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# TRADE REMEDIES: The Safeguards Measure and its Application in Selected Countries

*By Trade Programme Team*

## Introduction

International trade encompasses a host of countries, activities, functions, processes, products (goods and services) and people, tasked with various duties that are geared towards driving forward this lucrative field. International trade is currently conducted within the World Trade Organization (WTO) multilateral framework. Under this framework, there are rules that govern the manner trade transactions are conducted by Member countries of the WTO; this is because in the course of conducting trade, a host of challenges tend to occur. The rules governing trade transactions are articulated in Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994. One common challenge that countries face in the process of trading is import surge, which can loosely be defined as an unusual increase of an import product. There is a legal provision of the WTO under Article XIX of the GATT which deals with remedies of import surges. As members of the WTO, countries like India, South Africa and Canada have domesticated the WTO Agreement on Safeguards; however, Kenya has not established the legal and institutional framework under which the WTO Safeguards Agreement can operate.

## 2. What is a (Trade) Safeguard?

A trade safeguard is a tool used by a country to restrain or restrict international trade so as to protect a certain local industry from foreign competition. In the WTO system, a Member country may take a "safeguard" action, i.e., restrict imports of a product temporarily in order to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the domestic industry that produces like or directly competing products. Article XIX of the GATT 1947 outlines the regulations under which safeguards were applied. It was, however, not until the Uruguay Round of negotiations that an Agreement on Safeguards was arrived at, adding more clauses thereby enhancing its clarity as changes were introduced. This was in response to the gap that existed, thereby leading to application of the often referred to as "Grey Area" Measures that limited import of certain products within an agreement. With the enforcement of the World Trade Agreement on Safeguards (WTOAS), these measures have been explicitly prohibited with provisions put in place to eliminate those that were in use before the conclusion of this Agreement.

Safeguards are supposed to be used only in very specific circumstances, with compensation, and on a universal basis, i.e., a Member restricting imports for safeguard purposes will have to restrict imports from

all other countries. This should be applied equally to all Members without discrimination. It is important to note that exceptions to this non-discriminatory rule are provided for in the Safeguards Agreement. The Uruguay Round of WTO negotiations resulted in the adoption of the WTO Agreement on Safeguards. This Agreement sets out the rules for application of safeguard measures and requirements for safeguard investigations by national authorities. It further emphasizes transparency and avoidance of arbitrariness through laying down rules. The goal of the Agreement is to encourage structural adjustment on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets.

## 3. The WTO Framework on Safeguards

Safeguards, as shown above, are to be found in article XIX of GATT 1994 of the WTO Agreement and specifically, the WTO Agreement on Safeguards. It details regulations for application of the safeguard measures, remedies available, how to determine injury, if any, and how an aggrieved country or party may apply the remedies available. According to UNCTAD (2003) Dispute Settlement Handbook on Trade Safeguards, it is clear that, in order to impose safeguard measures under the provisions of GATT XIX, the following two conditions must be met. First, such an increase must have occurred "as a result of unforeseen developments and of the effect of the obligations incurred by" a WTO Member; and secondly, imports should enter into the importing country "in such increased quantities and under such conditions" as to cause or threaten to cause serious injury to the domestic industry. In such instances, it is imperative that the country that is aggrieved in such a manner will take recourse in imposition of trade safeguard measures.

It is outlined under the regulations, and is common practice, that the above conditions have to undergo investigations to prove if indeed the threshold for declaring imposition of trade safeguards is warranted. Investigations will be carried out by an independent, competent body in the country that is mandated to carry out this process. There are various remedies to trade imbalances as a result of conditions outlined above. This can be in the form of definitive or restrictive measures; quotas or levies in form of taxes on products that the aggrieved country imposes so as to aid the domestic industry in the endeavour to assist it to be competitive in the local as well as international market. The World Trade Organization (WTO) Framework on Safeguards covers the following: the circumstances under which safeguards are applied; investigation process for conditions; application on safeguard measures; duration, extension and review of safeguards; reapplication of safeguards; provisional safeguards/developing country specific; prohibition and elimination of grey areas; WTO Committee on Safeguards, notification and consultations; and dispute settlement

## 4. Safeguard Measures and Initiations by Other Countries

There are several countries that have applied safeguards measures before, these include: Canada, India, and closer home, South Africa. These countries have implemented the safeguard measures using institutions that cover the areas mentioned in Section 3 above. Canada, as a founding contracting party to the GATT in 1948, and Member of the WTO in 1995, helped to establish the current rules-based international trading system with the two foundational principles of reciprocity and non-discrimination (Bown, 2007). In its case, the Canadian International Trade Tribunal (CITT) was formed as a result of the International Trade Tribunal Act of 1985[1]. It is mandated to undertake two different enquiries/investigations into cases that may lead to imposition of trade safeguard measures depending on the source of the imported goods. On the one hand, the global safeguards inquiry looks at the impact of imports of goods from all countries producing similar products alike to those under domestic production while on the other hand, enquiries are specific to goods imported from China. The tribunal must submit its report to the government and the Minister for finance within 180 days normally, and within 270 days for complex cases from the date of beginning the enquiry. As with investigations specific to china, the tribunal's report is due in 70 days upon initiation of investigations[2].

[1]*The Act that brought into existence and formation of Canadian International Trade Tribunal.*
[2]*Accessed at: http://www.citt.gc.ca/publicat/safe_e.asp*

As one of the fast growing and large economies in the developing world, India's trade environment is closely monitored and is one of the most active as a WTO Member. As at May 2012, India had applied 18 safeguard measures for a variety of products. The legal and institutional framework for trade safeguards in India came into being under the Indian Customs and Tariff Act 1975[3] which empowers the central government to impose safeguard measures on goods which meet the threshold of being imported in increased quantities and cause or threaten to cause serious injury to the domestic industry producing like or directly competing products. The duty of carrying out the above is tasked to the office of the Director General in charge of safeguards which has been established as the main institutional organ to look into complains in this regard. This process and subsequent application of a chosen safeguards measure conforms to the WTO safeguards rules. However, it is noteworthy that, the period within which findings of investigations by the Director General should be submitted is eight months from the date of initiating the investigations. This should be accompanied by his recommendations as to the remedy to undertake in light of prevailing circumstances, which will then be put under consideration by the standing Board on safeguards, led by the Secretary of Commerce in India. These are then presented to the finance Minister for appropriate action.

In terms of trade, it is undisputable that in the African continent, South Africa as a country leads the rest in terms of trade, both locally and internationally. South Africa has a strong legal and institutional framework with detailed provisions that are applicable in trade safeguard issues. The body charged with these duties is the International Trade Administration Commission (ITAC) which came into being through the International Trade Administration Commission Act of 2002[4]. As with both Canada and India, South Africa has tried to follow the proscribed framework by the WTO. The Commission is tasked with duties of conducting investigations which it initiates upon reception of application on behalf of industries within the South African Customs Union (SACU). The regulations on safeguard measures in South Africa were amended in July 2005 giving rise to an amended safeguards regulation outlining the general safeguards regulations, the process of conducting investigations, how relevant information will be gathered, the SACU industry and how it is affected, and the standard safeguard measures conforming to the WTOAS.

It is evident from the above case studies that mechanisms have been put in place to try and institutionalize the WTOAS and domesticate them for application locally for each of the countries that have been mentioned herein. For each of these countries, specific institutions are tasked with the duty of looking into issues dealing with safeguards; South Africa has mandated the International Trade Administration Commission; India through the Director General in charge of safeguards; whereas Canada carries out this function through the Canadian International Trade Tribunal. Each has detailed regulations and provisions for the process of filing a safeguard complaint, initiation and termination of investigations, how to collect data in determination of cause and injury, imposition of a safeguard measure and by which authority, the time period that is allowed for each process and remedies available for application.

It is important to note that among the three countries, India leads with 18, in terms of the number of safeguard complaints lodged with the WTO, followed by Canada with 3 safeguard complaints, and lastly, South Africa which has for the period 1995 to 2012 made only 1 safeguard complaint. This can be attributed to the strong legal and institutional frameworks that have been set up by these countries, specifically to look into issues of trade remedies, particularly those that require imposition of trade safeguard measures. It is, therefore, imperative from the foregoing that Kenya learns in its endeavour to set up mechanisms that fall in the jurisdiction under which trade safeguards can be used to counter the negative effects of imports that seem to bedevil the country every other day.

According to the records found on the WTO website, the sectoral initiations are as shown in Table 1, with the top 3 products, mostly faced with safeguard initiations, being chemical and allied with 39 initiations; base

[3] *Section 8B of the Customs Tariff Act, 1975 empowers the Central Government to impose Safeguard Duty on goods, which enter in increased quantities, to India and cause or threaten to cause serious injury to domestic industry producing like or directly competing goods.*
[4] *Is the Act that anchors formation of the South African International Trade Administration Commission (ITAC).*

metals and articles with 38 initiations; and articles of stone, ceramics, plaster and glass with 22 initiations. All these fall within the period from formation of the WTO in January 1995 to April 2012. There have not been any cases of safeguard initiations submitted to the WTO by Kenya for the entire period that it has been in existence. It is, however, important to note that going by the definitions of what safeguards are, Kenya stands to gain immensely if it can make use of the provisions that are offered therein as there are scattered instances (requires research to prove) of excess imports into the country as outlined under Article 2.1 of the Safeguards Agreement.

**Table 1: Sectoral Safeguard Initiations from January 1995 – April 2012**

| Sector (HS Section Name) | Total Number of Initiations | Percentage |
|---|---|---|
| VI Products of the chemical and allied industries | 39 | 16.7% |
| XV Base metals and articles | 38 | 16.2% |
| XIII Articles of stone, plaster; ceramic prod.; glass | 22 | 9.4% |
| I Live animals and products | 18 | 7.7% |
| IV Prepared foodstuff; beverages, spirits, vinegar; tobacco | 18 | 7.7% |
| II Vegetable products | 15 | 6.4% |
| XI Textiles and articles | 14 | 6.0% |
| XVI Machinery and electrical equipment | 14 | 6.0% |
| VII Resins, plastics and articles; rubber and articles | 13 | 5.6% |
| X Paper, paperboard and articles | 7 | 3.0% |
| XII Footwear, headgear; feathers, artefacts, flowers, fans | 7 | 3.0% |
| XVII Vehicles, aircraft and vessels | 7 | 3.0% |
| V Mineral products | 6 | 2.6% |
| XX Miscellaneous manufactured articles | 5 | 2.1% |
| IX Wood, cork and articles; basket ware | 4 | 1.7% |
| III Animal and vegetable fats, oils and waxes | 3 | 1.3% |
| XVIII Instruments, clocks, recorders and reproducers | 3 | 1.3% |
| VIII Hides, skins and articles; saddlery and travel goods | 1 | 0.4% |
| | **234** | **100.0%** |

*Source: WTO Website*

## 5. Kenya's Legal System and Institutional Framework on Trade Safeguards

Kenya as a country is well-endowed with natural resources and, in keeping relations with its neighbours both nearby and from afar, it delves into the realm of trade, both at the local and international levels. In so doing, issues that touch on imports and exports will be encountered, both in the negative and positive. With a high import concentration index greater than 50 per cent, Kenya has had to deal with the challenge of job losses and industry closure for key sectors like the textiles. Safeguards come into play to curtail the effects that could arise as a result of excessive imports to Kenya and in their place

offer a favourable operating environment for the domestic industries that may be affected by such occurrences. A case in point would be the textile industry that has been affected by the importation of second hand clothes commonly called 'mitumba'.

In terms of development, Kenya is a developing country and, as such, is covered under the provisions outlined under Article 9 of the GATT Agreement on Safeguards which states as follows:

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.
2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non application is at least two years.

The application of safeguard measures in Kenya is spearheaded by the department of External Trade under the auspices of the Ministry of East Africa, Commerce and Tourism (previously Ministry of Trade). It is important to note, however, that Kenya lacks a definite body and structure/ mechanism that tackles issues that hinge on safeguards. Nonetheless, Kenya, being a Member and signatory to the WTO, is obliged to follows the laid down procedures in instances where it has to undertake a trade safeguard remedy. However, Kenya does not have a legal and institutional framework that governs safeguards per se, and as such, there is need for such a framework. According to the records at the WTO depository, and as has been mentioned earlier on, Kenya has not made any safeguard application so far. It is also important to note at this juncture that the Kenyan market is liberalized and as such it is, therefore, a tall order to pinpoint products that would be qualified for application of a particular safeguard measure. It is clear that some industries have been hurt as a result of excessive imports (Mitumba imports affecting the clothes industry) into the country that has resulted in closure of some industries and as a result causing loss of sources of livelihood and thus affecting, negatively, people's living standards.

## 6. Recommendations

Having gone through the various country application of trade safeguards, Canada, India, and South Africa, and comparing the legal and institutional capacities of each against the Kenyan one, it is clear that Kenya lags behind and lacks such a system in order to fully utilize the provisions under the safeguard measures as outline in the Safeguard Agreement fronted by the WTO. The following are some recommendations to the Government and the legal fraternity in Kenya, especially those that are tasked with the duty of ensuring there is a fair playing field in terms of trade between Kenya and its trading partners, both regionally and internationally.

1. **Set up an independent safeguards body/authority:** So as to give this topic the weight it deserves, it is important that an autonomous entity be set up to explicitly tackle issues that deal with safeguards – looking at excess imports and giving remedies that will cushion the domestic industry. In the same light, it would be important to give the body powers to act independent of ministry of trade's interference, albeit playing an oversight role.

2. **Incorporate public/stakeholders participation:** Borrowing from the practice in Canada, it is important to seek input from the public, who are

the main stakeholders in the industry as this will help to shed more light on the severity of the claims of excessive imports and the effects that have been felt by the key stakeholders (manufacturers) if any, thereby aiding in mapping a clear strategy on the way forward.

3. **Allocate resources to the sector:** In most developing countries, funds are normally scarce thereby even if there are cases of excess imports reported, it becomes a tall order to carry out investigations as allocations for this purpose, more often than not, are non-existent. It is of utmost importance that, for Kenya to be able to uptake the advantages that are offered to members under the WTOAS, funds to see this process must be allocated and used efficiently.

4. **Build partnerships:** Kenya could forge relations with developed countries that already have in place a sound legal and institutional regime on safeguards as a learning point, e.g., with South Africa. While doing so, it should also engage the civil society organizations locally to assist it in coming up with fitting laws and regulations that conform to the internationally accepted rules as stipulated by the WTOAS.

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