

Surge of Imports & Safeguard Measures: Case Studies

**Prepared by Peter Clark
President
Grey, Clark, Shih and Associates, Limited**

**Jakarta, Indonesia
20-22 March 2017**



Canada



US Steel safeguards

Largest Safeguards action under WTO

Ten categories of steel were covered

Potentially very disruptive

Spillover could force action by Canada, EU and others

Covered wide range of issues



U.S. – Steel Safeguards

- Complainant: China
- Respondent: United States



Canada

U.S. – Steel Safeguards

Third Parties:

Brazil

Chinese Taipei

European Communities

Republic of Korea

New Zealand

Switzerland

Turkey

Republic of Bolivarian

Canada

Cuba

Japan

Mexico

Norway

Thailand

Venezuela



Canada

U.S. – Steel Safeguards

Agreements cited:

- GATT 1994 Art. I:1, II, X:3, XIII, XIX:1, XIX:2
- Safeguards: Art. 2, 2.1, 2.2, 3, 3.1, 3.2, 4, 4.1, 4.2, 5, 5.1, 5.2, 7, 7.1, 8, 8.1, 9, 9.1, 12



Canada

Steel Safeguards

June 28, 2001 – USITC initiated safeguard investigation

Affirmative decisions:

- CCFRS (Certin Flat rolled Steel Products)
- Hot-rolled bar
- Cold-finished bar
- Rebar
- FFTJ (carbon and alloy, FiHinges, flanges and tool joints)
- Stainless steel bar
- Stainless steel rod



Canada

Steel Safeguards

Threat of Serious Injury

- Welded pipe
- Divided determinations
 - Tin mill products
 - Stainless steel wire
 - Stainless steel fittings and flanges
 - Tool steel



Steel Safeguards

USITC Recommended

- Tariffs and TRQs for products subject to affirmative determinations
- Tariffs 8 to 30%
- Only products with Affirmative findings



Steel Safeguards

President imposed definitive safeguard measures

- Presidential Proclamation – March 5, 2002



Canada

Steel Safeguards Schedule

- Panel Requested
- Panel Agreed
- Panel Report
- Request for Appellate Body Review
- Date of Appellate Body ruling
- Report Adopted



Canada

Steel Safeguards

- Panel issued 8 panel reports circulated as one document
- Found inconsistent with Safeguards Agreement and Article XIX GATT 1994 on numerous counts
- Mostly due to not providing proper reasons for recommendations



Steel Safeguards

U.S. failed to provide a reasoned and adequate explanation of how the facts supported the determination with respect to “increased imports”.

CCFRS (certain carbon flat rolled steel), hot rolled bar



Steel Safeguards

U.S. failed to provide a reasoned and adequate explanation that a causal link existed between increased imports and serious injury to domestic producers.

SA-2.1, 3.1 and 4.2(b) CCFRS, Hot-rolled bar, cold-finished bar, rebar, welded pipe FFJJ and stainless steel bar



Steel Safeguards

The United States failed to comply with the requirements of parallelism between the products for which the conditions had been established, and the products which were subjected to the measures.

SA 2.1 and 4.2 CCFRS, tin mill products, hot-rolled bar, cold finished bar, stainless steel rod and wire.



Parallelism

Not a term in Safeguards Agreement

Problem was excluding Canada and Mexico from action –
NAFTA

Jordan and Israel too

Analysis covered all countries

More analysis needed



Parallelism

Article SA analysis had to be the same coverage as countries affected

If you reduce the coverage need to remove the excluded countries from the analysis

NAFTA exclusion involved lot of trade

Non – NAFTA exclusions were tiny

Even small exclusions required analysis



Steel Safeguards

Inconsistent with Article XIX 1(a) GATT 1994, Article 3.1
WTO SA

Failed to provide reasoned and adequate explanation demonstrating that unforeseen developments had resulted in increased imports causing serious injury to relevant producers.

CCFRS, tin mill products, hot-rolled bar, stainless steel rod, stainless steel wire



Steel Safeguards

It is necessary to demonstrate for each measure at issue that Unforeseen Developments results in increased imports.

This meant 10 separate findings.

Each was subject to product specific WTO challenge

Article 3.1 – WTO SA



GATT 1994 Art. XIX:1

Emergency Action on Imports of Particular Products

- Unforeseen Developments
- Effect of introducing tariff concessions



Canada

Unforeseen developments

Provision designed to ensure that safeguards were really emergency measures

Unforeseen developments tied to concessions including tariff concessions

Seeking and explanation for change

Concessions changed circumstances



Unforeseen developments

Legal standard for determining that there are increased imports

Increase can be absolute or relative to market share

Sharp and sudden

Reasonable Period of time



GATT 1994 Art. I:1

Most-Favoured-Nation Treatment

The complaint related to exclusion of Canada, Mexico and Israel

Argument that Article XIX permits suspension of all obligations



Canada

Causation

Causation is different than coincidence

Serious injury must be caused by increased imports

Injury from other factors



Parallelism

Articles 2.1 and 4.2 of Safeguard Agreement

U.S. excluded imports from Canada and Mexico – NAFTA

Also Israel and Jordan

If the investigations were all imports, none can be excluded without further analysis.

Article 2.1 and 2.2 are parallel.



Parallelism

Failed to provide reasoned and adequate explanation as to how facts supported the decision.

Explanations included alternative explanations partly departing from each other – couldn't be reconciled.

Should USITC have done separate inquiries?



GATT 1994 Art. II

Schedules of Concessions

This is where the basic obligations are.

If safeguards are based on tariffs and not permitted then there is breach of Article II.



Canada

GATT 1994 Art. X:3

Publication and Administration of Trade Regulations

Technical grounds in case others do not work

Utility depends on style of approach



Canada

Q&A and Discussion

Thank you for your participation.



Canada 