



PART 1

IMPORT SURGES: THEORETICAL AND LEGAL FRAMEWORK



INTRODUCTION

1

1.1 Why this book?

Food imports particularly by net food importing developing countries have risen and are expected to rise further as population and income rise (Paulino, 1986, Ivory 1990). The impact of the increase in food imports varies across countries, commodities and socio-economic groups within the countries (Ng and Aksoy 2008). There has been growing concern backed by claims of some international civil society organizations that in some developing countries experiencing surges in food imports, while some population groups, mainly consumers, will benefit, others, such as small producers, may seriously suffer. The concern and the claims that the problems linked to rising food imports will grow even larger in the coming years, especially if tariffs worldwide are further reduced, add to the worry that in developing countries, import competing sectors lack alternative forms of safeguards to shield them against any adverse effects of rising food imports. The concern also increases when the food imports are sudden and unpredictable, i.e. viewed as “import surges”, because of the lack of understanding of how to cope with the risk associated with their unpredictability which complicates decision making at the production and market levels.

Determining appropriate measures to be taken to correct or mitigate the effect of import surges in developing countries becomes therefore an important task. Hasty reactions such as the full restriction of agricultural and food imports and the use of some safeguard measures to protect the import competing

sector may become controversial especially because of the lack of analysis justifying their uses and defining their implementation procedures. Such measures often target only the well-being of some stakeholders and overlook the economy-wide effects. Likewise, in most of the reported cases of import surges, it is not always clear whether the observed injuries or benefits were solely due to import surges to justify such restrictions. Moreover, the measures taken, even if they are justified, may not comply with the countries’ trade commitments and market reforms and may upset the long-term development objectives. There has been a knowledge gap concerning how the import surges and the measures taken to deal with them square with the countries’ agricultural development policies to reduce food insecurity and poverty.

It is therefore important to increase the level of understanding of issues around agriculture and particularly food import surges in the case of developing countries where agricultural production and marketing are often highly vulnerable to import surges. It is for this reason that the Food and Agriculture Organization of the United Nations (FAO) undertook a series of country studies aimed specifically at identifying food import surges and analysing their sources and impacts. The legal frameworks for the identification of import surges and injuries as well as the appropriate remedies have long been discussed under World Trade Organization (WTO) negotiations. For the country case studies, FAO developed a methodology based on the General Agreement on Tariffs and Trade (GATT)/WTO frameworks.

1.2 Objectives

The main purpose of this book is to increase the level of understanding of the phenomenon of agricultural and mostly food import surges including their sources and consequences drawing upon the series of FAO country case studies and other background work.¹ It has two specific objectives. The first is to examine the theoretical and legal frameworks underlying an import surge based on reviews of the definition and identification of an import surge and its potential causes and likely effects. The second is to synthesize the findings of the FAO country case studies including implications for ways to deal with import surges and especially to provide informed guidance to policy-makers to respond to the surge's consequences.

1.3 Organization of this book

This book is composed of three parts. The first two address the two specific objectives directly, while the last part contains the country case studies. The first part, *Part I*, deals with the theoretical and legal frameworks regarding agricultural import surges and includes this introduction chapter and four other chapters. This chapter continues with a review of various definitions of import surge. Chapter 2 explains ways to identify import surges; Chapter 3 describes the main sources of import surges; Chapter 4 elaborates on the potential consequences of import surges; and Chapter 5 cites the main methodological challenges in identifying the presence, sources and consequences of the import surges and presents an FAO manual on how to address these challenges especially for country case studies.

The second part of the book, *Part II*, focuses mainly on the examination and synthesis of country and commodity (mostly food products) case studies and comprises five chapters. Chapter 6 introduces and describes the countries and commodities chosen in the FAO case studies on import surges. Chapter 7 highlights what the sources of import surges in

developing countries are. Chapter 8 examines the consequences (injuries and benefits) of the import surges in developing countries. Chapter 9 reviews some of the government reactions to the import surges. Finally, Chapter 10 summarizes the findings, lessons learned and implications from these case studies.

The last part of this book, *Part III*, displays two selected papers to illustrate the country case studies undertaken by FAO in Kenya and the Philippines during the period 2004-06

1.4 Definition of import surges

To begin with, it is important to note that there is no unique or strictly conventional definition of an import surge. Dictionaries define the term "surge" as sudden, sharp and unexpected increases in the variable in question. The WTO Agreements on general trade remedy measures (i.e. antidumping [AD], countervailing and emergency safeguards) refer to the concept of an import surge in a more general way than that in the dictionaries. A useful working definition is found in Article 2 of the Agreement on Safeguards (ASG):

"When a product is imported into a country in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products".

Thus, a surge is associated with some form of "unusualness", i.e. a significant break from some established trend. An import surge occurs when the volume (or the value) of imports increases in a period of time over its normal level to an extent that is considered 'excessive' according to some predetermined criteria. There is no unique and accepted definition of these criteria but more often than not, these criteria tend to relate to the duration, the amount of imports compared with what is considered as the normal or base level of imports. The WTO texts contain relevant safeguard provisions concerning import surges, although these agreements no longer use the term "import surges".

¹ Although in the framework the discussion concerns agricultural import, the case studies focus mostly on food products. Tobacco is the only non-food products included in the case studies.

1.5 World Trade Organization (WTO) provisions: safeguards mechanisms

The definitions of import surges and its impacts always invoke the measures that governments may take to deal with the negative consequences of the surge. It is therefore important to introduce here the various measures in line within the WTO Agreements and negotiations on what are called the provisions on safeguards. Box 1.1 summarizes these provisions in the WTO Agreements and in the Doha Round related to import surges with some of the key concepts and terminologies employed, especially on the Agreement on Safeguards and the Special Safeguards (SSG).

Safeguards as WTO legal framework to deal with import surges²

The potentially adverse effects of import surges on domestic markets and the agricultural sector, particularly in developing countries, have received enough attention to prompt the concepts of safeguards to protect against any 'injurious' import surge. However, where trade restraint responses are deemed to be appropriate to curtail import surges and to meet national objectives, existing WTO compatible policy options are relatively limited and difficult to implement by many developing countries. The Agreement on Agriculture (AoA) text, Article 5(1a), allows safeguard measures to be put in place by certain countries. Under WTO, the instruments currently available for dealing with disruptive increases in imports are the ASG, and the SSG provision of the AoA.

Agreement on safeguards (ASG)

Under the ASG, safeguards can be applied only after detailed investigation has been conducted to substantiate the presence of significant injury or threat of serious injury. Furthermore, a causal link needs to be established between the claimed damage and the import surge. The rules are generally cumbersome and difficult to interpret particularly as regards to causality and the non-attribution of other factors to the damage.

The term "safeguards" is used in reference to government actions responding to imports that are considered "harmful" to the importing country's economy or domestic industries that produce goods that are in competition with or "similar" to the imported products. Typically, government intervention takes the form of an import restraint or control through increased tariffs or quantitative restrictions. Sometimes, the exporting country may voluntarily restrict its own exports, usually within negotiation with the importing country. Article XIX of the GATT and the WTO ASG prescribe the obligations of WTO members with regard to how they should apply safeguard measures in response to import surges. The economic analysis of import surges has to be conducted in this context for it to be consistent with the rules. A legal analysis of the interpretive approaches to some of the key concepts in the WTO Agreements hence becomes useful.

All WTO trade-remedy agreements, the ASG and GATT Article XIX contain terms and phrases that remain ambiguous and open to various interpretations. The ambiguity in the terminology is a reflection of the difficulties in striking a compromise during the negotiations of the particular agreement, or simply a desire to accommodate variations in state practice on the same issue within the same provision. The terminology is also motivated by the need for countries to justify their use of safeguard protection in most circumstances. Making sense of these unclear or ambiguous provisions can be a daunting task, particularly when the sound economic analysis of a problem is predicated on a precise definition or identification of the elements of a provision, and hence the applicable economic variables.

According to Article 3.2 of the *Understanding of the Rules and Procedures Governing the Settlement of Disputes* (DSU), the WTO dispute settlement system is charged with the task of maintaining the balance of negotiated concessions by clarifying the existing provisions in WTO Agreements in accordance with the customary rules of interpretation of public international law. Over the past decade, there is evidence that international trade relations have indeed become much more legalized under the WTO, pursuant to the adoption of the Uruguay Round agreements and, in particular, the DSU. The DSU ushered in a variety of reforms to the old GATT

² See also Mosoti and Sharma (2005), for more details.

Box 1.1

Summarizing WTO provisions related to import surges

There is no unique and accepted formal definition of “import surge” under WTO Agreements and discussions continue concerning this phenomenon. The following is a summary of the main provisions currently in place.

- **Agreement on Safeguards (ASG)**

Formal definition of import surge: none.

Description: increased quantities, in absolute terms or relative to domestic production, being imported under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products. This definition was further interpreted to mean “that the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury’.”

Methodology to substantiate injury: the presentation by the national authorities should include all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, and in particular the rate and amount of increase in imports in absolute and relative terms; the share of the domestic market taken by increased imports; and changes in the level of sales, production, productivity, capacity utilization, profits and losses and employment. A causal link must be established between the claimed damage and the import surge, and it must be verified that other factors are not responsible for the injury to the domestic industry (the “non-attribution” requirement).

Difficulties in implementation: beyond the requirement that all the factors listed be “evaluated” in each case, it remains unclear what conditions will support a finding of serious injury or threat, and what degree of confidence will be given to the information presented by national authorities. Also, while it is not difficult to demonstrate the occurrence of a surge and of its negative impact, it is far more difficult to substantiate causality and the non-attribution of other factors to the damage. In general, the rules are cumbersome and difficult to interpret, particularly for many developing countries.

- **Agreement on Special Safeguard (SSG)**

Formal definition of import surge: none

Description: a situation when safeguard action is authorized based on a rise in import quantities or a sharp fall in import prices for which the corresponding volume and price triggers are defined.

Quantitative threshold to define a surge: in the case of a volume surge, the import trigger is related to the actual level of average imports over the preceding three years, to the share of imports in domestic consumption and to the absolute volume change in domestic consumption. The trigger price is defined as the average c.i.f. unit value during 1986-88, expressed in domestic currency.

Methodology to substantiate the presence of a surge: based on statistical information. For the volume trigger, statistics are needed for monthly imports over the three years preceding the surge, as well as for changes in consumption. For the price trigger, statistics are needed for the current c.i.f. import price and the average c.i.f. price for the base period, 1986-88.

Requirements for safeguard measures: based on schedules regarding the amounts by which the trigger levels are exceeded, additional duties may be levied until the end of the year.

Methodology to substantiate injury: injury tests are not required under the SSG.

Difficulties in implementation: the right to use the SSG is reserved to only 38 WTO Members (of which 22 are developing countries) which undertook tariffication (the process of converting non-tariff barriers into tariffs during the Uruguay Round) and solely for a limited number of products. For instance, only six developing countries evoked the SSG provision during 1995.

- **Proposals for market access flexibilities under discussion in WTO**

In the ongoing discussions regarding the modalities to be agreed for the Doha Round negotiations, two proposals relating to imports for developing countries are under consideration.

Special Safeguard Mechanism (SSM): this mechanism is included in the Doha Round package (and not the Uruguay Round) and intended to allow the imposition of duties above bound ceilings to protect developing countries' domestic farm sectors from import surges. Outstanding issues include product eligibility, possible volume and price triggers, and whether the mechanism should be temporary or indefinite.

system, including greater clarity of rules, binding decisions, and a standing Appellate Body (AB).

The WTO dispute settlement system has generated a large number of the Panel examining the dispute (henceforth, the Panel) and AB reports, some of which touch or focus on aspects of the ASG, and the administration of safeguard measures in general. These reports contain legal interpretations that are valuable for guiding the economic analysis of concepts such as “increased imports”, “causation”, “causation and non-attribution”, “serious injury”, and “threat of serious injury”, “like or directly competitive products”, “domestic industry”, and many others.

Special safeguards (SSG)

This is a situation in which a safeguard action is authorized based on a rise in import quantities or a sharp fall in import prices for which the corresponding volume and price triggers are defined. In the case of a volume surge, the import trigger is related to the actual level of average imports over the preceding three years, to the share of imports in domestic consumption and to the absolute volume change in domestic consumption. The trigger price is defined as the average c.i.f. unit value during 1986-88, expressed in domestic currency.

For the volume trigger, data on monthly imports as for changes in consumption over the three years preceding the surge are needed. For the price trigger, statistics are needed for the current c.i.f. import price and the average c.i.f. price for the base period, 1986-88. Also based on schedules regarding the amounts by which the trigger levels are exceeded, additional duties may be levied until the end of the year. It is noted that no injury test is required under the SSG.

Special safeguard mechanism (SSM)

In the Doha Round of Multilateral Trade Negotiations, one of the proposals put forward to help developing countries respond to disruptive import surges is that of an SSM. This mechanism would allow the imposition of additional duties to protect domestic farm sectors from import surges. While the proposal has attracted considerable attention, many issues remain outstanding, including product eligibility,

the mechanisms for volume and price triggers, the resultant remedial action, including the level of additional duties, and the duration of application. Obviously, agreement on such flexibility provisions to deal with disruptive import surges is important in a context of negotiations aimed at achieving further reductions in bound tariff rates. Appropriate flexibility may also need to be introduced in regional and bilateral agreements which, however, often contain clauses that limit the application of safeguard clauses. Various opinions remain on the SSM and are debated on in the negotiations towards the conclusion of the Doha Round. These opinions concern product eligibility, trigger levels and the use of additional import duties.

All these definitions and concepts on import surges and the safeguards in this Chapter are important for the rest of this book. They serve as the basis of the legal and theoretical framework shaping the study on import surge.

References

- Ivory, P.** 1990. Food import growth in the Developing Countries. *Trocaire Development Review*. pp. 59-71.
- Mosoti, V. & Sharma, R.** 2005. The interpretation of various import surge-related concepts and definitions in the WTO legal text. *FAO Import Surge Project Working Paper No. 3*, May 2005.
- Ng, F. & Aksoy A.** 2008. Who are the net food importing countries? *Policy Research Working Paper No. 4457*. The World Bank.
- Paulino, L.** 1986. Food in the third world: Past trends and projections to 2000. *Research Report No. 52*. International Food Policy Research Institutes.
- World Trade Organization.** The SSGs provisions of the Agreement on Agriculture. Accessed online http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#aAgreement