

WTO Panel Issues an Important Reminder That Safeguards Are Not Safe from Challenge

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The November 6 panel report is just the latest in a long line of cases in which WTO Members have been unable to justify their safeguard measures.

A November 6, 2018, World Trade Organization (WTO) dispute settlement panel report¹ is further confirmation that while safeguard actions are in principle permitted by WTO rules, establishing compliance with those rules will be a daunting task when a safeguard is challenged by other WTO Members.

The November 6 panel report is just the latest in a long line of cases in which WTO Members have been unable to justify their safeguard measures. The case involved a complaint by Japan regarding a measure imposed by India on imports of hot-rolled flat steel products. The panel found the adequacy of the explanations by India's authority to be lacking, including with respect to the existence of serious injury or threat of serious injury and the causal relationship between the increase in imports and that serious injury or threat.

Safeguards are emergency measures in the form of tariffs, quotas or both, that are intended to address serious injury or the threat of serious injury caused by an unforeseen increase in imports. Unlike the rules that allow WTO Members to derogate from their trade liberalizing commitments to address unfair trade practices like dumping or subsidization, safeguards are derogations to address increased volumes of *fairly traded* imports and are exceptional in that important sense. It therefore is not surprising that the WTO rules governing safeguards carefully limit when they are permitted and hold members imposing them to a very high standard to demonstrate that they are justified.

A WTO Member contemplating a safeguard on more than a provisional basis (*i.e.* beyond 200 days) is required to assess whether the proposed safeguard is warranted. It must demonstrate the existence of unforeseen developments and must show through "reasoned and adequate explanations that the unforeseen developments have resulted in increased imports of the specific products targeted by the safeguard, and that there is a causal link between the increased imports and serious injury or threat of serious injury to the relevant domestic industry.

To establish the existence of serious injury or threat, the WTO Member must examine all relevant factors, including those listed in the WTO's Agreement on Safeguards relating to the scale of the increase in imports, the share of the market captured by them, and factors relating to the performance of the domestic industry. If the trends in only some factors are positive, there must be a compelling explanation as to how and why the domestic industry is nevertheless injured. Care must also be taken to distinguish between other factors that may be injuring the domestic industry and the injurious effects of the increased imports.

The November 6 panel report has particular resonance in Canada, where the federal Government has asked the Canadian International Trade Tribunal (CITT) to conduct an inquiry as to whether there is a rationale for definitive safeguards on seven classes of steel products, which are currently the subject of provisional safeguards. Canada has never before imposed a safeguard in the WTO era. The panel's report serves as an important reminder for the Canadian Government that any recommendation for safeguard measures by the CITT will need to be thoroughly justified if it is to withstand the WTO challenge that is almost certain to follow quickly if Canada does impose definitive safeguards.

¹ *India — Certain Measures on Imports of Iron and Steel Products (DS518)*

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