Safeguard Measures under WTO

Sheela Rai*

The doctrine of precedent is getting established in WTO and seems to be there to stay however much it is argued otherwise. Neglect of this fact means that we are overlooking some of the problematic developments in WTO jurisprudence. This is quite evident from the integration of the requirement of unforeseen developments for a WTO consistent safeguard measure. While the interpretation given by the Appellate Body in two recent cases might be correct according to the rules of interpretation it does not address the realities of the negotiation process where tariff cuts are made according to formulae accepted by a process of bargaining. Are we seeing the victory of formalism in international jurisprudence in WTO matters?

***West Bengal National University of Juridical Sciences, Kolkata. Email: sheela_rai@yahoo.com**

I
Introduction

Every state has the sovereign right to regulate its economy including trade and commerce within its territory and by its subjects. However, when the countries enter into bilateral or multilateral trade agreements they undertake to refrain from exercising this sovereign power in certain aspects. Under the GATT and now the WTO the countries undertook certain commitments. The commitments were broadly towards gradual liberalization of trade through successive rounds of negotiations. The countries undertook to eliminate quantitative restrictions and committed themselves to a tariff binding on the products. These tariff bindings were to be gradually lowered with the progress in liberalization of trade.

However, this process of liberalization has not been a smooth one either at the multilateral level or at the domestic level. There has been a continuous struggle between the forces of liberalization and forces of protection. This tussle is reflected in the GATT where commitments are subject to number of exceptions of various kinds. Some of these exceptions have been justified on the ground that they are there to safeguard the domestic industry against unfair trade practices. These are subsidies and dumping against which countervailing duties and antidumping measures are imposed. However, the domestic industry has been ensured of protection even in cases when there is no such justification. This was done by Article XIX of the GATT 1947 which recognised imposition of safeguard measures in the form of quantitative restrictions and tariff increases (beyond the bound rate) if the domestic industry was suffering from serious injury or there was threat of serious injury due to sudden increase in imports under unforeseen circumstances.

However, these safeguard measures had to be imposed on MFN basis.[1] The requirement of imposition of safeguard measures on MFN basis, of proving serious injury or threat of serious injury made the imposition of safeguard measures difficult. Thus the developed countries who were the major users of safeguard measures before the WTO resorted to

other measures such as voluntary export restraints. These so called grey area measures were opposed by the developing countries who wanted them to be banned. As a result in the Uruguay Round, Agreement on Safeguard Measures was introduced which banned such grey area measures under Article11 and provided for detailed rules for the imposition of safeguard measures so that these measures are not used for protectionist purposes. [2]

However, as the data below shows developing countries are adopting the trade strategies of the developed countries and are increasingly using the these measures to protect their markets against imports.

During the period January 1, 1995 to June 30, 2005 a total of 139 investigations were initiated and a total of 68 safeguard measures were imposed. Those totals are relatively low compared to the 2743 antidumping initiations and 1729 antidumping measures and 176 countervailing duty initiations and 108 countervailing duty measures notified during the same period. The country notifying the largest number of initiations since 1995 was India with 15 initiations, Chili, Jordan and the United States followed with 10 initiations each. Concerning application of new final safeguard measures, since 1995, India reported the largest number(8), followed by Chili and the United States (six measures each), followed by Czech Republic and the Philippines (five measures each).

Since safeguard measures did not have any justification in terms of unfair trade etc. as antidumping measures have therefore GATT tries to make their use difficult. Therefore the requirement that they can be imposed only in cases of serious injury and when increase in imports is due to unforeseen circumstances. Laws relating to safeguard measures are justified on the ground that they give domestic industry time to reallocate its resources or to restore its competitiveness. Another justification that is given is that it emboldens the countries to liberalise because they are assured of the use of safeguard measures in case the domestic industry is in crisis and needs protection. Advocates of safeguard measures under the GATS are putting forward this argument.

Article XIX of the GATT 1994 and the Agreement on the Safeguards together provide rules to be followed if a country decides to take safeguard measures. The general rule followed in the interpretation of the GATT agreements is that if provisions in the specific agreements conflict with the general provisions of GATT 1994 then provisions of specific agreements would prevail over the provisions of the GATT 1994. However, as far as possible the panel and the Appellate Body would try to read both the provisions in a harmonious way.[3]

This paper analyses the rules relating to emergency safeguard measures under the WTO and the interpretation of those rules by the Panel and the Appellate Body.

II
Conditions Necessary for Imposition of Safeguard Measures

Increase in Imports (as a result of unforeseen circumstances?)

A situation of conflict between Article XIX of GATT 1994 and the Agreement on Safeguards arose as the two have slightly different provisions specifying circumstances for the imposition of safeguard measures.

Article XIX of the GATT authorizes the use of Emergency safeguard measures if

(i) as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement including tariff concessions,

(ii) any product is being imported into the territory of that contracting party in such increased quantities and under such conditions

(iii) as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products.

Article 2.1 of the Agreement on Safeguards however, does not mention the first of the above three conditions. It says,

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

It became a moot issue in some of the cases before the Dispute Settlement Body whether the fact that the "unforeseeable circumstances" is not used in the Agreement on the Safeguards means that the Members did not want it to be a requirement for the imposition of safeguards measures any more.

In the case of 'Korea- Definitive Safeguard Measures on Imports of Certain Dairy Products'[4] and in 'Argentina-Safeguard Measures on Imports of Footwear'[5] the contention of the appellee was that since Agreement on Safeguards was included only in the Uruguay Round and the Members specifically excluded the first condition from the Agreement therefore, it should be considered that the Members did not want to include it as one of the rules for the imposition of safeguard measures.

However, the Appellate Body has held that the WTO Agreement is a single undertaking and unless there is conflict between the provisions of GATT 1994 and specific Agreements the whole should be interpreted harmoniously. The Appellate Body held that there is nothing in Article 1 or 11.1 of the Agreement on Safeguards that suggest an intention by Uruguay Round negotiators to subsume the requirements of Article XIX of the GATT within Agreement on Safeguards and thus to render those requirements no longer applicable. Appellate Body noted that Article 1 states that the purpose of the Agreement on Safeguards is to establish "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT

1994". According to the Appellate Body this suggests that Article XIX continues in full force and effect and establishes certain prerequisites for the imposition of safeguard measures. In Article 11.1(a) the ordinary meaning of the language "unless such action conforms with the provisions of that article applied in accordance of this Agreement" is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards. Appellate Body pointed out that neither of these provisions state that any safeguard action taken after the entry into force of the WTO Agreement need only conform with the provisions of the Agreement on Safeguards. With regard to the issue as to what is the meaning of the phrase "unforeseen developments" the Appellate Body stated that "unforeseen developments" was interpreted in the Hatter's Fur case[6]

> … "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[7]

On the basis of the above the Appellate Body concluded that unforeseen developments meant unexpected developments, developments which a Member did not expect when it undertook the tariff reduction obligation. Following this interpretation in the case of *Argentina –Definitive Safeguard Measures on Imports of Preserved Peaches*[8] the panel disagreed with Argentina's argument that increase in world stock of peaches and trend in prices could not be foreseen by its negotiators during the Uruguay Round. In this case Argentina argued that three factors constituted unforeseen developments: (a) increased production as a result of an exceptional Greek harvest; (b) substantial increase in world stocks; and (c) a downward price trend. Panel noted that the production in 1999/2000 (investigation period) was less than one percent higher compared with the production in 1992/93 when Uruguay Round negotiations were going on. Argentina stated that the negotiators could not foresee that exceptional production in 1992/93 would become a rule. Panel asked Argentina why its negotiators did not expect these fluctuations in future. Moreover Panel noted that there was no finding in the domestic authority's report that an exception had become a rule.

The requirement of that safeguard measures should be imposed only if there are "unforeseen developments" makes the imposition of safeguard measures difficult. The stand taken by the Panel and the Appellate Body had generally been that safeguard measures are intended to be used in rare and unexpected cases.

> In our view the text of Article XIX:1(a) of the GATT 1994 read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of ordinary, to be matters of urgency, to be in short emergency actions. And such emergency actions are to be invoked, only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend the obligation in whole or in part or to withdraw or modify the concession." Thus Article XIX is clearly, and in every way, an extraordinary remedy.[9]

However, the severity has been mellowed somewhat by two other interpretations given by the Appellate Body. Firstly, the Appellate Body has held that existence of "unforeseen developments" was not a condition but circumstance which must be demonstrated as a matter of fact for the safeguard measure to be applied consistently with the provisions of the Article XIX of the GATT 1994.[10] In *US-Chilled Lamb Meat Case*[11] the Panel pointed out that the Appellate body in *Korea-Safeguard Measures on Dairy Products* and in 'Argentina- Safeguard Measures on Footwear' did not distinguish between factual circumstance and independent condition. The Panel in this case opined that the former was a lesser threshold than the latter.[12] In any case the published final report of the investigating authority should contain a finding or reasoned conclusion on unforeseen developments.[13] Secondly, in the case of 'US-Definitive Safeguard Measures on Imports of Certain Steel Products'[14] on Steel the Appellate Body held that the characterisation of Article XIX remedy as extraordinary does not mean that the imports should be extraordinary or abnormal. It means that the circumstances in which the imports have increased were unexpected. "Thus the extraordinary nature of the domestic response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected."[15]

The conditions to be fulfilled for a valid imposition of safeguard measure under Article XIX read with the Safeguard Agreement are that the product in respect of which safeguard measure is being imposed:

(1) is being imported into its territory in such increased quantities, absolute or relative to domestic production,
(2) and under such conditions as to cause or threaten to cause
(3) serious injury to the domestic industry that produces like or directly competitive products.

Increase in import has to be in absolute or relative to domestic production. In the case of 'Argentina-Safeguard Measures on Footwear' the Appellate Body upheld the Panel's conclusion that a finding of increase in import has to evaluated on the basis of the trend of imports during the investigation period and not on the basis of end points only. In this case the Panel had concluded that Argentina did not adequately consider the "intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994 as well as the sensitivity of the analyses to the particular end points of the investigation period used."[16] However, the Appellate body did not agree with the Panel that trend in imports has to evaluated on the basis of five year historical period.

> Although we agree with the Panel that the increased quantities of imports cannot be just any increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five-years-, or for that matter, during any other period of several years. In our view the phrase "is being imported" implies that the increase in imports must have been sudden and recent.[17]

> Again it bears repeating, not just any increased quantities of imports will suffice. There must be "such increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury.[18]

In the case of 'US-Definitive Safeguard Measures on Imports of Certain Steel Products'[19] Panel held that the phrase "is being imported…such increased quantities" means that imports need not be increasing at the time of determination. Instead the requirement is only that "imports have increased if the products continue being imported in such increased quantities."[20] The Panel then considered whether a decrease in imports at the end of the period of investigation could, in an individual case prevent a finding of increased imports in the sense of Article 2.1 of the Agreement on Safeguards. The Panel observed that this would " depend on whether, despite the latter decrease, a previous increase nevertheless results in the product (still) 'being imported in such quantities'."[21] In that evaluation, according to the Panel, "factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand."[22]

Depending on its earlier decisions in 'Argentina-Footwear and US-Lamb' the Appellate Body in this case agreed with the Panel that there is a necessity of examination of trend in imports. However, with regard to the degree of increase in imports the Appellate Body sort of modified its earlier stand stating that the characterisation of Article XIX remedy as extraordinary does not mean that the imports should be extraordinary or abnormal. It means that the circumstances in which the imports have increased were unexpected.

Serious Injury or Threat of Serious Injury

Rules regarding second and third conditions are given in paragraphs (a) and (b) of Article 4.2. In the case of 'US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea'[23] the Appellate Body reversed the Panel's finding that there is a requirement for a discreet finding of serious injury or threat of serious injury. Appellate Body held that there is nothing in Article 2.1 which warrants finding either of serious injury or threat of serious injury but not both. According to the Appellate Body the clause would rather mean either one or the other or both in combination. With regard to the Panel reasoning that there is a necessity of discreet finding because Article 5.2(b) excludes quota modulation in case of threat of serious injury, the Appellate Body held that although it is an exception which must be respected but it would not be proper to generalize from such a limited exception to a general rule. Moreover in this case the exception did not apply because safeguard measures had been issued by hiking the tariff.

The decision of the Appellate Body looks strange, especially so, if we contrast it with the finding of the GATT Panel in the case of 'Korea Antidumping Duties on Imports of Polyacetal Resins from the United States'[24] wherein the Panel had stated that there was need for a discreet finding whether there was a present material injury, threat of material injury or material retardation in the establishment of industry. Although a finding of material retardation in the establishment of industry cannot be made in safeguard cases yet there should be an obligation of discreet finding whether domestic industry is suffering from serious injury or is threatened by a serious injury.

Article 4.2 (a) states

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

In the case of 'Argentina-Safeguard on Footwear' the Appellate Body upheld the Panel's conclusion that the Investigating Authority should at a minimum evaluate all the factors listed in Article 4.2 and any other relevant factor in addition to the listed factors. However, the Appellate body added that since serious injury means significant overall impairment of domestic industry within the meaning of Article 4.1(a) therefore although Article 4.2 requires that all relevant factors including those listed in Article 4.2 must be evaluated the provision does not specify what that evaluation must demonstrate. An evaluation of each listed factor need not necessarily show that each such factor is declining. 'In one case for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate significant overall impairment" of the industry.'[25]

In the case of 'US-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities'[26] the Appellate Body held that the obligation of the Investigating Authority to examine all relevant factors goes beyond examining the evidences submitted by the interested parties. It has the obligation to conduct an investigation therefore according to the Appellate Body if the Investigating Authority does not have sufficient information before them to evaluate the possible relevance of such an "other factor" they must investigate fully that "other factor" so that they can fulfil their obligations of evaluation under Article 4.2(a). But the Appellate Body rejected the European Communities argument that the competent authorities have an open ended and unlimited duty to investigate all available facts that might possibly be relevant. In this case, the Appellate body accepted the Panel decision in the facts of the case that there was no evidence to suggest that protein content in wheat was to such an extent in the 1996 and 1997 when the surge in imports occurred that it was a relevant factor to be investigated by the competent authorities.

Causal Link

Article 4.2(b) is a non-attribution clause. It says,

> The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

The Appellate Body in the 'US-Safeguard Measures on Wheat Gluten' held that existence of causal link does not mean that increased imports are the sole cause of injury. According to the Appellate Body the language of Article 4.2(b) suggests that the causal link between the increased imports and serious injury may exist, even though other factors are also contributing "at the same time" to the situation of domestic industry.

In the facts of the case the Appellate Body found that the Unites States acted inconsistently with its obligations under Article 4.2 of the Agreement as the USITC did not adequately evaluate whether increase in average capacity were at the same time causing injury to the domestic industry alongwith the increased imports. Appellate Body held that under Article 4.2(b) of the Agreement it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. If the competent authorities do not conduct this examination they cannot ensure that injury caused by other factors is not attributed to increased imports. In this case the USITC had not demonstrated adequately as required by Article 4.2 (b) that any injury caused to the domestic industry by increase in average capacity was not "attributed" to increased imports and, in consequence, the USITC could not establish the existence of "causal link" Article 4.2 (b) required between the increased imports and serious injury. Appellate Body also found that the USITC violated Article 2.1 and 4.2 by excluding imports from Canada without satisfying whether imports from other sources excluding Canada satisfied the requirements of Article 2.1 and 4.2 of the Safeguards Agreement.

Domestic Industry

Serious injury or threat of serious injury should be caused to the domestic industry which means the producers as a whole of the like or directly competitive products operating within the territory of a Member or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. In the case of **'**United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia'[27] the Panel and the Appellate Body rejected the US claim that producers of input products might also be included within the term domestic industry. In this case the Unites States had included the growers and feeders of live lambs as well as packers and breakers of lamb meat within the term domestic industry. Appellate Body held that domestic industry means producers of like or directly competitive products growers and feeders of live lamb and

packers and breakers of lamb meat were not producers of like or directly competitive products.

III
Remedies Available to Importing Country

Article XIX provides that the contracting parties would be free to suspend the obligation in whole or in part or to withdraw or modify the concession.

Article 5 of the Agreement explains the modalities for the application of safeguard measure. Safeguard measures should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

Safeguard measures can be applied in either of the two ways:

(a) by hiking the tariff; or
(b) by imposing quantitative restrictions

If a quantitative restriction is used, such a measure should not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless a clear justification is given that a different level is necessary to prevent or remedy serious injury. Para 2 of Article 5 provides how quota has to allocated to different countries in case the Member decides to allocate quotas among the supplying countries. The justification referred to in Article 5.1 is to be given only in case quantitative restriction is used not if quantitative restriction is not used. In the case of 'Korea-Safeguard Measures on Dairy Products' the Appellate Body reversed the Panel's finding that Article 5.1 requires a Member to explain at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment, even where the particular safeguard measure applied is not a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years.

IV
Notification and Surveillance[28]

Articles 12 and 13 provide for notification, consultation and surveillance.

Members have an obligation to send some notifications to the Committee on Safeguards. Some of these notifications are of a general nature, while others relate to specific safeguard or grey-area measures. The general obligations on notifications are the following:

(i) A Member has to notify its laws, regulations and administrative procedures regarding safeguard measures. Whenever any modification is made in them, such modification also has to be notified.

(ii) Reverse notification on all these matters may also be made. Thus, a Member may send a notification relating to some measures taken by another Member, if it finds that the other Member has not fulfilled its obligations regarding the notification of its existing measures.

The obligation regarding notification in respect of specific safeguard measures are the following:

(i) Notifications have to be sent when:
(a) an investigation is started,
(b) existence of serious injury or its threat is determined, and
(c) a decision is taken to apply or extend a safeguard measure

The notification on injury must contain evidence of serious injury and the precise nature of the product involved. The notification on the application of a safeguard measure must contain, in addition, the proposed measure, the proposed date of introduction, the expected duration and a timetable for a progressive liberalization. The notification on the extension of a measure must also contain evidence that the domestic industry is adjusting.

(ii) Notification has to be sent before taking a provisional safeguard measure.
(iii) The results of consultations, the results of mid-term reviews, the information on compensation and the information on the suspension of concessions and other obligations have to be notified to the Council for Trade in Goods through the Committee on Safeguards

(a) It is obligatory on the Members proposing a safeguard measure to furnish to the 'Committee on Safeguards' with proper notifications of their investigations and decisions. They must also provide exporting members an opportunity which should be adequate for consultations prior to the application of a safeguard measure.

The Dispute Settlement Body while interpreting the phrase 'all pertinent information' held that all items specified in Article 12.2 as well as the address of injury factors listed in Article 4.2(a) need to be included in the notification.

So far as the expression 'shall immediately notify' in Article 12.1, the Panel on 'Korea-Dairy' held that, there is a need under the Agreement to balance the requirement for some minimum level of information in a notification against the requirement for immediate notification. The more detail that is required, the less 'instantly' will members be able to send notifications.. There is no basis in the wording of Article 12.1 to interpret the term 'immediately' to mean 'as soon as practicably possible'.

In the case of 'US-Safeguard Measures on Wheat Gluten' the Panel reiterated the propositions as held in 'Korea- Safeguard Measures on Dairy Products', that member has to notify immediately its decisions or findings. Observance of this requirement is all the more important considering the fact that a safeguard measure is imposed on imports of a

product irrespective of its source and potentially affects all members. All members are therefore entitled to be kept informed, without delay of the various steps of the investigation of the Safeguard Agreement.

Article 12.2 of the Safeguard Agreement lists the types of information, which a member proposing to apply or extending a safeguard measure has to furnish to the Committee on Safeguards. Such information inter alia, should include:

(i) evidence of serious injury or threat thereof caused by increased imports;
(ii) precise description of the product involved and the proposed measure;
(iii) proposed date of introduction; and
(iv) expected duration and time table for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Goods or the Committee on Safeguards have the power for asking additional information from the Members proposed to apply or extend the safeguard measure.

On the other hand, Article 12.3 of the Safeguard Agreement requires members proposing to apply a safeguard measure to consultations prior to the implementation of its measure.

The other procedural formats envisaged in Article 12.4 to 12.11 of the Agreement on Safeguards are as under:

- Provisional safeguard measures, if any, to be notified to the Committee on Safeguards;
- The results of consultations and mid-term review of any form of compensation and proposed suspension of concessions/ obligations to eb conveyed immediately to the Council for Trade in Goods;
- Members, laws, rules, regulations relating to safeguards to be notified to the Committee on Safeguards;
- Any non-governmental measure has to be notified to the Committee on Safeguards;
- All notifications to the Council for Trade in Goods shall normally be made through Committee on safeguards; and
- Confidential information may not be disclosed by any member if its disclosure would impede law enforcement or be contrary to public interest or prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 12.3 of the Agreement n Safeguards in regard to consultation was discussed in the case of ‘Korea-Dairy Products’, ‘US-Pipe Line’, and ‘US-Wheat Gluten’. The sum of these decisions is that if modification of the original measure takes place that indicates fair amount of consultation, which led to modification of the original measure. Secondly, consultations are an important means of achieving the aims of Article 8.1 of the Safeguard Agreement, the settlement of compensation maintains a balance of concessions. The fair amount of time necessary to prepare for consultations should be decided on a case-by case basis. In any case, the exporting members should be allowed

necessary time to analyse the proposed measure and determine its consequence before consultations so that they can have a meaningful exchange of views on the proposed measure. Proper consultations are for the best interests of both importing and exporting members since the understanding and settlement during the consultations may well enable them to avoid disputes and subsequent retaliatory actions.

With the establishment of a Committee on Safeguards under the authority of the Council for Trade in Goods, the Committee has the following functions of surveillance:

(a) to monitor, and report annually to the Council for Trade in Goods and make recommendations of the general implementation of the Agreement on Safeguards and its improvements;
(b) Whether or not, upon a request of a member find the procedural requirements under Council for Trade in Goods.
(c) To assist the members in their consultations under the provisions of the safeguard agreement on members' request;
(d) Examine measures covered by Article 10, and paragraph (1) of Article 11 and monitor phasing out is such measures and report to the Council for Trade in Goods.
(e) To review upon a request of a member taking a safeguard measure, whether proposal to suspend concessions or other obligations are substantially equivalent and report to the Council for Trade in Goods
(f) To receive and review all the notifications provided for in the Agreement on Safeguards and report to the Council for Trade in Goods;
(g) To perform any other function connected with the Agreement on Safeguards that the Council for Trade in Goods may determine.

V
Special Treatment for Developing Countries

Article 9 makes special provision for developing countries. These special provision are of two types:

1. Developing country Members are to be treated differently in case of safeguard measures applied against products originating in their country. Article 9.1 provides,

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its shares 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 percent of total imports of the product concerned.

2. Article 9.2 provides that developing country Members taking safeguard measures can extend it for a longer period than the developed country Members and can re-impose a safeguard measure after a lesser gap than that allowed to the developed country Members.

> 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 atleast two years.

Korea claimed in the 'US-Carbon Line'[29] that the US violated Article 9.1 by not excluding developing countries having *de-minimis* margin. The US on appeal contended that the Article 9.1 does not obligate Members to provide specifically for non-application of a safeguard measure, and that the "text requires only that the safeguard measure 'not be applied' against a developing country Member having less than three percent of imports."[30] According to the United States, Article 9.1 "is silent as to how a Member may meet this obligation [in Article 9.1], and certainly does not require a list of the developing countries [excluded from the measure]".[31] According to the United States it met the Article 9.1 requirement by establishing a mechanism—a 9,000 ton exemption for each country—under which the safeguard duty on imports could not possibly apply to any developing country Member accounting for less than three percent of total imports.

Appellate Body agreed with the US that Article 9.1 does not specify how a Member has to meet its obligation under the provision. But in the facts of the case it upheld Panel's finding that the US has violated its Article 9.1 obligation because it found that according to the latest data available at the time the line pipe measure took effect—data found in the Panel record and not disputed by the United States—the 9,000 short-ton exemption from the over-quota duty imposed by the line pipe measure did not represent three percent of the total imports. Rather, the exemption represented only 2.7 percent of total imports. According to the evidence in the Panel record, an exemption of approximately 10,000 short tons would have amounted at the time to a three-percent exclusion. The exemption applied by the United States was, on the evidence, too small.

VI
Concluding Remarks

On reading the decisions of the WTO Appellate Body and Panel one often wonders whether it is a victory of formalism in International law. However much we argue otherwise the doctrine of precedent is getting established in WTO and seems to be there to stay.[32] Neglect of this fact means that we are overlooking some of the problematic developments in the WTO jurisprudence. This is quite evident from the integration of the requirement of 'unforeseen developments' for a WTO consistent safeguard measure. While the interpretation given by the Appellate Body in 'Korea- Definitive Safeguard Measures on Imports of Certain Dairy Products' and in 'Argentina-Safeguard Measures on Imports of Footwear' might be correct according to the rules of interpretation it does not address the realities of the negotiation process where tariff cuts are made according to formulae accepted by a process of bargaining. In the absence of product-wise bargaining the requirement to prove what were the unforeseen developments with regard to particular product since the time of negotiations is, at best, fantastic.[33]

Notes:

[1] The rule was inferred from Article XIX which provided that safeguard measure had to be imposed with reference to a product. The rule has now been explicitly stated in Article 2.2 of the Agreement on Safeguards which says, "Safeguard Measures shall be applied to a product being imported irrespective of its source."

[2] Article 11.1(b) states, " a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with Paragraph 2."

[3] There is a presumption against conflict. *Indonesia- Certain Measures Affecting the Automobile Industry* WT/DS54/R adopted on 2 July 1998, para 14.28.

[4] WT/DS98/AB/R adopted on 14 December 1999.

[5] WT/DS121/AB/R adopted on 14 December 1999.

[6] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX*, adopted on 27 March 1951.

[7] Ibid para 9

[8] WT/DS238/R adopted on 14 February 2003

[9] Argentina-Safeguard Measures on Imports of Footwear WT/DS121/AB/R adopted on 14 December 1999, Para 93

[10] Ibid para 92.

[11] United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from NewZealand and Australia WT/DS/177/R,WT/DS/178/R, adopted on 21 December 2000.

[12] Ibid. Report of the Panel Para 7.19

[13]United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from NewZealand and Australia, Report of the Appellate Body Para 76.

[14] WT/DS248/AB/R, adopted on 10 November, 2003.

[15] Ibid. Para 350.

[16] para 8.276 of panel report.

[17] Report of the Appellate Body, para 130.

[18] ibid para 131.

[19] WT/DS248/AB/R, adopted on 10 November, 2003

[20] Report of the Panel Para 10.162.

[21] ibid para 10.163.

[22] ibid.

[23] WT/DS202/AB/R adopted on 15 February 2002.

[24] Report of the Panel ADP/92 adopted on 2 April 1993

[25] Report para 139

[26] WT/DS166/AB/R, adopted on 22 December 2000.

[27] WT/DS177/R, WT/DS178/R. Adopted 21 December 2000.

[28] This part is based on A.K.Koul, *The General Agreement on Tariffs and Trade(GATT)/ WTO: Law, Economics and Politics*; Satyam Books (2005), and B.L. Das, *The World Trade Organisation: A Guide to the Framework for International Trade* Earthworm Books Pvt. Ltd. (1999).

[29] WT/DS202/AB/R adopted on 15 February 2002.

[30]United States' appellant's submission, para. 89.

[31]*Ibid*., para. 86.

[32] Sheela Rai, "Doctrine of Precedent in WTO" eSS, Mumbai, India http://www.esocialsciences.com/Articles/displayArticles.asp?Article_ID=787 (1/9/2007)

[33] Sheela Rai, "Imposition of Safeguard Measures and Unforeseen Development" unpublished paper.