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The Challenge of Safeguards in the WTO

by Fernando Piérola

Cambridge University Press, 2014

In this well written and very readable book, the author Fernando Piérola, Senior Counsel at the Advisory Center on WTO Law, lecturer at several universities, and a respected trade lawyer, provides an excellent overview of the WTO law and practice relating to safeguards.

He first provides a detailed 82-page overview of the history of safeguards in the GATT and the WTO as well as the proffered rationales for such clauses and measures imposed pursuant to them (Part 1).

The rest of the book is then devoted to analysis of the WTO Agreement on Safeguards (AS). On the basis of the WTO Appellate Body report in *US–Line Pipe*, he distinguishes between the right to apply a safeguard measure (Part 2) and the application of such a measure (Part 3). The final Part 4 deals with procedural aspects, covering both domestic investigatory requirements and multilateral obligations. The concluding remarks provide both a useful overview of the key issues discussed and recommendations for improvement, based on the shortcomings that the author perceives within the system as described in the earlier sections of the book.

The interesting section on rationales for safeguard measures covers the full gamut of justifications underpinning safeguard measures, namely: flexibility (expectations and transaction costs, *rebus sic stantibus*); compensation and adjustment (efficiency counter-argument, compensation, industrial adjustment); and political valve and institutional channel arguments, before concluding that '[s]ome of these objectives are debatable. However, it is accepted that the safeguard mechanism advances the objectives of the multilateral trading system by addressing political economy concerns that may otherwise frustrate taking any step forwards' (p. 97). It may be noted as an aside that the same 'realpolitik' comment could be made about the other two trade remedies: anti-dumping and the countervailing duty instruments.

In Part 2, Piérola first covers the two threshold issues that cover the scope of the investigation, namely the period of investigation (POI) and the definition of the product concerned, i.e. the imported product. He then discusses the three prerequisite determinations of unforeseen developments, increased imports, as well as injury and the causal link.

With respect to the 'controversial' (p. 139) Appellate Body ruling that the 'unforeseen developments'¹ requirement in Article XIX:1(a) of the GATT 1994 co-exists with the AS requirements for imposing safeguard measures, the author raises two interesting consequences. First of all, it would seem that there must be a causal link between unforeseen developments and increased imports. If so, then supposedly the Article 4.2 (b) AS causation analytical requirements, as developed by the Appellate Body, apply in this context too, which imposes a substantial burden upon investigating authorities.

1 Meaning: 'events that occur after undertaking GATT obligations, which would be 'unforeseen' at the time of assuming those obligations and that could not be countered by legally available means because of the constraints imposed by the GATT' (p. 136).

Second, Piérola notes the Appellate Body's distinction between 'unforeseen' and 'unforeseeable' and at the end of the book rightly advocates that application of the notion of 'unforeseeable developments' might be more appropriate. In this context, he recalls that in *Argentina–Footwear* the AB stated that 'unforeseen' in the context of Article XIX means 'unexpected' at the time of negotiations and it noted that, as compared to unforeseen, unforeseeable means 'unpredictable' or 'incapable of being foreseen, foretold or anticipated'. Thus, 'foreseen is something that is actually expected, while foreseeable is something that is capable of being potentially foreseen. Hence, unforeseen is a notion that qualifies a fact as not actually anticipated; unforeseeable, on the other hand, qualifies a fact as not being able to be foreseen or anticipated' (p. 365).

In Part 3, which deals with the application of safeguards, the author distinguishes five distinct topics: the product scope, the geographical scope, the extent of the measure, the form of the measure, and the duration of the measure.

In the section on geographical scope, the author discusses, *inter alia*, the – by now largely uncontested – MFN nature of safeguard measures by virtue of Article 2.2 of the AS as well as the concept of *parallelism* between the product scope of the safeguard investigation and the product scope of the safeguard measure. This concept has been developed by the Appellate Body in its case law, and arises particularly in situations where a WTO member includes imports from all sources in its increased imports, injury, and causation determinations, but then later excludes imports from Free Trade Agreement (FTA) partners from the scope of the measure. While the Appellate Body thus far has not commented directly on the relationship between Article 2.2 of the AS and Article XXIV of the GATT 1994, in the sense of whether Article XXIV would allow exclusion of FTA partners from the scope of a measure, as long as their imports are also excluded from the increased imports, injury and causation analyses, it is in any event clear from the Appellate Body reports that this question would only need to be answered if the parallelism and related requirements are observed. This situation thus far has not arisen in the cases that have come up in WTO dispute settlement.

Part 4 distinguishes between domestic and multilateral procedural obligations imposed upon investigating authorities when conducting safeguard investigations and imposing safeguard measures. Piérola's analysis brings to the fore the perplexing point that, when compared to anti-dumping and countervailing duty investigations, the *domestic* procedural safeguard obligations are clearly less developed.² However, their *multilateral* counterparts, notably the various Article 12 of the AS notification requirements to the Committee on Safeguards,³ have no equivalent in the Anti-Dumping and SCM Agreements. As Piérola notes: 'The implication of the standard of review based on 'reasoned and adequate findings and conclusions is unparalleled in trade remedies ... [B]y limiting the scope of factual review to the findings, conclusions, explanations and analysis contained in the published reports, the AB has limited the evidentiary burden for a Member considering a complaint against a

2 A noted exception being the obligations for the investigating authorities to provide 'reasoned and adequate findings, conclusions, explanations and analyses' on the basis of Articles 3.1, last sentence, and 4.2(c) AS (p. 332).

3 As the notifications to the WTO Committee on Safeguards have to be submitted in English within tight deadlines, they are an extremely useful and timely tool for practitioners and interested parties.

safeguard and the underlying investigation' and '[t]he obligation has been treated as so fundamental that, despite its procedural nature, its violation leads to the violation of the underlying substantive requirement. It is the major hurdle that in all cases has determined the WTO-inconsistency of all safeguards challenged before panels and the AB.'

These differences exist even though all three legal instruments were negotiated within the same timeframe. To enhance transparency and due process, any future versions of these agreements might wish to incorporate the best of both 'fair' and 'unfair' trade remedy instruments.

While the book does an excellent job in what it covers, this reviewer missed a discussion of the relationship between the WTO safeguards regime and similar regimes in FTAs, which often gives rise to confusion on the part of the responsible authorities, for example, in the sense that when a WTO member has concluded an FTA with another FTA member it does not necessarily mean that an AS safeguard measure could not be applied to the FTA partner. Furthermore, useful reference documents such as the text of the AS and the document of 19 October 2009 in which the WTO members agreed on the contents of the various notifications to the Committee on Safeguards, mandated by Articles 9.1 and 12 of the AS,⁴ could have been added as annexes, so that the book could serve as a stand-alone reference work. Hopefully, these minor shortcomings can be remedied in the second edition.

The book is highly recommended for investigating authorities, trade negotiators, lawyers/consultants, and others with an interest in this 'evasive' (p. 368) instrument. In light of the explosion of safeguard investigations and measures in recent years,⁵ the publication of this book certainly comes at an opportune time and hopefully will prevent some of the more dubious safeguard cases in the future. Piérola notes that 'given the obscurity of many of their operational aspects, it is likely that [safeguard measures] are being displaced by the use of other trade-restrictive devices, in particular anti-dumping and countervailing duty measures'. In light of the bluntness of the safeguards instrument,⁶ this may not necessarily be a bad development.

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A Global History of Trade and Conflict since 1500

edited by Lucia Coppolaro and Francine McKenzie

Palgrave Macmillan, 2013

This book contains a series of nine essays (as well as an introduction and conclusion) on a wide variety of topics, all of which examine the question of whether, in Montesquieu's

⁴ WTO Doc. G/SG/1/Rev. 1, G/SG/N/6/Rev 1, G/SG/89, 5 November 2009.

⁵ As Piérola notes at 367, '[s]afeguard and safeguard investigations are a day-to-day business in many parts of the world, particularly in developing countries.'

⁶ Compare Vermulst, Pernaute, Lucenti, Recent EC Safeguards Policy: Kill Them All and Let God Sort Them Out?, 38:6 *Journal of World Trade*, 955–984 (2004).