

WTO AGREEMENT ON SAFEGUARDS AND ARTICLE XIX OF GATT

Drawing upon Fernando Piérola-Castro's extensive experience as a WTO practitioner, this book is a comprehensive and up-to-date overview of safeguard measures. With each chapter exploring a different provision of the agreement, it explores the relevant rules and procedures that govern safeguard investigations, the imposition of measures, the question of consultations and rebalancing and the multilateral transparency requirements of notification. Grounded in relevant case law, this book emphasises practice, logistics and risk management. Without focussing on the practice of any particular jurisdiction, it offers a general framework that can be applied to several domestic laws. It is a practical manual with the view of assisting in day-to-day problems in the handling of safeguard matters.

FERNANDO PIÉROLA-CASTRO is an international lawyer and arbitrator. He has worked as a safeguard investigating authority, litigated safeguard disputes in the WTO, and currently advises governments on safeguard-related matters.

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Fernando Piérola-Castro

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WTO Agreement on Safeguards and Article XIX of GATT

A DETAILED COMMENTARY

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Treaties, Documents and Other Sources

TREATIES

Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AS	Agreement on Safeguards
DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
DSU/Dispute Settlement Understanding	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU-Colombia-Peru Trade Association Agreement	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Understanding on Article II:1(b)	Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994
USMCA	United States-Mexico-Canada Agreement
Vienna Convention	Vienna Convention on the Law of the Treaties of 1969
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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WTO Doc. G/SG/N/1/COL/2	Committee on Safeguards, Colombia, Decree No. 152 of 22 January 1998, G/SG/N/1/COL/2, dated 25 May 1998
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Safeguard investigations initiated; Safeguard measures imposed	https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm#statistics , last visited 11 August 2021

Preface

More than twenty-five years have passed since the inception of the World Trade Organization (WTO) and the multilateral trading system as we know it today. It has been a period of profound experiences in the management of trade policy under the surveillance of a multilateral institution and in the settlement of disputes between WTO Members. No new regulatory developments of the same scope as those resulting from the Uruguay Round have emerged again. However, it has been a period of extensive knowledge development and learning in the interpretation and application of existing multilateral obligations arising from the many WTO agreements, including the Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

This fact is of the greatest importance to the system, particularly for the purpose of market access concessions and the definition of the space that national authorities can avail themselves of in defining protective actions. The WTO safeguard mechanism is the legitimate vehicle provided by the multilateral rules for the temporary adjustment of trade concessions or negotiated outcomes in the light of the demands of local industry under extraordinary circumstances. The Agreement on Safeguards is the main multilateral regulatory regime for the processing of safeguard requests in a safeguard investigation, the application of safeguard measures and their eventual extensions, possible rebalancing of concessions as a result of the application of those measures, and the multilateral exchanges with respect to decisive actions. The Agreement on Safeguards serves a vital role as it enables Members to accommodate their national industrial concerns, and weigh and balance the value of the concessions they made with new concessions that they would have to give in return.

When established, the WTO and the Agreement on Safeguards had the objective of reseizing multilateral control over safeguard measures, as stated in

the preamble of the Agreement on Safeguards. This has been successfully achieved. The introduction and implementation of a comprehensive notification mechanism of domestic safeguard laws and regulations, as well as of all key aspects in a safeguard investigation and application of safeguard measures, provides the space for fruitful exchanges among Members and an effective pre-dispute settlement forum before any dispute may be formally brought before the WTO dispute settlement process under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Furthermore, the WTO dispute settlement process has played one of the most critical roles in the interpretation of the disciplines on safeguard matters and the development of analytical criteria for the conduct of safeguard investigations. While there has been only a limited number of safeguard measures adjudicated by WTO panels and the Appellate Body the decisions of these adjudicating bodies have shown the complexities involved in the interpretation of the multilateral rules on safeguards. Many of these decisions have clarified key issues in the conduct of safeguard investigations and the adoption of safeguard measures, while some of them have brought up legal and academic debates on the consistency of the rules *inter se* and the feasibility of implementing some of the theoretical requirements in practice by the national investigating authorities.

The implementation of the current rules on safeguards under the Agreement on Safeguards has led to the development of practical methodologies, analytical tools, best practices and sometimes just reasonable criteria on various complex matters, for the benefit of the national investigating authorities and those in charge of adopting safeguard measures, domestic industry representatives seeking safeguard action, exporters and importers frequently involved in trade remedy investigations, practitioners handling safeguard disputes, and scholars and researchers interested in this field.

This book offers a theoretical contribution to the field of safeguard measures. It follows the division of the Agreement on Safeguards into fourteen provisions, and devotes a chapter to each of them. It complements the overview with a chapter devoted to Article XIX of the GATT 1994. The commentary is based primarily on the text of each of these provisions. Where appropriate, it refers to the interpretations and the treatment of relevant issues accorded by WTO panels and the Appellate Body. There are various legal issues that are still unresolved, and the book shows that the treatment of many of these leads to new questions, most of them equally complex. In many cases, these questions have been handled in a very pragmatic fashion by the national authorities.

The book is based on a previous work of a more academic profile, *The Challenge of Safeguards in the WTO*, also published by Cambridge University

Press, in 2014. However, the book draws on my practical experience as a WTO legal adviser in trade remedies to various safeguard investigating authorities around the world, my litigation experience before WTO panels and the Appellate Body in safeguard and trade remedies disputes, and my early career experience as a national trade remedy investigator. I have tried to put myself in the shoes of the domestic authorities, and many times in the shoes of interested parties, while writing this book.

As alluded to above, the book is composed of sixteen chapters, fourteen of which correspond to the fourteen provisions of the Agreement on Safeguards. Each chapter has its own table of contents. While there is no thematic segmentation in the Agreement on Safeguards, its fourteen provisions revolve around five different areas: general disciplines, investigation and substantive determinations, application, notifications and institutional checks and balances, and rebalancing proceedings. The general disciplines are covered by Articles 1 and 11. The rules on the conduct of safeguard investigations and the making of substantive determinations are contained in Articles 2.1, 3 and 4. The rules on the application of safeguard measures are contained in Articles 2.2, 5, 6, 7 and 10. The requirements of notification and the institutional framework and procedures to enable other Members to exert multilateral control over safeguard measures, including the resort to formal dispute settlement, are contained in Articles 12, 13 and 14. Finally, the rules and procedures governing the rebalancing of GATT concessions and other obligations in response to the application of safeguard measures are contained in Articles 8 and 12.3.

Article XIX of the GATT 1994 is at the core of the Agreement on Safeguards. This provision is present throughout each of the chapters of the book, and it will be readily apparent that each of them addresses the links they have with Article XIX. However, to provide an overall perspective of how the many provisions of the Agreement on Safeguards come together with Article XIX, Chapter 15 of the book is devoted to this basic provision of the system. Chapter 16 finally complements the content with a description of the negotiating history of both Article XIX and the Agreement on Safeguards.

I hope the reader will find this work useful and inspiring in exploring a sometimes complex, but at the same time fascinating area of trade regulatory practice. I would like to thank several people who have contributed with their support or conversations to the maturation of my ideas, and in particular Niall Meagher, Maria-Jose Kong, Vitaliy Pogoretsky, Ramiro Bertoni, Cherise Valles, Christian Vidal, Kholofelo Kluger, Leah Buencamino, and of course my parents, Fernando Piérola Sr. and Martha Castro, as well as my sister, Martha-Denise Piérola.

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