would leave ‘a big gap in the whole scheme which we have so far discussed relating to all the rules proposed under the Chapter dealing with general commercial policy’.³⁴ On the other hand, while it recognized its likely need, the United Kingdom questioned the coexistence of the safeguards clause with the tariff review mechanism (which later on became Article XXVIII:1 of the GATT).³⁵ Similarly, France asked for coordination with the Committee on organizational matters to avoid contradictions with the waivers clause.³⁶
- (ii) **Scope of safeguard clause:** Norway suggested its scope should be limited to ‘strictly necessary and very strictly defined cases’.³⁷ Similarly, the United Kingdom questioned the scope as too wide, suggesting a limitation to tariff commitments and the express exclusion of quantitative restrictions. Alternatively, it advocated for the

³² UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, pp. 3–4.

³³ UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, pp. 3–4.

³⁴ UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, p. 11.

³⁵ UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, pp. 5–7.

³⁶ UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, pp. 5–7.

³⁷ UN Doc. E/PC/T/C.II/PV/7, 1 November 1946, p. 11.