

A Study on the Legal Issues Arising from the Investigation on Various Industrial Impacts of Trade in Services Outside of the WTO Framework

Cheung Chai Hong

School of International Law, China University of Political Science and Law, Beijing, China

Email address:

lseandychung@gmail.com

To cite this article:

Cheung Chai Hong. A Study on the Legal Issues Arising from the Investigation on Various Industrial Impacts of Trade in Services Outside of the WTO Framework. *Social Sciences*. Vol. 7, No. 2, 2018, pp. 88-93. doi: 10.11648/j.ss.20180702.16

Received: February 22, 2018; **Accepted:** April 2, 2018; **Published:** April 24, 2018

Abstract: This paper examines existing multilateral trade agreements except the WTO in terms of their regulations concerning investigation on industrial impacts of trade in services. The main purpose of the paper is to provide possible legal reference for continuing to promote negotiations on emergency safeguard measures in WTO trade in service. Mainly through Legal Positivism, in terms of identifying industrial impacts of trade in services, there are clear and objective regulations within the European Union and in its multilateral agreements with Eastern European countries; NAFTA permits Mexico to take protectionist measures in banking and financial services, and has established relevant standards for industrial impacts; the bilateral trade agreements signed by China and other countries are mostly treaties of principle, thus not unpractical. To reach an agreement on this issue so as to facilitate trade in services, this paper suggested that the international community should promote the WTO to adopt investigation on industrial impacts of trade in services, so as to further increase multilateral disciplines.

Keywords: Trade in Services, Safeguard Measures, Investigation System of Industrial Impact

1. Introduction

Safeguard measures in a trade agreement allow member governments to cancel or cease to fulfill their normal obligations under their agreement under certain circumstances to safeguard a more important interest. [1] Due to the fact that they allow the Fair trade rules set by international treaties to be inapplicable to members under certain conditions, and the significant impact they bring to the economic interests of other members, hence, their applicable conditions and procedures etc. should be strictly restricted. Thus, it is necessary to conduct research accordingly.

In 1995, the Uruguay Round successfully integrated service trade into the WTO multilateral trading system, and the General Agreement on Trade in Services (GATS) marked the beginning of a new process of multilateral trade in services. However, due to the way service trade provide a diverse and complicated of interest, especially the Doha Round to agricultural and non-agricultural market access (NAMA) problems on service trade negotiations, before the WTO members great divisions in this topic, negotiations are difficult

to achieve consensus. As of now, there is no substantial breakthrough in the GATS as an open agreement, and the emergency safeguard mechanism of service trade under the multilateral system is still in a blank state. In contrast, many countries have tried to introduce the provisions of the service trade emergency safeguard mechanism in the regional or bilateral service trade arrangements that they have concluded. [2].

2. WTO Disciplinary Regulations Concerning Investigation on Industrial Impact of Trade in Services

Under the WTO framework, safeguard measures are generally known as trade restrictions, controls, boycott and suspension of benefits imposed on a certain type of legally restricted imported product by means of the trade protection measures that are generally prohibited by the WTO. The safeguards currently covered by the WTO Agreement include the GATT Article 19, the safeguards system represented by the

<Agreement on Safeguards Agreement>, the special system represented by the <Agreement on Agriculture>, and the <Agreement on Textiles and Clothing>, as well as the Authorized negotiating terms for Emergency Safeguard Measures (ESM) of trade in services covered by the GATS agreement.

Clause 10 of the General Agreement on Trade in Services (GATS) concluded by the Uruguay Round provides for "emergency safeguards" as follows: (i) Multilateral negotiations should be conducted on the issue of emergency safeguards on the basis of the principle of non-discrimination. The outcome of such negotiations should come into effect no later than three years from the effective date of the WTO Agreement. (ii) In the period leading up to the effective date of the outcomes of negotiations mentioned in article 1, notwithstanding the provisions of Sub-clause 21 of Clause 1, any members may, within one year of the specific commitment, inform the Council of Trade in Services of its intention to amend or withdraw that commitment, provided that the member states to the Council explaining why the amendment or revocation cannot wait until the three-year period set forth in Clause 1, Sub-clause 21. (iii) The provisions of paragraph 2 shall cease to apply after three years from the effective date of the WTO Agreement. [3] In the light of the above provisions, the negotiations on the ESM should be concluded no later than 1 January 1998. Nonetheless, because the disagreements between member states concerning the desirability and feasibility of establishing ESM for trade in services were all too significant, it has so far failed to reach any legally binding draft institution to date although it has been postponed for five times already.

3. Relevant Institutional Arrangements in Regional Trade Agreements

According to the statistics in 2002 on 69 more favorable regional trade arrangements, 68 of them allow all member States to apply emergency safeguards under Clause 19 of the GATT; 6 of them limit the application of the measure to only the transitional period. There are other provisions that accept the application of safeguards in the event of difficulties in the balance of payments, domestic industrial restructuring as well as protection of infant industries and specific agricultural sectors. In most cases, these agreements require prior consultation and notification, and priority is required to be given to the application of measures that minimize the distortion of normal trade. [4] Combined with the reported prepared by the WTO Working Team for Trade in Services [5] by over the years and the analysis of certain trade arrangements carried out by the writer, it can be said that many of the bilateral and multilateral trade arrangements outside of the WTO now make reference to the application of safeguards. However, most of them are directly related to the trade of goods, and they are mostly norms based on principle. There are no safeguards rules specifically for trade in services, and no principled restrictions established on the investigation of

domestic industrial impact on member States brought by the liberalization of trade in services.

3.1. EU

3.1.1. Establishment of the "Treaty of Rome" for the European Economic Community

Clause 36 of the Treaty of Rome authorises member states to impose restrictions on imports for public policy reasons, which is about the same as the "general exception" in Clause 14 of the GATS. Clause 108 to 109 provide for regulations on safeguards for international Balance of Payment, which is about the same as the "Restrictions on safeguards on Balance of Payments" section of Clause 12 of the GATS. It is noteworthy that Clause 115 allows the Commission to authorize Member States to take protective measures in cases where implementation of the common commercial policy leads to economic difficulties. Clause 226 allows Member States to apply for the implementation of protective measures when serious economic difficulties arise for a sector or area which are likely to persist during the transition period after the Treaty takes effect. The above provisions are also accepted by the Maastricht Treaty of 1993 marking the transition of the European Community from an economic entity to an economic and political entity. The "Treaty of Rome" only provides for "economic difficulties" or "serious economic difficulties" that may be caused by common commercial policies including certain liberalization measures in the area of trade in services in principle, yet it does not establish the relevant substantive criteria and the procedural rules for actually conducting industrial investigations.

3.1.2. European Economic Area Agreement Established by EU and EFTA

The EEA Agreement [6] covers the liberalization in various areas including goods, people, services, capital etc. Safeguards are specifically regulated by the three clauses 112 to 114 in Chapter 4 "Safeguard measures" of Part 9 "Institution Provision"; with the general abolition of anti-dumping and anti-subsidy trade remedies in the EEA being applicable, retaining the right to implement safeguards. [7] According to the substantive norms of Clause 112, subject to complying with certain procedural requirements of Clause 113, if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, the contracting party may unilaterally take appropriate remedy measures. At the same time, the scope and duration of application of the above safeguard measures should be strictly limited to the extent necessary. Priority should be given to measures that bring the least possible distortion to the agreement, and the measures apply to all the members. Clause 113 is the procedural norms regarding prior consultation and notification of safeguards and, at the same time is subject to a periodic evaluation by the EEA Joint Committee every three months within the applicable period. Clause 114 is about the right for members to take appropriate rebalancing measures in the event of which the application of safeguards of other members results in an imbalance of rights and obligations

enjoyed by the members under the agreement. [8]

Thereafter, several members have voiced their individual opinions concerning the above-mentioned safeguards under the EEA in a series of unilateral declarations by the EEA members. These mainly include: (i) The Austrian government unilaterally declares that due to its specific geographical conditions, the area of settlements, especially land which is suitable for residential housing construction, is scarce. Austria is of the opinion that if the free flow of economic resources distorts the real estate market, it will eventually lead to serious economic, social or environmental difficulties, thus meeting the requirements of Clause 112. The EU believes that the above statement on safeguards by the Austrian government has not infringed the rights and obligations of the Treaty members under the agreement. (ii) The Iceland Government considers that taking into account its economic homogeneity and its small population, it can implement safeguards if the implementation of the agreement results in large-scale labor inflow to specific regions, specific jobs or specific industries leading to serious disruption in the labor market or real estate market. [9]

In addition, Clauses 40 and 41 of the Convention Establishing the European Free Trade Association (2002 Revised) [10] has also included substantially same terms and terminology as the EEA Agreement. We will not go into further details here. The Directive issued by the EU in 1998 on the common rules for the realization of natural gas-related products and services within the EU also made reference to safeguards. Clause 24 of the directive provides that Member States may implement necessary safeguards on a temporary basis in the event of a sudden crisis in energy markets, or when the safety of the personnel involved or the integrity of the equipment, systems and installations are compromised. It sets limits on necessity and minimum market distortions, while requiring that other member states and the EU must be notified without delay. [11]

It restricts the application of safeguards in the field of trade in services to the event of which serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising. However, it does not provide any guiding restrictions on the specific definition of the terminology of the Treaty. One can assume an investigation on the service industry to determine whether the above situation has occurred depends on the individual judgment of the member parties. The agreement does not provide substantive and procedural norms. The subsequent unilateral declarations by the several member parties also have only pre-identified their most worrying potential damages, and they have not clearly defined what constitutes "large-scale movements of labor", "disturbances on the real estate market" and "serious disturbances on the labor market", nor have they provided any description on the procedural issues related to the above-mentioned investigations into the industry. Based on current information, no specific implementation guidelines is provided.

3.1.3. Serial Agreements Signed by EU and Eastern European Countries [12]

Regarding the occasions listed above in the series of agreements in which restrictions can be imposed on normal trade, including trade in services, the provisions of the articles are more specific and practical compared to the trade agreements mentioned above. Unfortunately, it does not put emphasis into the issues regarding the design of investigation system that proves the existence of impact to industries in the above circumstances. However, in the writer's opinion, the highlight lies in its establishment of an objective standard for the vanishment and drastic reduction in market shares of domestic companies or nationals in the industry amid competition from opening up of markets. Comparing to the general requirements of conditions, such as to prove the industry is facing serious difficulties, leading to possible serious social problems etc, the standards is more objective and carries less judgment.

In addition, when implementing trade restrictions, the series of agreements above require that the restrictions apply only to the relevant parties which enter the industry after the measures come into effect, yet the agreement cannot discriminate existing business activities of the companies or nationals from EU in the country. The writer argues that this gives rise to an issue: the circumstances for which trade restrictions can be imposed arise from the commercial activities of foreign companies or nationals whom already exist in the specific industry in the country, on this basis it imposes restrictions on the potential foreign companies and nationals whom may enter the specific industry of the country. Although it protects the vested interests of foreign companies and foreign nationals that are effectively established in the country, it is potentially unfair to the foreign companies and foreign nationals who have the intention to enter the specific industry in the country. If that's the case, the issue lies in while establishing the scope of domestic business of the specific domestic service sector to be potentially investigated in, how to distinguish between the foreign service providers and domestic service providers that already have effective commercial presence in the country as well as the services they provide, and whether the adoption of equity shareholding ratio standards is required.

3.2. North America Free Trade Agreement (NAFTA)

NAFTA is also a free trade agreement that covers various trade issues such as goods and services. In its annex Clause 1413.6, Section B Payments System Protection, NAFTA has established a safeguard system for financial services in Mexico. [13] Specifically, when Mexico's total legitimate capital in subsidiaries of foreign commercial banks, as defined in Annex 7, reaches 25% of the total capital of all onshore commercial banks, Mexico may request to consult with other member parties regarding the adverse effects brought by the presence of commercial banks owned by other member parties to its domestic market. Factors needed to be considered prior to determining the potential adverse effects include: the risk of undue control of the Mexican payments system by non-Mexican persons; the effect foreign commercial banks

established in Mexico may have on Mexico's ability to conduct monetary and exchange-rate policy; the adequacy of the agreement in protecting the Mexican payments system.

The agreement establishes a number of substantive judgment standards that determine the adverse effects of market liberalization on domestic industries in the particular sector by allowing Mexico to take safeguard measures in specific areas of banking financial services in trade in services under certain circumstances. This enables the establishment of objective measurable standards, for instance, the sum of legitimate capital in subsidiaries of foreign commercial banks reaching 25% of the total capital of all onshore commercial banks in Mexico; together with several more flexible, subjective criteria such as excessive control over domestic industries, the impact on country's ability to enforce industrial policies, the impact on the status of domestic industries, etc. The combination of subjective and objective standards can avoid the drawbacks of implementing a standalone standard to a certain extent.

4. Regulations in Relation to Bilateral Agreement

4.1. Japan–Thailand Economic Partnership Agreement

“Emergency Security Measures” were provided in Chapter 7 “Trade in Services”, article 84 of the Japan–Thailand Economic Partnership Agreement, signed in April 2007. The Parties agree to initiate negotiations on the subject in not less than six months from the signing of the Agreement. In a Joint Statement issued in the Japan–Thailand Economic Partnership Committee held in Tokyo on 1st November 2007, it was stated that the Committee decided to establish a Trade in Services Committee and initiate negotiations on the Emergency Security Measures before April 2008 as provided in article 84. In light of the information the writer has gathered, the parties are yet to reach any agreement. [14]

4.2. New Zealand - China Free Trade Agreement

Safeguard Measures were also provided in Chapter 9 “Trade in Services”, article 121 of the “New Zealand - China Free Trade Agreement”. [15] The form of measures was largely similar to the aforementioned trade in services agreements that ASEAN signed with China and Korea respectively. This Agreement has left the issue to the multilateral framework under the WTO, thus no specific guidelines has been set.

4.3. Free Trade Agreement Between Costa Rica and Mexico

Trade in Services Security Provisions were included in Chapter 4 of the Free Trade Agreement between Costa Rica and Mexico. The reasons of initiation include safeguarding public interest and national security, largely similar to article 14 and article 14 (2) of GATS. No specific explanations were given due to also concerns in relation to the environment, national heritage and integrity. [16]

4.4. ASEAN with China and Korea

The trade in services agreements ASEAN signed with China and Korea respectively. In article 9 “Safeguards” of the “Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China” signed between China and ASEAN in December 2006, it was provided that:

(i) *The Parties note the multilateral negotiations pursuant to Article 10 of the GATS on the issue of emergency safeguard measures based on the principle of non-discrimination. Upon such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Agreement so as to incorporate the results of such multilateral negotiations.*

(ii) *(Before the completion of multilateral negotiations mentioned in paragraph (i) occur, if the implementation of this Agreement causes substantial adverse impact to a service sector of a Party, the affected Party may request for consultations with the other Party to discuss any measure with respect to the affected service sector. Any measure taken pursuant to this paragraph shall be mutually agreed by the Parties concerned. The Parties concerned shall take into account the circumstances of the particular case and give sympathetic consideration to the Party seeking to take a measure. [17]*

In the writer's opinion, the said provision in the Agreement shows that the contracting parties are concerned on the adverse effects on the opening of trade in services to their industries. In addition, it acknowledges the value of the safeguard measure system, but it categorizes the system of trade in services emergency safeguard measures as the result of the negotiations on the said problem under the WTO framework. As discussed above, as the GATS negotiation team are yet to reach consensus on the said problem, the Agreement lacks specific implementation guidelines. In principle, article 9 (2) requires that when the opening up of trade in services of a Part causes substantial adverse impact to a service sector of the other Party, the adversely affected party can request for consultation and the other party shall take into account the circumstances of the particular case and give sympathetic consideration.

However, under the above premise, there were no procedural guidelines on proving the adverse effects in relation to trade in services suffered by domestic service sectors. As to the only standard given, namely “substantial adverse effects”, the article does not provide any actionable guidelines that can be used in determining whether the said effects are present.

As suggested by the academic community, in relation to bilateral FTA, safeguard measures are only available in transitional periods in most cases, so as to ease the substantial impact of free trade. [18] However, referring to the above analysis, there was hardly any safeguard measures implemented specifically for trade in services. Many of those implemented are awaiting the negotiation results of the GATS

negotiating team under the WTO multilateral framework, in hopes of incorporating the said results with appropriate amendments. As to the topic the writer is inquiring, namely the system of investigation of the impact on trade in services industries, the safeguard measures implemented provide no insights in relation to the actual standard and procedural regulations, save as some isolated concepts.

5. Conclusion

After assessing the emergency safeguard measures in the bilateral and multilateral trade agreements outside of the WTO, and the closely connected system of investigation on the impact on the domestic trade in services industries, the writer is of the view that there is currently no legal text that can serve as a reference to the ongoing negotiation of the WTO trade in services ESM negotiation. However, many legal texts undeniably confirm the necessity for safeguard measures to be implemented in the trade in services sector, and in principle provide regulations on important concepts and procedures to be abided by in trade in services safeguard measures and investigation system on the impact on the domestic trade in services industries. These consensuses, although limited in scope, might serve as a concrete basis for the multilateral negotiation under the WTO framework.

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