



RSC 2023/14
Robert Schuman Centre for Advanced Studies
Global Governance Programme-498

WORKING PAPER

Reassessing the Safeguards Mess

Bernard Hoekman and Petros C. Mavroidis

European University Institute
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ISSN 1028-3625

© Bernard Hoekman and Petros C. Mavroidis, 2023

Published in February 2023 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)

Italy

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With the support of the
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Abstract

The WTO Agreement on Safeguards was hailed as an important achievement of the Uruguay round, rightly so, given that it managed to outlaw the use of voluntary export restraints. Intended to facilitate the use of transparent, temporary, and non-discriminatory instruments to assist domestic industries injured by import competition, World Trade Organization (WTO) jurisprudence undermined the realization of this objective. Worse, erratic case law created negative externalities, ranging from greater recourse to more discriminatory trade practices and use by the United States (US) of the types of managed trade that the Agreement of Safeguards was meant to abolish. As in the classic bootlegger-Baptist metaphor in the literature on regulation, the unintended consequence of WTO jurisprudence on safeguards has been more rather than less selective protection (discriminatory trade policies). As, if not more important, it made it more difficult for WTO members to use an instrument intended to assist governments in sustaining political support for an open trade regime. In this paper, we describe the source of discomfort and suggest ways to address it in a meaningful manner.

Keywords

Emergency protection; safeguards; trade agreements; WTO; Appellate Body

Acknowledgments

Prepared for a festschrift in honor of Marco Bronckers. We are grateful to Chad P. Bown, Bill Davey, and Alan O. Sykes for helpful comments.

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1. Safeguards: Forty years and ticking

Safeguards are trade policy instruments used to protect domestic industries injured by import competition. They involve a government increasing protection for imported products beyond bound levels for a temporary period. Bronckers, in two papers, provided an excellent account of the legal treatment of safeguards, focusing on the applicable rules under the General Agreement on Tariffs and Trade (GATT) Article XIX (Emergency Action on Imports of Particular Products).¹ He underlined the ‘incompleteness’ of the legal disciplines embodied in Article XIX, pointing to the holes and loopholes in the provision, an issue that also occupied his astute reviewer, Koulen.² Bronckers did not limit his observations to the legal discipline but also considered the behavior of GATT Contracting Parties in the realm of safeguards and the extant dispute settlement practice. There was not much on the latter, reflecting the limited invocation of Article XIX to impose safeguard measures.

GATT required safeguards to be temporary (i.e., time-bound) protectionist measures that applied to all sources of supply, i.e., on a non-discriminatory basis, conditional on a finding that a domestic industry was seriously injured by import competition that, in turn, was the result of unforeseen developments. While there is a solid normative economic rationale for these criteria,³ in practice, countries have always shown a revealed preference for what Bronckers called selective measures. Bronckers’ major point was his concern that the GATT safeguard clause would, absent flexibility in its application, only see its relevance eviscerated. He was writing in the 1980s, against the background of readily available information to the effect that many GATT Contracting Parties were using so-called grey area measures such as the notorious voluntary export restrictions (VERs) and anti-dumping actions instead of global safeguards.

VERs clearly were not in conformity with the GATT. Anti-dumping actions were, in principle, permitted if they satisfied GATT procedural and substantive rules for their imposition. A common feature of both VERs and anti-dumping was that they were ‘selective’ – a neutral term that Bronckers privileged to denote actions targeting imports originating in specific countries. Safeguards, so the argument Bronckers engaged with, were not intended to provide relief against specific sources. VERs were source-specific and not transitory – they involved importing nations ‘persuading’ exporters to reduce the volume of exports. Compared to transparent, temporary tariffs applied to all imports of the products concerned, the welfare implications of VERs from a multilateral perspective were nefarious, as they did not generate revenue for the importing countries concerned and did more to restrain the ability of the most efficient exporters to contest the market than would be the case if tariffs were used.

Bronckers pointed to ambiguities in the GATT text that could provide a legal basis to justify selectivity in the application of safeguards.⁴ In a compelling response, Koulen (1983) took a different view, largely based on the negotiating record. That was then, before the Uruguay round and the new Agreement on Safeguards. The World Trade Organization (WTO) agreement on safeguards was a less incomplete contract than its GATT predecessor, explicitly closing the door to VERs.⁵ However, it left open two sizeable windows: (i) it allowed for quota modulation in Article 5.2(b), whereby importers could weigh the impact of their measures and hit ‘mavericks’ the hardest (i.e., permitting some selectivity); and (ii) it did not endow the WTO membership with policing powers over VERs.⁶

1 Bronckers (1981); Bronckers (1985).

2 Koulen (1983) and Bronckers (1983).

3 See, e.g., Corden (1974), Bhagwati (1976), Deardorff (1987), Hoekman and Leidy (1990); Bagwell and Staiger (1990; 2004).

4 Bronckers has consistently taken the view that greater flexibility to apply safeguards on a selective basis would make this instrument more salient in the arsenal of commercial policy available to governments. An example is his argument that if selective safeguards were to be accepted under the WTO Agreement on Safeguards this would remove the perceived need for à la carte mechanisms such as the specific safeguards included in China’s protocol of accession to the WTO (Bronckers, 2010).

5 Vermulst et al. (2004) discuss this issue in some depth. Sykes (2006) provides an excellent overview of the WTO Agreement on Safeguards.

6 If both exporters and importers are incentivized to conclude VERs, they are likely to do so in a non-transparent manner. Mavroidis and Wolfe (2015) argue that WTO members should empower the WTO Secretariat to actively search for VERs. In the absence of such a mandate, independent initiatives, notably the Global Trade Alert, have helped to fill the gap. See <https://www.globaltradealert.org/>.

We do not know if the number of VERs has increased or decreased following the advent of the WTO, because we have no information on the number of VERs in place during the GATT years. What we do know is that the WTO Appellate Body, presented with a more complete contract than panels during the GATT years, managed to confuse the membership with its rulings on safeguards-related disputes.

The persuasive analysis of WTO case law on safeguards by Alan Sykes is well summarized by the title of his 2003 article – ‘The Safeguards Mess’ – which says it all.⁷ The legislative confusion that Bronckers pointed to in his work on safeguards in the GATT period was meant to be addressed through a new WTO Agreement on Safeguards. Instead, we now observe a discomposure because of the (failed) efforts of the Appellate Body to interpret the text that was negotiated in the Uruguay Round. In this paper, we discuss the consequences of the Appellate Body’s (re-)construction of the key provisions of the Agreement on Safeguards. We pick up the trail from where Bronckers (GATT) and Sykes (WTO) left it and discuss the impact that the Appellate Body case law had on the use of trade protective action by WTO members. Our argument is that, by tightening the screws and making recourse to the WTO safeguard clause onerous, the Appellate Body contributed to greater use of selective instruments (anti-dumping) and de facto selective safeguards because of the expectation that measures justified under the Agreement on Safeguards would be found to be inconsistent with the agreement by the Appellate Body no matter the type of safeguard that was applied. While prima facie, the Appellate Body arguably acted in a manner that undercut the intention of negotiators as reflected in the text of the Agreement on Safeguards, the stance that was taken can be characterized by the bootlegger-Baptist metaphor in the literature on the political economy of regulation: the strict interpretation of the applicable regulations by the Appellate Body (‘Baptists’) had the effect of supporting those governments (‘bootleggers’) that prefer to pursue selective protection.⁸

There are good economic arguments in favour of introducing a safeguards clause in an agreement like the GATT/WTO. *Ex ante*, because of the flexibility introduced, it incentivizes participants to make more meaningful concessions, whereas *ex post*, it permits governments to offer domestic industries unable to confront import competition with a breathing space in which to adjust, thus helping to sustain (mobilize) political support for maintaining an open trade regime.⁹ Economists recognize that using trade policy to address adjustment pressures generated by international competition is unlikely by itself to be sufficient – other domestic policies are needed¹⁰ – but if safeguards are used, they should be transparent, time-bound, price-based (tariffs, not quotas) and apply to all sources of supply. Governments have rarely abided by these prescriptions. Historically, the revealed preference has been for discrimination (selectivity). VERs benefitted import-competing industries by reducing competition and allowed importing country governments to reap political gains while (partially) compensating exporters by permitting them to capture monopoly rents.¹¹

Post-WTO, contingent protection has taken the form of anti-dumping, albeit at levels that are lower than during the GATT years in the case of Organisation for Economic Co-operation and Development (OECD) countries, subsidies of different kinds, most of which are designed to benefit domestic industries and, often, domestic firms.¹² Under the Trump Administration, there was a shift back to explicitly managed trade by the United States to address situations that should have been addressed through global safeguards – which may in part have been a consequence of the Appellate Body case law on safeguards. While it is impossible to determine the counterfactual, the Appellate Body case law can be regarded as implicitly supporting the revealed preference of governments for selectivity (discrimination) by not encouraging the use of non-discriminatory safeguard actions – an example of bootlegger-Baptist dynamics at work. In contrast to the GATT period analysed by

7 Sykes (2003). Lee (2014) offers a critical analysis of Sykes’ argument.

8 The concept is suggested in Yandle (1983).

9 For analyses of the rationale for and design of safeguards provisions in trade agreements see Corden (1974), Deardorff (1987), Bown (2006) and Horn and Mavroidis (2007).

10 The basic presumption should be that policy aim to ‘save people, not jobs’ (Spence, 2011).

11 Finger, Hall and Nelson (1982; Smith and Venables (1991).

12 The increasing use of subsidies in the post 2009 period is documented in Evenett and Fritz (2021).

Bronckers, where textual ambiguity cast doubt on the usefulness of the safeguard instrument, it is the agents this time, and not the principals, that inflicted the damage. The Appellate Body, through its case law, contributed to the confusion, and not the WTO framers who managed to iron out some of their differences during the Uruguay round negotiations.

The remainder of the paper proceeds as follows. In section 2, we discuss briefly what went wrong in the case law. Section 3 details our argument regarding the policy-substitution and policy-dilution effects of the case law. We end in section 4 with a few thoughts about prospects for return to the original (Uruguay Round) equilibrium.

2. WTO Judiciary Does Not Play to the Tune

As mentioned, Alan Sykes has developed a very comprehensive critique of the way the Appellate Body interpreted the various provisions of the Safeguards agreement. He argues that by re-introducing the ‘unforeseen developments’ criterion and requiring that investigating authorities ‘cut the cloth according to the coat’ and avoid imposing safeguards to counteract the precise amount of injury suffered (which in any event is calculated based on a range of elasticities and does not yield a precise number), the Appellate Body made it quite difficult for those imposing safeguards to prevail in case of litigation (Sykes, 2003; 2006).

Numbers tell their own story. Under the GATT, there were only two formal safeguards disputes (Ahn, 2006). Using the definition on the WTO webpage,¹³ there have been 62 disputes on safeguards submitted so far, of which:

- i. Thirty never reached the stage where a panel report was issued:
 - in two cases, the panel’s authority lapsed;¹⁴
 - in the remaining cases, the panel was either not formed or consultations were ongoing.¹⁵
- ii. One was appealed ‘into the void’ because there no longer was a functional Appellate Body to adjudicate.¹⁶
- iii. Five cases were settled.
- iv. In the remaining 26 cases, a report was issued in which the complainant prevailed. In fact, there is not one single case where the respondent managed to successfully defend its position.¹⁷

As Sykes was the first to point out, not even the most sophisticated agencies managed to prevail before the Appellate Body (Sykes, 2003). Complainants have a 100% record in litigation, a substantially higher percentage than the mean of 60% documented by Hoekman, Mavroidis, and Saluste for WTO disputes for the 1995-2020 period (Hoekman, Mavroidis, and Saluste 2021). This win rate is unheard of in WTO litigation.

Besides the legally questionable interpretations of the agreement by the Appellate Body that Sykes has chastised, there is a policy consideration as well. Safeguards, if one plays by the book, are meant to provide temporary relief only – there is a ‘dynamic use constraint’ (Bagwell and Staiger, 2005). A peace clause introduced in the agreement obliges WTO members that impose safeguards for four or six years to remove the trade barriers and refrain from re-imposing them for an equal period in the sector concerned. Moreover, safeguards imposed for more than three years must be accompanied by the payment of compensation to affected trading partners.

13 See wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

14 DS 351; DS 356.

15 DS 78; 133; 164; 214; 220; 223; 226; 230; 260; 274; 278; 303; 328; 428; 446; 544; 545; 546; 547; 548; 552; 554; 556; 562; 564; 568; 573; 595.

16 DS 518.

17 DS 98; 121; 166; 177; 178; 202; 207; 238; 248; 249; 252; 252; 253; 254; 258; 259; 415; 416; 417; 418; 438; 444; 445; 468; 490; 496.

Compared to anti-dumping duties, this is the preferred option from a cosmopolitan perspective, as the balance of rights and obligations remains unaffected. There is no obligation to compensate when anti-dumping duties are imposed, and they can be imposed for a long time since sunset clauses merely oblige members to initiate a new investigation every five years, not to remove duties. Also salient here is that the Appellate Body has eviscerated much of the original thinking in the Anti-dumping Agreement regarding sunset clauses by hollowing out the requirements for a lawful sunset investigation.¹⁸

3. Facing the Music

Increasing the burden of proof for lawful imposition of safeguards risks contributing to the proliferation of anti-dumping duties, which are characterized by substantially higher transaction costs (since investigation takes place both in the importing as well as the exporting market), and punishes exporters for allegedly practicing ‘unfair’ trade without compensating them. On paper, safeguards have a function that is distinct from the other two contingent protection instruments, anti-dumping- and countervailing duties. From a legal perspective, the latter two measures purportedly address ‘unfair’ trade, whereas the former ‘fair’ trade. ‘Unfair’ means that export prices are lower than those in the home market, either because of a private decision by exporting firms to price discriminate, or because of a subsidy that a WTO member has granted to its national industry. From the perspective of economics, there is nothing unfair about dumping as similar behavior – price discrimination – may also occur (and often does) in the domestic market (Finger, 1993).

In practice, the distinction between “fair” and “unfair” trade is more like a line in the sand than set in stone. Countervailing duties are a world apart since they presuppose state action, which might or might not exist. When it exists, there is no point in initiating a safeguarding investigation and document increased imports. By pointing to the subsidy paid, one needs to show price or quantity effects to show injury. Assuming the subsidy covers the price differential, it should be all downhill. If no state action is involved, it is impossible to impose countervailing duties. The instrument-substitutability nexus thus applies across two instruments: anti-dumping and safeguards.

With this in mind, we should also note that investigating authorities enjoy enough latitude to come up with a dumping margin, especially when they make recourse to “best information available.” If invocation of safeguards becomes harder, then the obvious candidate for protective action is the imposition of anti-dumping duties. The difference between anti-dumping and safeguards is that the former is selective by design. The WTO member concerned can target the maverick and hit it with duties. This is not to suggest that the two instruments are complete substitutes. One important difference is that demonstration of injury is a mere procedural requirement in anti-dumping. If dumping is one factor contributing to injury, duties can be imposed to address all of the injury suffered. Conversely, as already explained, safeguards can address only the amount of injury caused by increased imports. All we want to suggest here is that the two instruments can be used interchangeably. It is because of this property that making it more difficult to use one may increase the frequency of use of the other.¹⁹

¹⁸ For a detailed discussion see Mavroidis (2016, pp. 128ff).

¹⁹ Bown (2002) elaborates on this argument and provides evidence for the early WTO period. We recognize that the net effect post-WTO may be positive from a welfare perspective because anti-dumping actions are more transparent (visible) than VERs and involve tariffs (price-based instruments) as opposed to quotas. However, because anti-dumping is less effective in protecting a domestic industry than a global safeguard would be – unless most major sources of supply are targeted – the policy-substitution outcome may give rise to policy dilution, i.e., a shift to measures that actively undermine the rules-based trade order. As discussed below, the invocation of GATT Article XXI by the Trump Administration to justify higher tariffs on steel and aluminium is a prominent example.

3.1. Pushing Towards Anti-dumping

Industries can remain protected for long periods of time, with the instrument of protection changing over time (Mansfield and Busch, 1995). A country that has imposed safeguards to protect say, its automotive sector, cannot keep safeguards in place forever under the Agreement on Safeguards. After four to six years, it must withdraw the measure for at least an equal period. What next? If the automotive lobby is politically powerful, it may exert pressure to maintain protection through other instruments, such as subsidies. If the industry wishes to keep tariffs in place, it can initiate an anti-dumping investigation. Of course, the incentive for this is increased given the likelihood that the government will lose the argument on the use of safeguards before WTO adjudicating bodies considering the case law record noted above.

Each of the three WTO contingent protection instruments was negotiated in a self-contained manner. The time-bound nature of safeguard actions, the dynamic use constraint, and the removal of the need to offer compensation to affected exporters during the first three years of safeguard imposition were laudable elements incorporated into the WTO agreement on safeguards that sought to encourage the use of safeguards relative to anti-dumping and countervailing duties. No one could have anticipated that WTO case law would evolve to reduce the usefulness of safeguards to those seeking temporary relief or that case law on anti-dumping would evolve the way it did, e.g., with regard to sunset clauses, increasing the scope for anti-dumping to provide long-term protection. Finger and Nogues point to substitution between anti-dumping and safeguards in the case of Mercosur countries (Finger and Nogues, 2006). Anti-dumping, in their analysis, was used by Mercosur partners to support liberalization of trade between themselves. In the minds of policymakers, anti-dumping was not a sanction against 'unfair' trade but was regarded to be the best available functional (de facto) safeguard, because 'real' safeguards had become dysfunctional following the Appellate Body case law. This gave rise to perceptions of a consequent risk that the attitude towards safeguards taken by the Appellate Body might be adopted in the Mercosur context as well. Case law in safeguards thus appears to have contributed towards incentivizing users to shift to other contingent protection instruments. An under-appreciated corollary risk for the trading system associated with this outcome is that the notion that trade is unfair becomes more entrenched over time and less attention is given to the need for industries to adapt to a more competitive environment.

3.2. Along Came the Trump Administration

An additional problem with the case law is that it might provide users with perverse incentives to instruments other than the three discussed above to address import competition. Section 232 of the US Trade Act²⁰ provides for the possibility to impose trade restrictions in the interest of national security. The Trump Administration conducted a series of investigations in the field of steel and aluminum products originating in various WTO members.²¹ This provoked a hostile reaction in various quarters. The argument raised was that the legal basis invoked was arguably ill-suited to promote national security. What followed was a flurry of disputes by various members of the WTO, namely DS 544, 547, 548, 550, 551, 552, 554, 556, and 564. Canada and Mexico (DS 550 and 551, respectively) have settled their dispute with the US in the meantime. The remaining complainants are entangled in a legal battle with the US before WTO panels.

It is not our purpose here to assess whether the complaints introduced are well-founded. What is clear is that the US has consistently invoked Section 201 of the US Trade Act of 1974²² whenever it initiated an investigation to impose safeguards. Consistently that is, until the actions by the Trump Administration are described above. What explains the change? It may be that the US authorities anticipated that if they had acted within the four corners of Section 201 and invoked only Article XIX

20 The full text is reproduced in [govinfo.gov/content/pkg/USCODE-2015-title19/pdf/USCODE-2015-title19-chap7-subchapII-partIV-sec1862.pdf](https://www.govinfo.gov/content/pkg/USCODE-2015-title19/pdf/USCODE-2015-title19-chap7-subchapII-partIV-sec1862.pdf).

21 See fas.org/sgp/crs/misc/IF10667.pdf.

22 See [govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1978-2.pdf](https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1978-2.pdf).

of GATT and the Safeguards Agreement of the WTO and were subsequently challenged before a WTO panel, they would suffer yet another defeat. Invoking national security as a defence could tilt the balance in its favour since WTO panels have consistently applied a deferential standard in disputes where a respondent invoked national security.

The only case in the GATT history where the national security exception was discussed concerned the US embargo following the accession of Sandinistas to power in Nicaragua. As Pinchis-Paulsen explains, the panel dealing with the matter was lame even before its inception, as the US stated it would not accept an unfavourable outcome since, in its view, the national security exception was self-referential and non-justiciable (Pinchis-Paulsen, 2020). All in all, national security concerns were never comprehensively litigated during the GATT era. Even though differing opinions regarding the justiciability of Article XXI (the provision discussing national security) were expressed, there was an implicit consensus that adjudication in this area could be prejudicial to the GATT system as such.

Opening the door to panels to adjudicating national security concerns comes, of course, close to a 'wrong case', in the sense that, absent a very careful judgment, the risk of a false positive looms large. As written, Article XXI does not bar justiciability (for fear of abuse of the provision) but endorses a highly deferential standard of review. With the advent of the WTO, it was impossible to keep the 'wrong cases' out anymore, and cases were brought. Largely because of the passage to negative consensus, but also because of the fact that fewer and fewer WTO members shared an understanding of the 'wrong case' – a result of the increasing heterogeneity of the WTO membership – cases pertaining to national security found their way into the docket: DS512 and DS567 are illustrations, but not the only ones; DS547, 548, 551, 552, 554, 556, 564 mentioned above, all concern trade barriers justified by invoking the national-security exception. Whereas the European Union (EU) and the US managed to resolve the first national-security-related dispute in the WTO-era bilaterally (DS38), the same has not happened with the cases that we have cited above.

So, we are squarely in the realm of the standard of review and how deferential it is. In DS512 (*Russia – Measures Concerning Traffic in Transit*), the panel advanced a series of good points to support an approach in favour of deference, assuming the facts of the case support that a threat to national security exists. These are tough cases for any adjudicator. Even in deep-integration regimes like the EU, courts are not prepared to meddle with definitions of national security, adopting a highly deferential standard of review in this regard.²³ Pushing the frontier of the coverage of Article XXI of GATT so as to include the actions in the steel and aluminium sectors was thus, quite likely, a conscious attempt by the Trump Administration to benefit from a deferential standard of review, possibly because of fear of another failure before the WTO had it decided to defend its measures under the current safeguards-regime.²⁴

3.3. Taking Stock

The Appellate Body case law in the realm of safeguards has been criticized for being overly restrictive, and the number of successful complaints against safeguard actions provide a prima facie veneer of confirmation to this effect. Those interested in providing breathing space to an ailing industry can more easily rely on recourse to anti-dumping. A plausible argument can be made to the effect that, by tightening the screws when adjudicating disputes under the Agreement on Safeguards, the Appellate Body contributed to the increased use of anti-dumping. Furthermore, there is a potential moral hazard issue as well, as the marginal effort to attempt to get it right when imposing safeguards is unlikely to be associated with a pay-off in the form of reducing the likelihood of being found to be at fault if a targeted country contests the safeguard measures.

²³ Mavroidis (2016, pp. 477ff).

²⁴ In Hoekman, Mavroidis and Nelson (2023), we suggest alternatives to formal dispute settlement to address the use of trade policy justified by national security concerns.

Bronckers' worst fears regarding the policy-relevance of the safeguards agreement have materialized, but this time thanks to an unlikely source: the Appellate Body case law. Of course, all is not lost, as case law can always be reversed. The WTO legal order, as is, does not know of *stare decisis* (binding precedent). We advance a few thoughts to this effect in what follows.²⁵

4. Safeguarding Safeguards

There is a key difference between safeguards on the one hand and the other two instruments of contingent protection on the other. The reason for intervening against dumping and countervailing subsidies originates in the behaviour of a foreign party that is dumping (exporting firms) or subsidizing (governments). Safeguards are predicated on serious injury to a domestic industry, which might occur even if growth rates at home have led domestic consumers to consume more. The intended function of each of the three instruments differs, with each supposed to fulfill a specific role. The intended balance across the use of these instruments has been undone, in part through the case law of the Appellate Body.

We have underscored why safeguards are a sensible instrument to include in a trade agreement like the WTO. Unlike anti-dumping, for example, which has been criticized for many good reasons,²⁶ contract flexibility through the inclusion of a safeguards clause facilitates concessions and allows WTO members to assist industries in adjusting to greater import competition by temporarily raising tariffs. This can help sustain domestic political support for a gradual process of trade integration and an open trade regime. Anti-dumping can do the same, albeit in a less straightforward and potentially more costly way – and one that is less accessible to developing countries given the administrative bureaucracy and expertise needed. One important policy and practical advantage of global safeguards is that they are easier to apply.

All this suggests that a strategy of making safeguards redundant through interpretation of the legal text is unwise from a systemic perspective. Understanding the negotiating intent is key for WTO adjudicators, who must also correct misconceptions about its interpretative exercise. Ideally, WTO members should rethink the type of adjudicators they would like to see appointed in the WTO courts. The membership can also take a decisive step through a targeted legislative amendment to bring the safeguard clause more in tune with its intended function. We take these issues in turn.

4.1. What Was the Negotiating Intent?

The negotiating record of the WTO Safeguards Agreement reveals heated discussions between (especially) Southeast Asian and Transatlantic nations regarding the issue of selective safeguard measures (VERs).²⁷ This was probably the single most important issue that occupied the minds of negotiators, and its resolution through the advent of quota modulation and the ban on VERs was a well-thought compromise. While safeguards would be, in principle, non-discriminatory, their bite could be modulated to hit some exporting nations harder. A requirement to offer compensation for safeguards that are in place for more than three years imposed a dynamic use constraint.

Our understanding of the compromise reached in the Uruguay round negotiations is that the aim was to design an agreement that would be functional and workable. The Tokyo round agreement had shown its limits when practice moved to new pastures, notably VERs. This is what the new WTO agreement aimed to avoid in the future. It is a more realistic construct, as it tries to strike

²⁵ WTO panels ruled against the US in the disputes on steel and aluminum, and subsequently appealed “into the void”, as there is no longer a functional Appellate Body to entertain its claim. See https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds550_e.htm. The panels that dealt with the steel and aluminum disputes held that the US imposition of trade measures did not constitute a safeguard action and that the matter at hand concerned the legality of invoking the GAT national security clause.

²⁶ There is an extensive literature on this. See Finger (1993) and Prusa (2021).

²⁷ Brilliant (1993) provides a comprehensive overview and discussion of the negotiations.

a balance between non-discrimination and acceptable selectivity while limiting the negative spillovers to 'tolerable' levels through the compensation requirement for longer lasting safeguard actions. Unfortunately, the negotiating intent not only was not reflected in WTO dispute settlement rulings, but the Appellate Body made safeguards an almost unworkable instrument.²⁸

4.2. Why Did the Appellate Body Get It Wrong?

WTO adjudicators are called to interpret one incomplete contract (the WTO) through another incomplete contract (the Vienna Convention on the Law of Treaties (VCLT)).²⁹ The latter mentions a few elements that must be considered without assigning weights to them. This is already a problem. Probably thinking that the safest way to avoid undoing the balance of rights and obligations struck by the Uruguay round negotiators was to insist on the words used, WTO courts became extreme textualists. Words are not a-contextual. Mistakes happened. 'Unforeseen developments' is not mentioned in Article 2 of the Safeguards Agreement, which explains under what conditions safeguards can be imposed. And yet, the Appellate Body saw room to include this requirement through an interpretation of Article 1 of the same agreement, entitled 'General Provision', which mentions Article XIX of GATT (which contains the 'unforeseen developments' requirement) but which simply refers to the type of measures covered and not to the conditions for their lawful imposition.

Why not look to the negotiating record, and see how this issue was debated there? Because the Appellate Body has also taken the view that considering the negotiating history is a matter of discretion for adjudicators under Article 32 of VCLT. In practice, the word 'may' in Article 32 of VCLT, denoting that recourse to the negotiating record is optional, has been understood as 'not'. In cases where the argument could be made in two distinct ways, the Appellate Body picked one, satisfying itself that it was all clear.

In the early GATT days, detail did not matter much. The GATT was a relational contract among like-minded countries. In relational contracts, incompleteness is less of a problem. Good faith substituted for missing words. Disputes often were settled. But things changed as membership expanded. The WTO is much less of a relational contract, and thus incompleteness generates greater costs. As the WTO contains overwhelmingly 'standards' and not 'rules', and because standards invite more discretion, WTO adjudicators are agents with substantial room to interpret the WTO agreements. Their attitude regarding the negotiating record will influence the extent of exercise of discretion. Practice shows that they opted for more rather than less discretion by consistently disregarding the Uruguay round negotiation.

In a dialogue between Oliver Wendell Holmes and Learned Hand, two giant figures in US judicial history and legal thinking in general, Hand reports saying to Holmes when the latter departs after a meeting:

'Well Sir, goodbye. Do justice!' He [Holmes] turned quite sharply, and he said: 'Come here. Come here.' I answered: 'Oh I know, I know.' He replied: 'That is not my job. My job is to play the game according to the rules.'³⁰

The rules are observed not by simply reading them but by asking what they are supposed to achieve. Part of the answer lies in the element the Appellate Body has consistently overlooked: the negotiating record.

28 Stewart and Dwyer (2001) discuss adjudication of safeguards disputes and its inconsistency with the negotiating intent.

29 Article 3.2 of the DSU states that WTO judges must clarify the agreements through recourse to customary rules of interpretation. In its very first report (DS2), the Appellate Body equated this reference to the VCLT.

30 Learned Hand, 'A personal confession', in Dilliard (1974, p. 307).

4.3. Hercules in Geneva

Ronald Dworkin constructed an ideal judge, Hercules, who based judgments on 'fit and substance', debating the originalist Hermes, another fictional judge (Dworkin 1986). Negotiation can help but is not a panacea. More is required. What should the WTO Hercules look like? As already stated, she/he should know where the agreements originated. With this knowledge in mind, the WTO Hercules could/would ask what their intended function was and interpret the terms in light of their intended function. The purpose of the WTO is to liberalize trade as agreed by the parties. Trade liberalization is expressed in legal language but is a welfare-enhancing economic ideal. Indeed, some of the agreed institutions cannot be meaningfully interpreted absent some input from economic analysis. How can one understand likeness in the marketplace absent an understanding of cross-price elasticity? Is it possible to decide whether dumping, among many other factors, has caused injury absent an empirically informed analysis? How can the counterfactual be constructed when calculating the permissible level of retaliation without such knowledge? And so on and so forth.

Holmes observed, '[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics' (Holmes, 1897, at 474). Over one hundred and twenty years later, Holmes' future has not arrived. We understand, of course, that our WTO Hercules is a multi-persona, a Renaissance woman/man, and it is undeniably rare to come across people who combine these talents. Perhaps the membership should try to mix talents and stop typecasting its adjudicators à *l'image de* proverbial WTO delegates. A change in this respect might enhance the intellectual coherence of future WTO dispute settlement reports, assuming the Appellate Body crisis is resolved.

4.4. A Gap to Fill

There are two rationales behind safeguards, as we have noted above, an *ex ante* function to support the making of commitments, and an *ex post* function, to provide a breathing space to industries in WTO members that have suffered because of a greater volume (and lower price) of imports that compete with local production. The latter gives rise to a conundrum. Measures are imposed to provide relief, but if nothing changes, relief can only be temporary and maybe even a curse. While exporters continue to operate in a globally competitive environment and become more efficient, local producers will have a few years in the sun with no obligation to change their behaviour. If at all, they might be incentivized to lobby a few years later for anti-dumping duties or other forms of support.

And yet, many WTO members do use the breathing space in order to address the ultimate cause (increased imports being the proximate cause) of injury. From attempts to improve productivity to re-training workers (the German *Umschulung*) to become employed in activities for which there is demand, international practice reveals dozens of policy initiatives in this regard. To request that specific action be undertaken during the period when a safeguard is in place, in terms of a WTO obligation, would be doubly wrong: the world community would lose gains from innovation (in an area where a lot can be gained), and it would be perceived as an undue intrusion into national sovereignty. And we know from past experience that efforts to pierce the sovereignty veil have been consistently rebuffed.

This is where we would like to introduce a distinction between an obligation of action and an obligation of a specific action. The WTO could require those imposing safeguards to undertake some corrective action, as imports are only the proximate and not the ultimate cause of injury. The WTO should not be imposing a specific action but appropriate action. When a safeguard has been imposed, WTO members should be called on to address the causes behind a loss in competitiveness reflected in expanding import market shares. If safeguards aim to provide a breathing space, breathing spaces will come and go unless something more is done.

Worse, we will return to the vortex of constant protection, where anti-dumping duties will be succeeding safeguards, in turn, succeeded by anti-dumping duties, and so forth. And as noted above, there may well be worse outcomes, insofar as large players return to a world of VERs, voluntary import expansions, motivate specific trade measures under the umbrella of national security and use instruments that are not or only partially subject to WTO rules.

Moving in this direction will be beneficial for the WTO in other ways as well. WTO members will be in a position to show those left behind that the WTO is not their enemy. In fact, a safety net will be available, and it will be up to individual societies to weave it to their liking. This could also be a way to bring in a discussion about labour in the WTO, which seems to be a priority for the current United States Trade Representative.³¹

These are subjects that have engaged Marco Bronckers over the course of a long and productive career (e.g., Bronckers, 2001), illustrating his ability to be 'ahead of the curve'. This is certainly reflected in developments on the safeguards front in the almost 40 years since he wrote his papers arguing for greater flexibility in the use of selective safeguards. Looking back, the salience of the systemic worries he expressed at the time has become ever clearer. So has the need for approaches that recognize the political economy realities of sustaining an open global trade regime.

³¹ See [reuters.com/article/usa-trade-tai-wto-idUSL2N2NS26V](https://www.reuters.com/article/usa-trade-tai-wto-idUSL2N2NS26V).

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Authors

Bernard Hoekman

EUI and CEPR

bernard.hoekman@eui.eu

Petros C. Mavroidis

Columbia Law School

pm2030@columbia.edu