

ARTICLE

Rebalancing the Trading Scale?

Recent Trends in the Implementation of Article 8 of the Safeguards Agreement

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The WTO safeguard measure takes the form of a suspension of an obligation under the GATT or the withdrawal or modifications of a GATT concession. When an importing Member imposes a safeguard measure, it shall endeavour to maintain a substantially equivalent level of concessions and may agree to compensate the exporting Member(s) affected by the safeguard measure. The SG Agreement also stipulates that if no agreement is reached within thirty days, the affected Member could suspend, under certain conditions, the application of substantially equivalent concessions or other obligations to the trade of the imposing Member. It has been rare that the exporting Member and the Member applying the safeguard agreed to a compensation. At the same time, until 2018, notifications of suspension of concessions to rebalance the level of concessions have also been rare. However, suspension of concessions sharply increased since 2018. This article offers some observations relating to this recent trend.

Keywords: WTO, Safeguards, GATT, compensation, suspension of concessions, rebalancing

I INTRODUCTION

Safeguards, anti-dumping and countervailing measures are often collectively called ‘trade remedies’. This is because each form of measure is intended to ‘remedy’ certain types of injury caused by imports to an importing Member’s domestic industry. However, compared with anti-dumping and countervailing duty measures, safeguard measures have certain distinctive features, including:

First, unlike Anti-Dumping (AD) and countervailing measures, safeguard (SG) measures are applied ‘to a product irrespective of its source’.¹ That is, while AD and countervailing measures apply to an imported product from one or more exporters operating out of a specific country,² safeguard measures apply, in principle, to imports from all sources (countries).³

Second, unlike AD and countervailing measures, the existence of any kind of ‘unfair’ practice on the part of foreign exporters or WTO Members, such as ‘dumping’ or ‘subsidization’, is not a condition for the application of safeguard measures. (See Article XIX of the GATT 1994 and the SG Agreement for the precise conditions when a safeguard measure may be applied.)

Third, unlike AD and countervailing measures, an importing Member that imposes a safeguard measure ‘shall

endeavour to maintain a substantially equivalent level of concessions and other obligations’ – that is, to compensate – exporting Members that are affected by the measure. If no agreement is reached between the parties on any adequate means of trade compensation, the SG Agreement allows the affected exporting Members to suspend the application of concessions or other obligations, subject to certain conditions. This paper looks into this particular aspect of the SG Agreement: namely, the interplay between, on the one hand, compensation and on the other hand, suspension of concessions if the compensation has not been granted.

2 RELATION BETWEEN SUSPENSION OF CONCESSIONS AND COMPENSATIONS

The SG Agreement and Article XIX of the GATT 1994 envisage a safeguard measure to take the form of a suspension of an obligation under the GATT or the withdrawal or modifications of a GATT concession. Typically, safeguard measures involve increase of import duties beyond the agreed tariff bindings or introduction of some kind of quantitative measure.⁴ Under the terms of Article 8.1 of the SG Agreement, a Member proposing to apply a safeguard measure:

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¹ Article 2.2 of the SG Agreement.

² In this article, the word ‘country/countries’ is used to include separate customs territories.

³ But note that imports from small-shared developing countries are exempted from the measures. (Art. 9.1).

⁴ Article 1 of the SG Agreement provides as follows: ‘This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994’. Art. XIX:1(a) of the GATT 1994, in turn, provides as follows: ‘If [certain conditions are met] the contracting parties shall be free ... to suspend the obligation [incurred by a contracting party under this Agreement, including tariff concessions], in whole or in part or to withdraw or modify the concession’.

shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing ... between it and the exporting Members which would be affected by such a measure ... To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

That is, when an importing Member, after an adequate investigation process has been completed, wishes to proceed to impose a safeguard measure, it 'shall endeavour to maintain a substantially equivalent level of concessions' and 'may agree' to compensate the exporting Member(s) affected by the safeguard measure.

However, it is actually very rare that compensation is offered. Between January 1995 and August 2023, there have only been four notifications reporting that the exporting Member and the Member applying the safeguard had agreed to a compensation.⁵

The SG Agreement further stipulates that if no agreement is reached within thirty days, then the affected Member could suspend, under certain conditions, the application of substantially equivalent concessions or other obligations to the trade of the imposing Member. The relevant provision, Article 8.2 of the SG Agreement, provides as follows⁶:

If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free [...] to suspend [...] the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure.

The conditions that need to be met before a Member can suspend concessions⁷ are described in subsection 4.2.1 below.

3 HISTORICAL PERSPECTIVE

As mentioned above, it has been rare that the exporting Member and the Member applying the safeguard agreed

to a compensation. But that does not mean that exporting Members have often resorted to the suspension of concessions – that is, to rebalance the level of concessions. In fact, until 2018, notifications of suspension of concessions to rebalance the level of concessions have also been rare. The table below indicates the number of such notifications submitted since 1995.⁸

Year-By-Year Number of Notification of Proposed Suspension of Concessions^{9,10}

<i>year</i>	<i>Notifications of Proposed Suspension of concessions</i>	<i>Revisions or/Supplements Notifications to proposed suspension of concessions¹¹</i>	<i>(For Context) SG Measures Applied</i>
1995	0	0	0
1996	0	0	1
1997	0	0	3
1998	1	0	5
1999	0	0	5
2000	0	0	7
2001	1	0	9
2002 ¹²	6	1	14
2003	2	1	15
2004	0	0	6
2005	1	0	6
2006	0	0	7
2007	0	0	5
2008	0	0	6
2009	0	0	10
2010	0	0	4
2011	0	0	11

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⁵ There are 3 compensation notifications that concern safeguard measures imposed by Costa Rica. The first (notified in Mar. 2015) was offered to Uruguay (*see* document G/L/1108-G/SG/134). The second (notified also in Mar. 2015) was offered to Argentina (*see* document G/L/1112-G/SG/136). The third (notified in Sep. 2021) was offered to Canada (*see* document G/L/1400-G/SG/265). In addition, while the notifying Members did not specify it as notification of a compensation, Brazil and Costa Rica jointly notified in Mar. 2023 that they agreed to certain MFN-tariff treatment of a product that is not subject to the safeguard measure. (*See* G/L/1480-G/SG/280.) For compensations offered in GATT times, *see e.g.*, the notification by the United States explaining the compensation provided to the United Kingdom: L/1951 of 1962.

⁶ The full text reads as follows: 'If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove'. Note that such suspension can be aimed specifically 'to the trade of the imposing Member'.

⁷ The expression 'suspend (or suspension of) the application of concessions' will be used hereafter in this article as a shorthand for 'suspend (or suspension of) the application of concessions or other obligations'.

⁸ To clarify, the SG Agreement does not oblige a notification to confirm that any of these proposed suspensions (which often take the form of increased duties) materialized.

⁹ Proposed suspension of concessions submitted pursuant to Art. 8 of the SG Agreement against the US s. 232 measures are included here for the purpose of statistics. The United States does not consider the s. 232 measures to be safeguard measures. (*See* Subs. 3.1 below for context.)

¹⁰ *See* the WTO's Analytical Index, https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm#art8 for details. (Accessed end of Oct. 2023. This webpage is regularly updated by the WTO Secretariat.)

¹¹ Only revisions/supplements that affect the substance of the proposed suspension are counted.

¹² This is the year when the United States applied a safeguard measure on certain steel products.

year	Notifications of Proposed Suspension of concessions	Revisions or/Supplements Notifications to proposed suspension of concessions ¹¹	(For Context) SG Measures Applied
2012	0	0	6
2013	2	0	8
2014	1	1	11
2015	1	0	11
2016	0	0	6
2017	1	0	9
2018	11	3	7
2019	4	1	12
2020	6	4	12
2021	4	4	9
2022	1	1	3

As can be seen, during fourteen of the twenty-eight year-period from 1995–2022, no proposal of suspension of concessions was notified by Members. In fact, with the exception of the year 2002, until 2018, the maximum number of such notifications received per year was two. By contrast, the figure sharply increased to 11 (eleven) – 14 (fourteen) if one includes notifications revising previously notified proposals of suspension – in 2018. The next sections offer some observations on such recent developments.

4 RECENT DEVELOPMENTS

4.1 The Years 2018–2020

The major events that took place during 2018–2020, when the number of notifications of proposal of suspension of concessions increased sharply, were as follows:

On 7 February 2018, the United States applied two safeguard measures: one on imports of large residential washers and the other on imports of crystalline photovoltaic cells (solar cells). Five¹³ Members submitted proposed suspensions of concessions in reaction to these two safeguard measures.

On 8 March 2018, the United States issued two Presidential Proclamations pursuant to section 232 of the Trade Expansion Act of 1962, under which the US President determined that tariffs are necessary to adjust imports of steel and aluminium articles that threaten to impair the national security of the United States. The measures, which came into force on 23 March 2018, consisted of a 10% duty for aluminium and 25% duty for steel. While the United States explained¹⁴ that those measures were not safeguard measures, some Members understood them to be so and eight proposals of suspension of concessions were submitted in reaction to these two section 232 measures.¹⁵

Subsequently, on 2 February 2019, the European Union applied a safeguard measure on certain steel products. In its notification, the European Union referred to the section 232 measures taken by the United States as one of the elements that led to the decision to apply a safeguard measure.¹⁶ Four Members submitted proposed suspension of concessions in reaction to this safeguard measure.¹⁷

On 1 February 2020, the United Kingdom withdrew from the European Union. In so doing, it continued to apply, with some modifications, the EU's safeguard measure applied on certain steel products.¹⁸ Four Members submitted proposed suspensions of concessions in reaction to this safeguard measure.¹⁹

4.2 Observations

4.2.1 Timing for the Submission of a Proposed Suspension of Concessions

Articles 8.2 (*see* footnote 7 for the full text) and 8.3 of the SG Agreement provide a complicated timeline within which a

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¹³ Counting Korea and China that proposed suspension of concessions vis-à-vis both of the US measures as 2 each. China, Japan, and Korea submitted proposed suspension of concessions vis-à-vis the safeguard measure on solar cells. Korea and China submitted proposed suspension of concessions vis-à-vis the safeguard measure on large residential washers.

¹⁴ *See e.g.*, G/SG/168.

¹⁵ China, the European Union (two separate notifications), India, Japan, Russia, and Türkiye (two separate notifications) submitted proposed suspensions of concessions. The panel in *China – Additional Duties on Certain Products from the United States* (DS558) found that neither Art. 8.2 of the SG Agreement nor Art. XIX:3(a) applied to the additional duties that China imposed as the suspension of concessions. (para. 8.1 a, WT/DS585/R.) At the DSB meeting of 19 Sep. 2023, China announced that it would appeal this report to the Appellate Body, which is currently not functioning. (*See* WT/DSB/M/483.) For the other cases where the suspension of concessions were brought to a dispute, *see* the following documents for the latest status as of the writing of this article (Oct. 2023): for India, WT/DS585/R (mutually agreed solution); for Türkiye, WT/DS561/8 (panel still in progress); for Russia, WT/DS566/7 (panel still in progress); for the European Union, WT/DS559/10 (Arbitrator composed on 20 Jan. 2022 pursuant to DSU Art. 25, but suspended).

¹⁶ For example, the European Union explained as follows: 'During the [investigation] period, imports into the USA of the 26 products under assessment have sharply decreased, in particular since the imposition of the US s. 232 measures. [...] The trend of increased imports in the Union, which is driven in part by the impact of the US s. 232 measures, is expected to be even more pronounced in the near future if no measures are taken'. (*See* G/SG/N/8/EU/1 – G/SG/N/10/EU/1 – G/SG/N/11/EU/1/Suppl.1.)

¹⁷ Brazil, Russia, Korea and Türkiye submitted proposed suspensions of concessions.

¹⁸ The United Kingdom explained as follows: 'The transition review was initiated [on 1 Oct. 2020] at the request of the Secretary of state for International Trade. The review will conclude whether the safeguard measure applied by the European Union, which is also applied by the United Kingdom, and which will be transitioned when the transition period under the Withdrawal Agreement pursuant to Art. 50 of the Treaty on European Union ends at 23.00 GMT on 31 Dec. 2020, should be varied, extended or revoked'. (*See* G/SG/N/6/GBR/1.)

¹⁹ Russia, India, Korea and Brazil submitted proposed suspensions of concessions.

proposal for the suspension of concessions needs to be submitted. Assuming that consultations between the Member applying the safeguard measure and the affected exporting Member have been carried out in accordance with the SG Agreement, a suspension of concessions can happen: (1) not later than ninety days after the subject safeguard measure is applied, and (2) upon the expiration of thirty days from the day on which the notification of such suspension is received by the Council for Trade in Goods. A notification of suspension of concessions needs to be submitted at a point in time that fits within the mentioned timeline.

One of the issues that relevant Members faced in the recent years in this relation is what to do when the original safeguard measure is extended. In fact, many Members have submitted a revision or a supplement of the original suspension proposal when the original safeguard measure was extended.²⁰ When Members submitted a revision or a supplement of the suspension proposal, they often revised the content of the suspension. However, there are instances where the first notification of proposed suspension of concessions was submitted when the safeguard measure was extended.²¹

4.2.2 The Content of the Suspension²²

Before 2018, Members usually included a detailed description of the suspension. For example, a notification made in 2002 identified an exhaustive list of all the products, in 8-digit HS format, covered in the suspension of concessions.²³ By contrast, in the suspension notifications made after 2018, some Members have opted for a very simple description. For example, a notification made in 2019 stated that '[t]he details of the suspension of concessions and other obligations will be provided to the Council for Trade in Goods before their application'.²⁴ In addition, as noted in subsection 4.2.1 above, even when the original notification of a proposed suspension contained a detailed description of the suspension, some Members subsequently modified that description.

4.2.3 Timing When the Suspension takes Effect

Article 8.3 of the SG Agreement provides that 'the right of suspension [...] shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement'. That is, a Member whose exports are affected by a safeguard measure normally cannot suspend the concessions to 'rebalance' for the first three years during which a safeguard measure is in effect. However, two exceptions are identified: (1) when the safeguard measure has been taken as a result of a relative (as opposed to absolute) increase in imports, or (2) when the safeguard measure does not conform to the provisions of the SG Agreement. In such cases, the 'three years' limitation provided for in Article 8.3 of the Agreement does not apply. While the question remains as to how the determination that such exceptional situation exists should be made,²⁵ some Members have in fact notified that the proposed suspension of concessions would not wait for three years to be effectuated.²⁶

5 CLOSING

The provisions of the SG Agreement regarding the granting of compensation and the suspension of concessions represent reflect one of the peculiarities of the SG instrument as compared to the AD or the countervailing instruments.

As explained in this article, under the WTO regime, compensations have rarely been offered. While suspensions of concessions also followed a similar trend for some time, they have now become more frequent. It is to be seen how the Members' practice regarding compensation and suspension of concessions will evolve from here.

Notes

²⁰ See e.g., G/L/1359/Rev.2 – G/SG/N/12/TUR/9/Rev.2.

²¹ See e.g., G/L/1183 – G/SG/N/12/TUR/5.

²² There have been very few disputes regarding suspension of concessions taken under Art. 8 of the SG Agreement. One of the few is *Turkey – Additional Duties on Imports of Air Conditioning Machines from Thailand* (DS573). In Feb. 2019, Thailand brought a dispute against Türkiye concerning its additional duty (i.e., taken as a result of suspension of concessions in reaction to Thailand's safeguard measure) on imports of air-conditioning machines from Thailand. Türkiye notified this suspension in Aug. 2017 in reaction to the fact that Thailand extended its safeguard measure on non-alloy hot rolled steel flat products in Jun. 2017. On 10 Nov. 2020, Thailand requested that the Panel suspend its work, and the authority for the establishment of the Panel lapsed on 19 Nov. 2021. Thailand's main claim regarding the SG Agreement was that Türkiye violated Arts 8.2 and 12.3 of the SG Agreement because Türkiye was not an 'affected exporting Member' with a 'substantial interest' in the Thailand's safeguard measure, given the low level of imports from Türkiye.

²³ See G/C/10 – G/SG/43.

²⁴ See G/L/1306/Suppl.1 – G/SG/N/12/KOR/4/Suppl.1.

²⁵ The SG Committee engaged in a discussion on this issue in its Apr. 2002 meeting. (See paras 119 ff and paras 86 ff in G/SG/M/19.) It was noted that there had been instances in which there were disputes as to whether imports had increased absolutely or otherwise, and the Committee discussed how to proceed in those cases short of a 'unilateral retaliation'.

²⁶ See e.g., G/L/1364/Suppl.1 – G/SG/N/12/BRA/4/Suppl.1.