



TPSA | CANADA-INDONESIA TRADE AND
PRIVATE SECTOR ASSISTANCE PROJECT

SAFEGUARDS

Jakarta, 20-22 March 2017

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

Canada

Program undertaken with the financial support of the Government of Canada provided through Global Affairs Canada

Project Executed by:



The Conference Board
of Canada

Partner:



Table of contents

Introduction

- GATT Origins
- Objective and structure of the Agreement on Safeguards
- Rationale

Conditions for application of safeguard actions

- Unforeseen developments
- Increased imports or conditions of competition
- Serious injury or threat
- Causation
- Application on an MFN basis

Application of measures

- MFN
- Provisional measures
- Definitive measures
- Compensation
- S&DT



INTRODUCTION TO SAFEGUARDS

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.

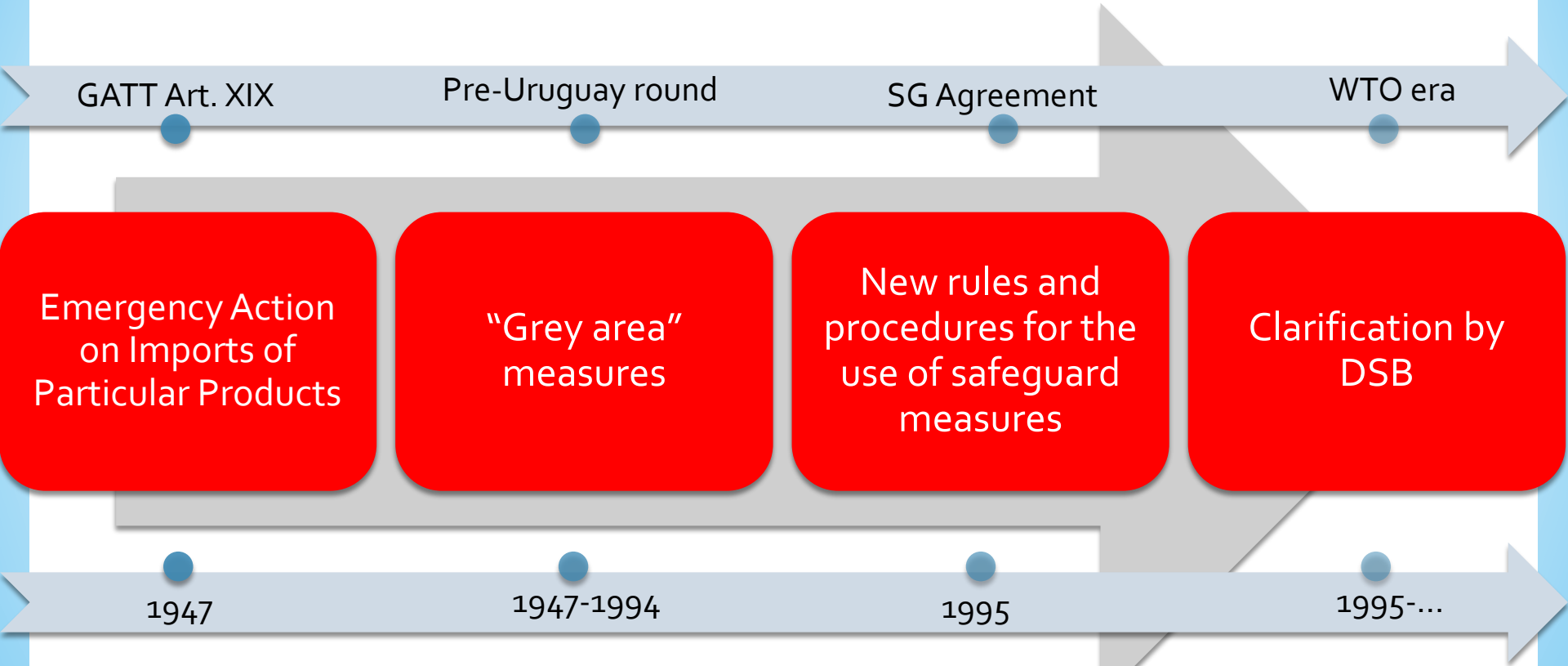


Canada

Source: WTO, "Technical information on Safeguards"



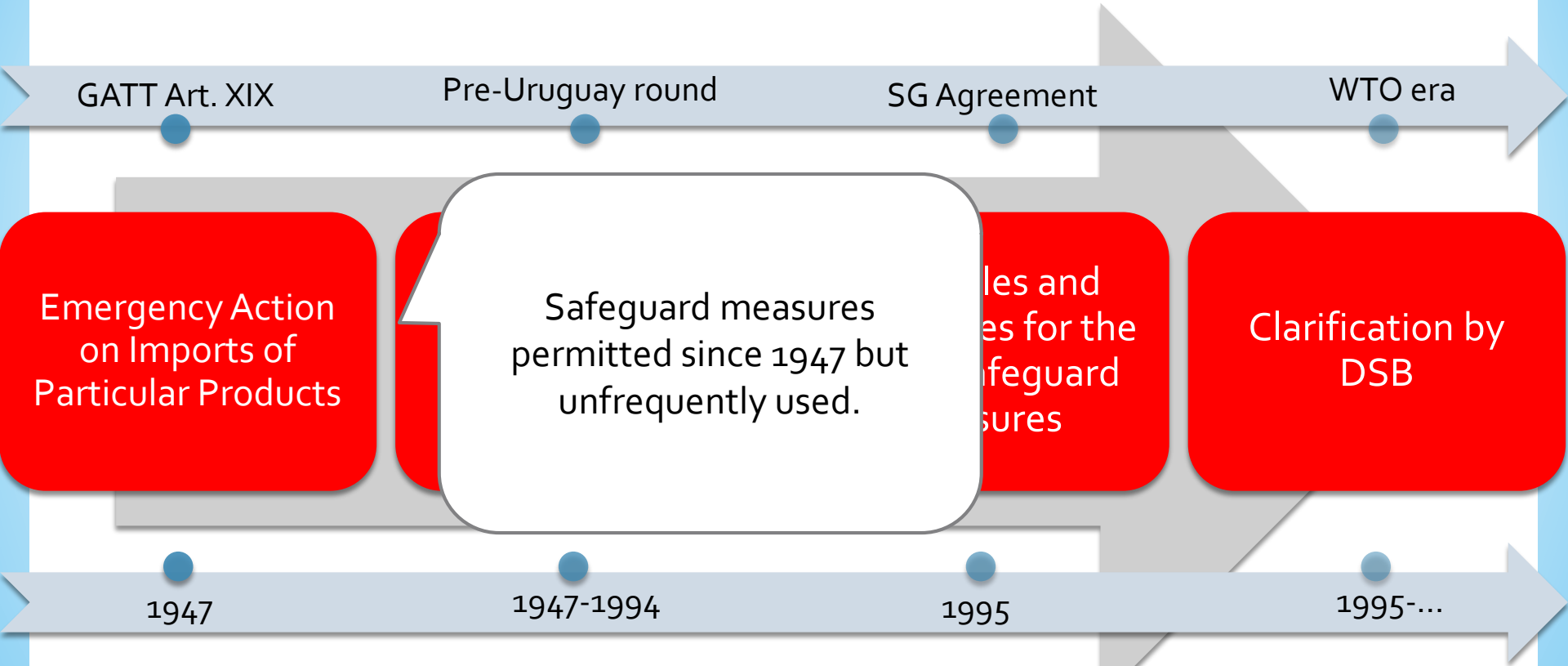
Historical development of safeguards under the GATT/WTO



Source: WTO, "eLearning on Trade Remedies"



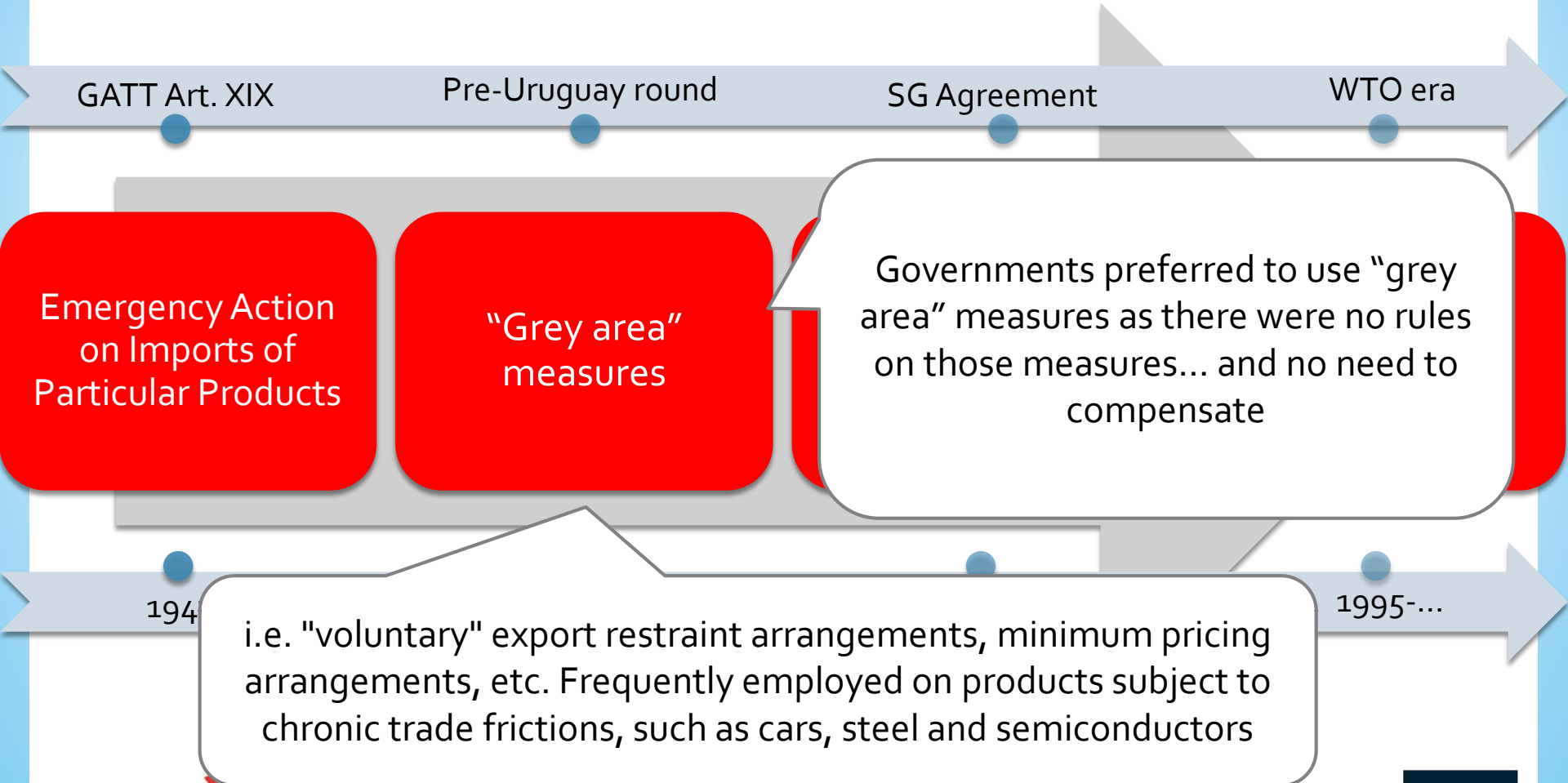
Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



Historical development of safeguards under the GATT



GATT Art. XIX

Pre-Uruguay round

SG Agreement

WTO era

Emergency Action on Imports of Particular Products

"Grey area" measures

Governments preferred to use "grey area" measures as there were no rules on those measures... and no need to compensate

i.e. "voluntary" export restraint arrangements, minimum pricing arrangements, etc. Frequently employed on products subject to chronic trade frictions, such as cars, steel and semiconductors

194

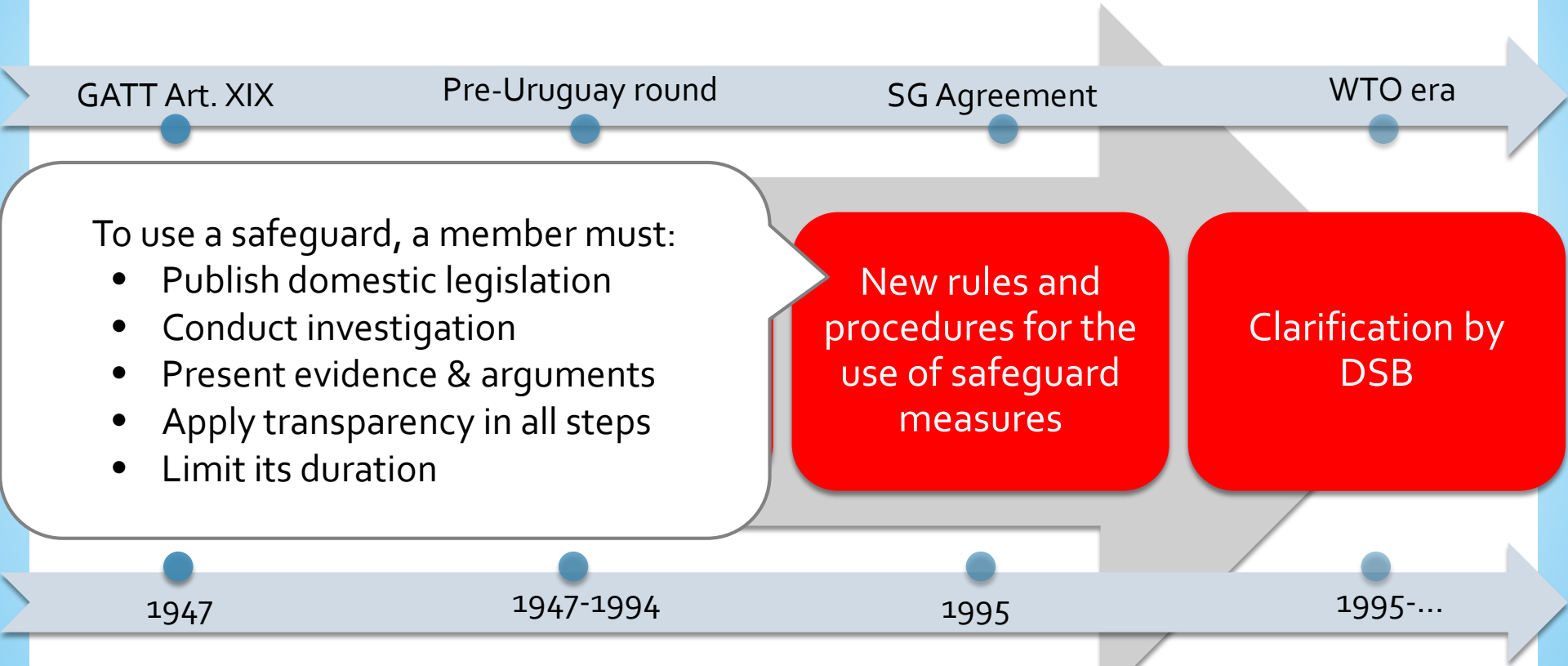
1995-...



Source: WTO, "eLearning on Trade Remedies"



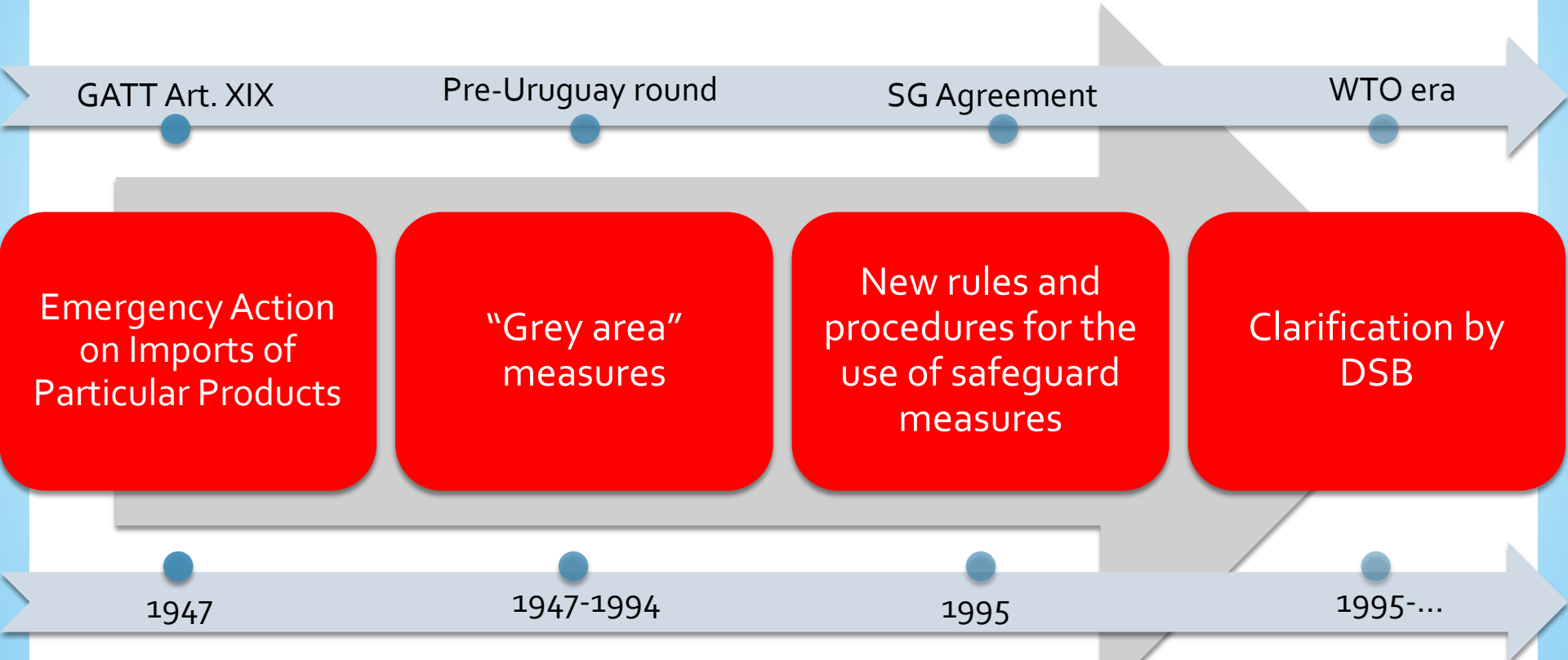
Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



Historical development of safeguards under the GATT



Source: WTO, "eLearning on Trade Remedies"



OBJECTIVE AND STRUCTURE OF THE AGREEMENT ON SAFEGUARDS



Canada



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



Canada

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



Canada

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.



Canada

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

CONDITIONS FOR APPLICATION OF A SAFEGUARD ACTION

Unforeseen developments

Increased imports or conditions of competition

Serious injury or threat

Causation

Procedural requirements



Canada



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 ..."

"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



Canada

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



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.



Canada

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.”



Canada

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...***



Canada

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.***



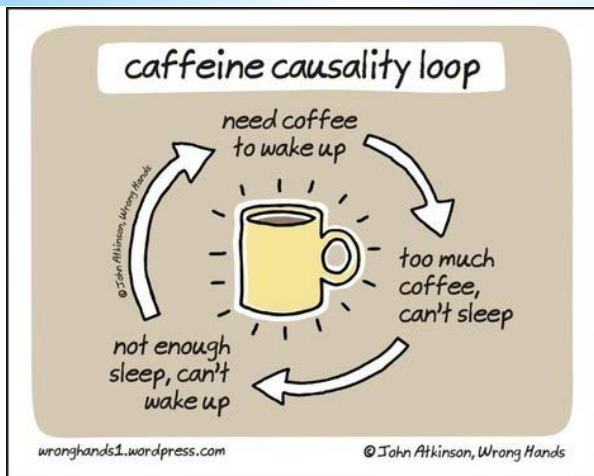
Canada

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."*



Canada

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** ..."*



Canada

- **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

Source: WTO, "Technical Information on Safeguard Measures"

APPLICATION OF SAFEGUARDS

MFN

Provisional measures

Definitive measures

Compensation



Canada



MFN

SG Agreement Art. 2.1

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



Canada

- **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..."



Canada

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



Canada

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



Canada

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)



Canada

Source: WTO, "Technical Information on Safeguard Measures"