



**TPSA** | CANADA-INDONESIA TRADE AND  
PRIVATE SECTOR ASSISTANCE PROJECT

# SAFEGUARDS

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**Alexandre Larouche-Maltais  
Senior Trade and Investment Expert  
Conference Board of Canada**

**Canada**

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# INTRODUCTION TO SAFEGUARDS

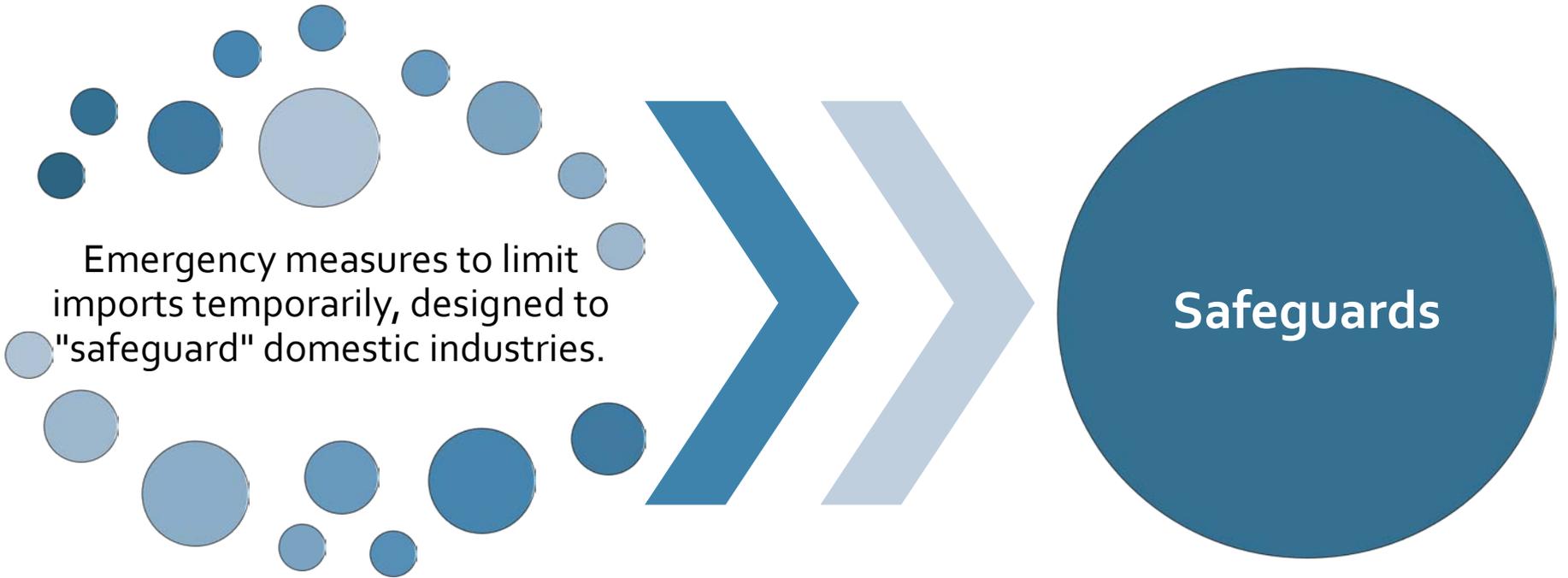
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Historical development under the GATT/WTO

Rationale for the use of safeguard measures against “fair trade”



# In a nutshell...



A WTO member may apply a temporary "safeguard" measure (e.g., an extra duty, or a quota, or other measure, on imports of a product) where an increase in imports of the product is causing, or is threatening to cause, serious injury to the industry.

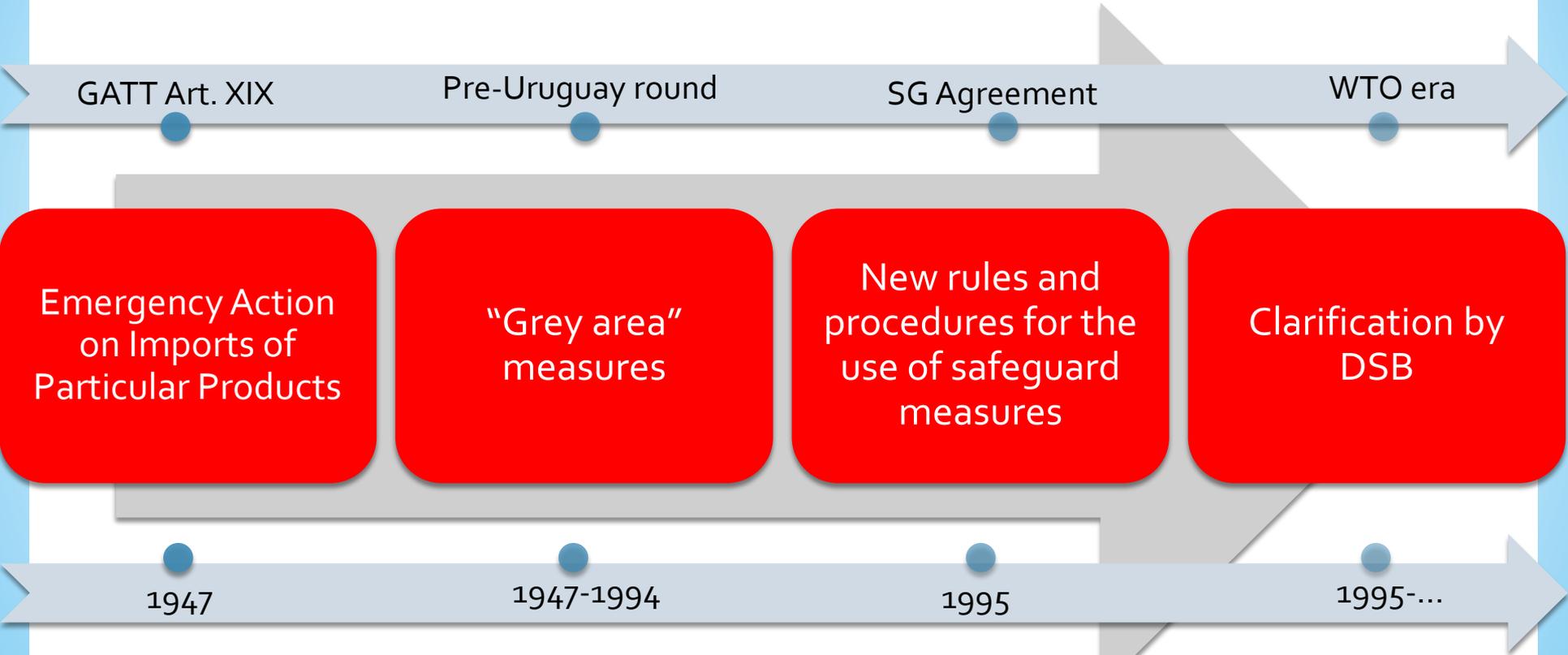


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Source: WTO, "Technical information on Safeguards"



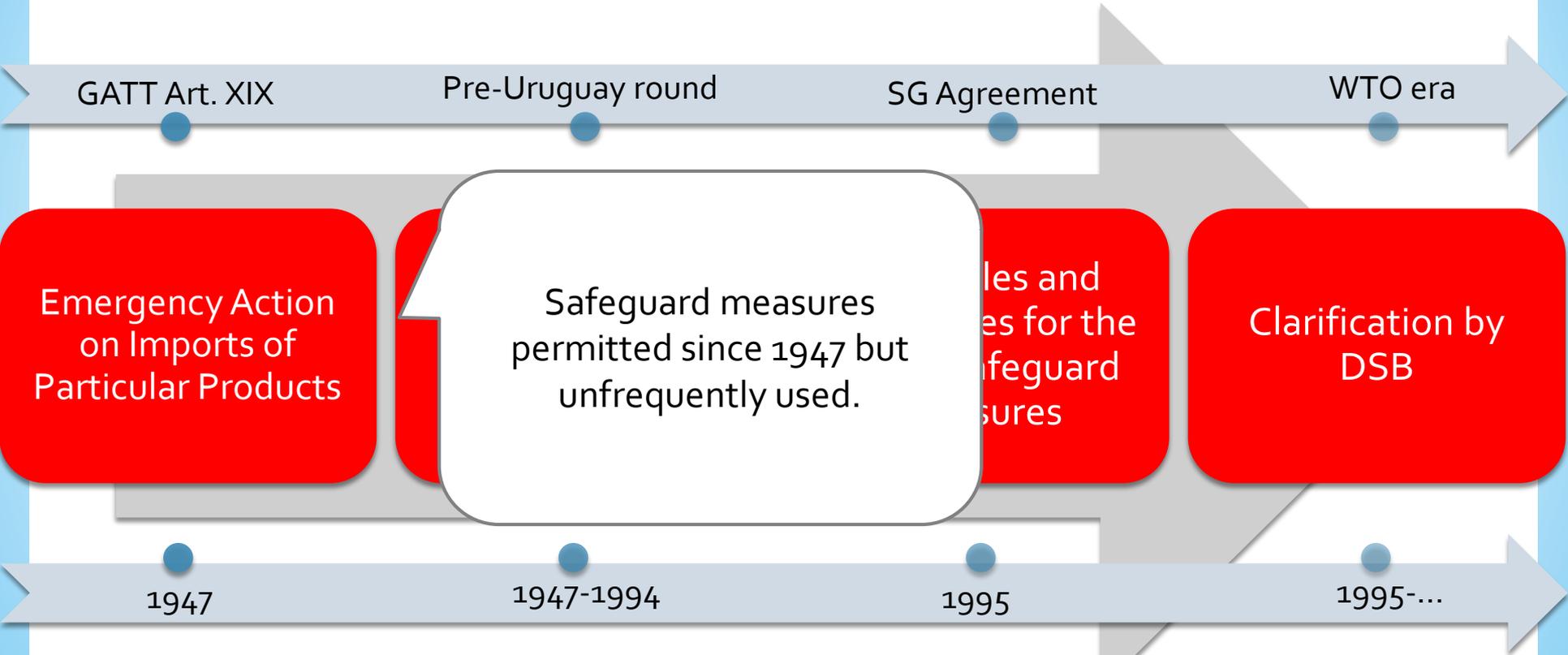
# Historical development of safeguards under the GATT/WTO



Source: WTO, "eLearning on Trade Remedies"



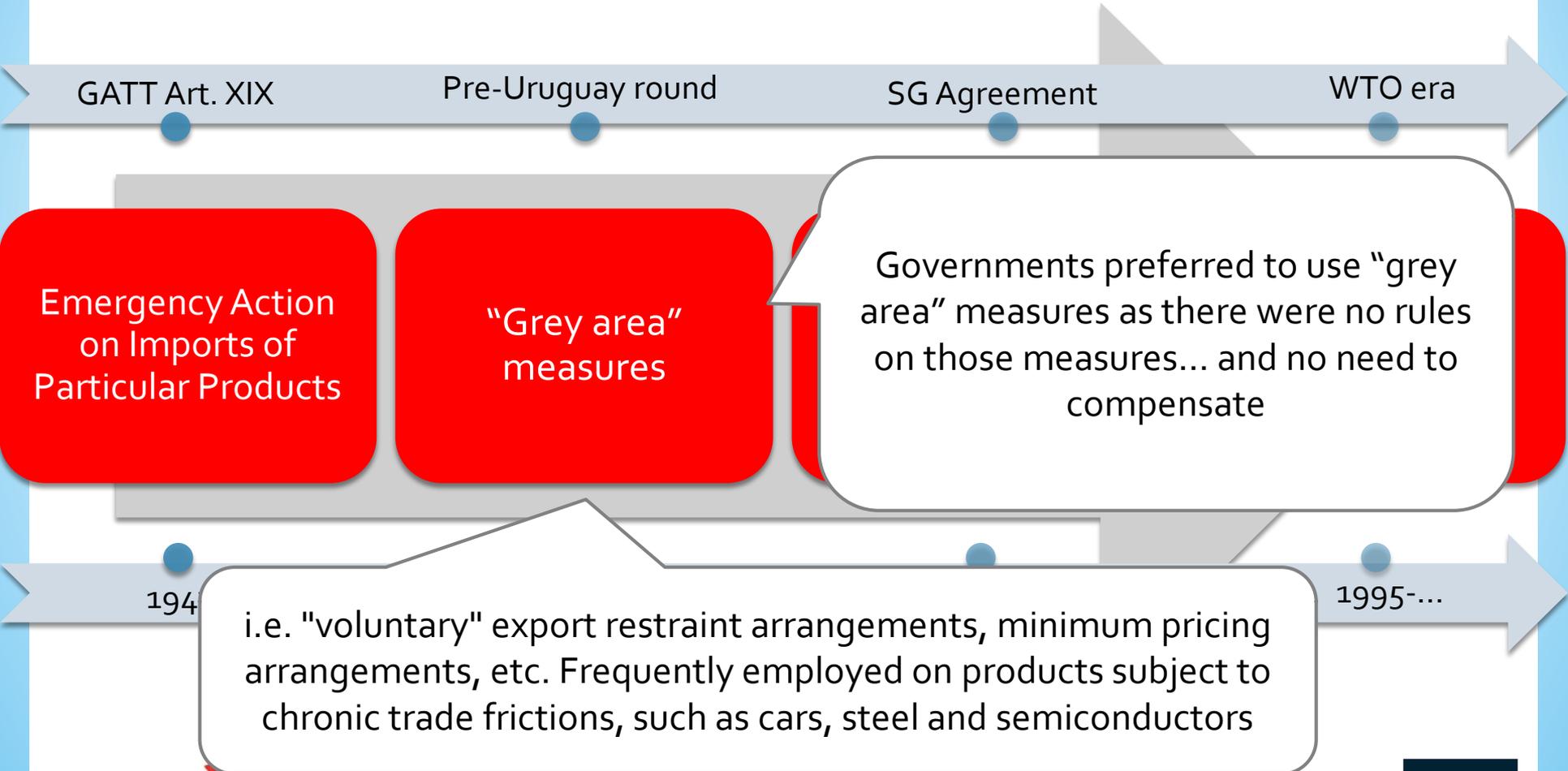
# Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



# Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



# Historical development of safeguards under the GATT

GATT Art. XIX

Pre-Uruguay round

SG Agreement

WTO era

To use a safeguard, a member must:

- Publish domestic legislation
- Conduct investigation
- Present evidence & arguments
- Apply transparency in all steps
- Limit its duration

New rules and procedures for the use of safeguard measures

Clarification by DSB

1947

1947-1994

1995

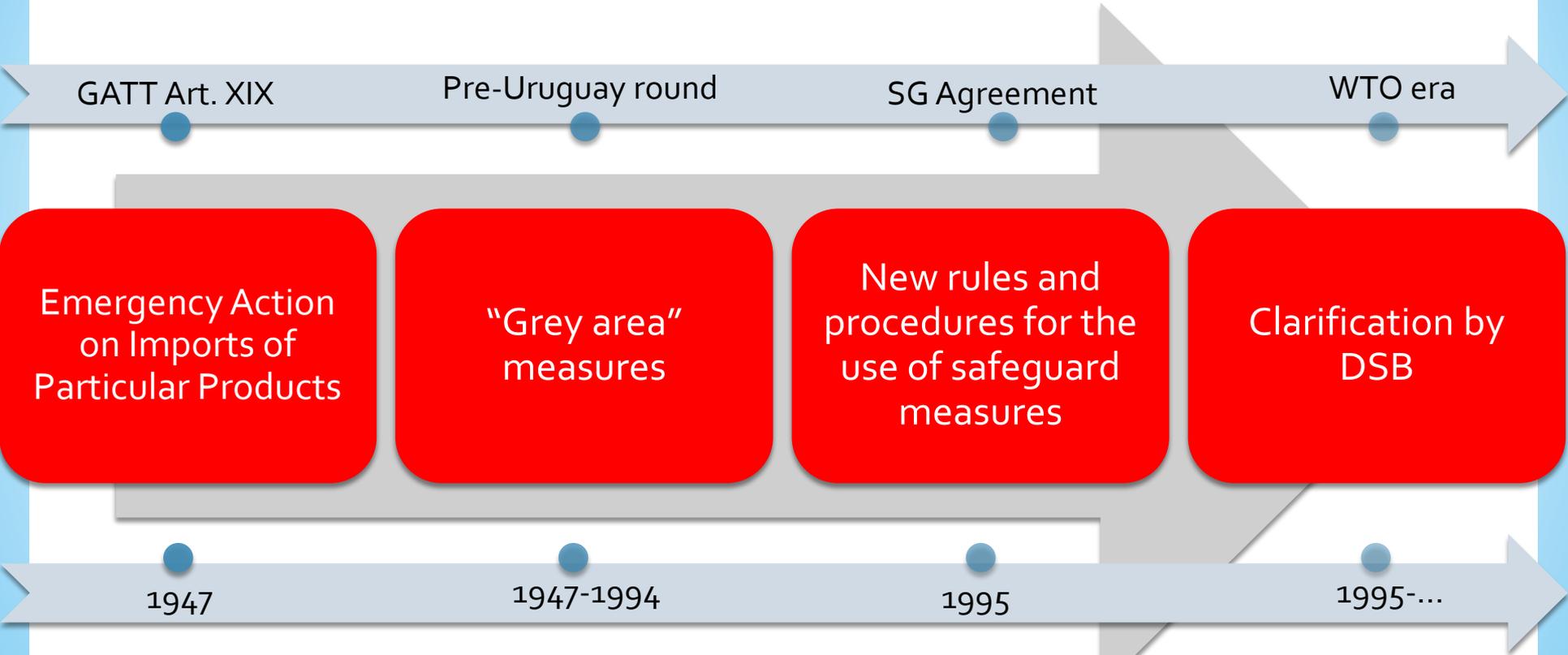
1995-...



Source: WTO, "eLearning on Trade Remedies"



# Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



# OBJECTIVE AND STRUCTURE OF THE AGREEMENT ON SAFEGUARDS

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# Objectives of the SG Agreement

## GATT clarification

- Clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX

## Control safeguards

- Re-establish multilateral control over safeguards and eliminate measures that escape such control

## Structural adjustment

- Encourage structural adjustment and enhance rather than limit competition in international markets



Source: Preamble of the Agreement on Safeguards

# Objectives of the SG Agreement

In line with the “object and purpose of the Agreement on Safeguards the injury standard for the application of a safeguard measure should be **higher than the injury standard for antidumping or countervailing measures**”

**Structural adjustment**

- Encourage structural adjustment and enhance rather than limit competition in international markets



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Source: Preamble of the Agreement on Safeguards

# Structure of the SG Agreement

Art. 1 General Provision  
Art. 2 Conditions

General Provisions

Application of new SG Measures

Art. 3 Investigation  
Art. 4 Determination of Serious Injury or Threat Thereof  
Art. 5 Application of Safeguard Measures  
Art. 6 Provisional Safeguard Measures  
Art. 7 Duration and Review of Safeguard Measures  
Art. 8 Level of Concessions and Other Obligations  
Art. 9 Developing Country Members

Art. 10 Pre-existing Article XIX Measures  
Art. 11 Prohibition and Elimination of Certain Measures

Pre-Existing Measures

Multilateralism

Art. 12 Notification and Consultation  
Art. 13 Surveillance  
Art. 14 Dispute Settlement



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Source: Preamble of the Agreement on Safeguards



# Rationale

How can a WTO member justify the use of safeguard actions, without the presence of illegitimate practices, against “fair trade”?

- **Restoring competitiveness:** viable industries besieged by foreign competition, and seek a respite to restore their “competitiveness” with additional capital investments
- **Adjustment costs:** to slow the pace of industry contraction may, under certain conditions, reduce these costs
- **Political benefits of protection:** combination of severe decline in an import competing industry and growth and prosperity for foreign competitors.



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Source: Sykes, "The Safeguards Mess: A Critique of WTO Jurisprudence" 2003

# CONDITIONS FOR APPLICATION OF A SAFEGUARD ACTION

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Unforeseen developments

Increased imports or conditions of competition

Serious injury or threat

Causation

Procedural requirements



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## Unforeseen developments

GATT Art. XIX

*"If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions ..."*



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Source: Appellate Body in  
Argentina — Footwear (EC)  
1999

"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."

Evidence of this claim must be demonstrated by the Investigating authority of the importing country

# Increased imports or conditions of competition

GATT Art. XIX and SG Agreement Art. 2.1

*"... if[...] [a] product is being imported [...] in such increased quantities, **absolute or relative** to domestic production, and under such conditions ..."*

"the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively"

There is no "minimum" quantity required, and no "absolute formula" on suddenness. Assessment must be done on a case by case basis.



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Source: Appellate Body in Argentina — Footwear (EC) 1999



The SG Agreement defines serious injury as a “significant overall impairment” in the position of a domestic industry;

## Serious injury

GATT Art. XIX and SG Agreement Art. 2.1

*apply a safeguard measure to a product only if ... that such product is being imported ... to **cause or threaten to cause serious injury...***

“Often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be ‘serious injury’. Serious injury does not generally occur suddenly.”



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Source: Appellate Body in US — Line Pipe (2001)



## threat of serious injury

GATT Art. XIX and SG Agreement Art. 2.1

*apply a safeguard measure to a product only if ... that such product is being imported ... to **cause or threaten to cause serious injury...***



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The SG Agreement defines “threat of serious injury” as a “serious injury that is clearly imminent”

Mean “either one or the other, or both in combination”

“Threat of serious injury” sets a lower threshold for the right to apply a safeguard measure than a “serious injury”

Source: Appellate Body in US — Line Pipe (2001)

# Domestic industry

GATT Art. XIX and SG Agreement Art. 2.1

*apply a safeguard measure to a product only if ... that such product is being imported ... to cause or threaten to cause serious injury to the **domestic industry that produces like or directly competitive products.***



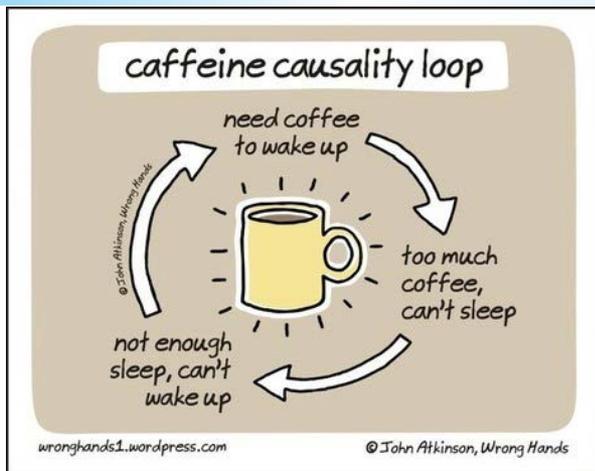
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The SG Agreement defines “domestic industry” as

1. “producers as a whole of the like or directly competitive products”; or
2. those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

This definition allows a **broader consideration of effects** than in anti-dumping or countervail cases.

Source: WTO, “Technical Information on Safeguard Measures”



## Causal link

GATT Art. XIX and SG Agreement Art. 4.2(b)

*investigation must demonstrate, "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."*



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Source: Appellate Body in  
US — Steel Safeguards  
(2003)

Competent authority must establish, "unambiguously, with a reasoned and adequate explanation", and "in a way that leaves nothing merely implied or suggested", that imports from sources covered by the measure, alone, satisfy the requirements for the application of a safeguard measure.

... Even if the amount of imports that would be excluded is small, it still must be adequately explained



## Procedural requirements

SG Agreement Art. 3

*"... A Member may apply a safeguard measure only following an **investigation** ..."*

- **Investigation:** Typically, initiated on request by the domestic industry. Unlike the case of anti-dumping and countervail, however, there are no representativeness requirements
- **Confidential information:** obligation to protect confidential information
- **Published report:** Member must publish a detailed report or reports setting forth the findings and reasoned conclusions on all pertinent issues of fact and law



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Source: WTO, "Technical Information on Safeguard Measures"

# APPLICATION OF SAFEGUARDS

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**MFN**

**Provisional measures**

**Definitive measures**

**Compensation**



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## MFN

SG Agreement Art. 2.1

*"Safeguard measures shall be applied to a product being imported irrespective of its source."*



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- **No discrimination:** In general, safeguards must be applied on an MFN basis, contrary to anti-dumping and countervailing actions
- **Special and differential treatment:** safeguard measure shall not be applied to low volume from developing country Members

Source: WTO, "Technical Information on Safeguard Measures"



## Provisional Measures

SG Agreement Art. 6

*"In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure..."*



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Under limitations:

1. **Preliminary determination** that there is clear evidence that increased imports have caused or are threatening to cause serious injury
2. in **critical circumstances**, where delay in applying a measure would cause harm that would be difficult to repair
3. only take the form of **tariff increases**
4. no more than **200 days**

Source: WTO, "Technical Information on Safeguard Measures"



# Trade Shield

## Definitive measures

**Forms:** not limited under SG Agreement

**Level:** somehow adjusted to the injury of threat; and reduced after one year

**Quotas:** should not reduce the quantities of imports below the annual average for the last 3 representative years, unless justified

**Duration:** 4 years, unless it is extended consistent with the SG Agreement

**Extension:** Total max of 8 years



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Source: WTO, "Technical Information on Safeguard Measures"



## Compensation

GATT 1994 Art. XIX:3(a)  
and SG Agreement Art. 8

**Form:** trade compensation to all exporting countries that would be affected

**Level:** To be agreed through consultation

**No agreement:** Exporting countries take trade retaliatory measures, i.e., themselves to suspend "substantially equivalent concessions"

**Limited retaliation:** absolute increase, affected exporting countries cannot exercise their right to retaliate for the first three years of application



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Source: WTO, "Technical Information on Safeguard Measures"



# Special and Differential Treatment

SG Agreement Art. 9

1. **As affected exporter:** no safeguard measure on developing countries with less than 3% import share (total of less than 9%)
2. **As injured producer/importer:**
  - Same initial duration (4 years) but **extension of 6 years** (instead of 4)
  - Relaxed rules on reapplication of measures (1/2)



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Source: WTO, "Technical Information on Safeguard Measures"