ANALYSIS OF THE SSM TEXT OF THE CHAIR'S AGRICULTURE MODALITIES PAPER (19 MAY 2008)

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Introduction

One of the most contentious aspects of the new WTO agriculture modalities paper issued on 19 May is likely to be the section on special safeguard mechanism (SSM) for developing countries.

The paper continues to contradict several key points insisted on by the G33 in its many position papers and interventions, including at the agriculture meetings in the Room E as well as open-ended formats since the release of the Chair's previous modalities paper on 8 February.

The G33, chaired by Indonesia, is a grouping of over 40 developing countries that advocate food security, farmers' livelihoods and rural development. It has championed the establishment and effective operationalising of SSM as well as special products (SP) as instruments for special and differential treatment to advance their cause.

The "Room E negotiations" involving 38 delegations in the past three months saw a spirited defence by the G33 members of their positions on SP and SSM. They were opposed by a few countries, notably the United States among the developed countries and Argentina, Uruguay, and Thailand, among the developing countries with export interest.

The 8 February paper by the Chair of the agriculture negotiations, Ambassador Crawford Falconer of New Zealand, was criticized by the G33 for imposing severe conditions before the SSM can be used, and for limiting the remedy (what actions countries can take to offset the problem when an import surge or price decline takes place). They feared that the SSM would become a weak and useless instrument.

The 19 May revised paper resolves a few of the most contentious points in favour of the G33. These include removing the earlier proposal to have the SSM expire at the end of the Doha Round's implementation period, and also removing one of the options as to how long a SSM measure can be in place, i.e. only to the end of the calendar year.

However, in many other areas, the Chair has retained the severe limitations on the use of the SSM. This is especially so in limiting the number of products for which the SSM can be invoked, the price-based "trigger" which can only come into effect when prices fall by at least 30% below the standard, and in limiting the extra SSM

duty that can be imposed to only up to the bound levels of the previous Round (i.e. the Uruguay Round).

And in one crucial area, he has also turned around and deprived countries of the use of the SSM for products that are covered by bilateral or regional trade agreements.

What is even more surprising is that in his statement to the last agriculture meeting (on 9 May 2008), Falconer had told the WTO members that in areas where differences still exist, "the revised text will protect and reflect the positions those members have had... So that nobody's position is undermined at all...It will just simply reflect where members are at a particular point in time...

"It is pretty clear to me that on any number of issues, whether it be special products, SSM, OTDS...there are going to be differences in positions in my next revision which will be reflected because there is not a single agreement that you have reached on a number of those issues at this point in time."

However, in the 19 May paper, on some of the key points, the well-known views of the G33 have not been reflected, as they could have been in the normal way, by putting them in square brackets as an option.

Para 121: Restricted number of products

Para 121 states that the SSM shall not be invoked for more than [3-8] products in any given 12 month period. This repeats what had been stated in the February paper, despite the objections of the G33, which did not want any restrictions on the number of times the SSM can be invoked.

A seminar presentation by the FAO (June 2007) showed that there can be many "simultaneous import surges", with a developing country experiencing at the same time an import surge in many products.

For example, one particular country, in 1999, had 15 products where import volumes exceeded the 3-year moving average by 30% (which is an extreme form of import surge). The same country had 11 products in 1998, 9 products in 1987 and 8 products in 1992 and 2002 similarly exceeding the 30% volume surge. In almost all years in the period 1984-2003, the country had above 4 products with this extreme import surge.

Thus, the Chair's restriction on allowing only 3 to 8 products to be eligible for the SSM to be invoked is very restrictive, and would greatly devalue the usefulness of the SSM.

It should also be noted that the SSG (which the developed countries, who in the Uruguay Round converted their many restrictions into tariffs) does not have such a restriction. In fact, some developed countries have invoked the SSG hundreds of times. By putting such a strict restriction on the use of the SSM, it is being treated

with far less flexibility than the SSG (which is mainly used by developed countries), which is against the principle that the SSM should be more flexible.

Para 124: Volume-based Trigger and Remedy

Para 124 deals with the volume-based SSM, its triggers and the remedy in terms of additional duty allowed. The paragraph provides two options.

The first option reflects the G33 position. In three tiers (where the volume of imports are 105-110, 110-130 and over 130 per cent of base import volume, which is the average of the preceding three years) the maximum additional duty is 50% of current bound tariff or 40 percentage points, whichever is higher; 75% and 50 points; and 100% or 60 points respectively. There is no limitation on whether the pre-Doha or Uruguay Round bound rates are exceeded.

The second option reflects the opposing view, of those that are against an effective SSM. The first trigger comes into effect only when the increase in import volume is 130-135% and the remedy is an extra 20% of the bound tariff on top of the applied tariff as long as the bound tariff is not exceeded. As pointed out by the G33 earlier, this is really absurd as the objective of the SSM is to be allowed to exceed the bound tariff.

The second remedy in this option is when the volume is 135-155% of base imports. Then, the lower of 25% of current bound tariff or 25 percentage points can be added on applied tariffs provided this does not exceed the mid-point between the pre-Doha bound tariff and the current bound tariff.

The third remedy is when the volume exceeds 155% of base imports, the extra duty is the lower of 30% of current bound tariff or 30 points to be added to the applied tariff, provided the pre-Doha bound tariff is not exceeded.

The conditions for the use of SSM are so strict in the above as to render it useless. Firstly, it can be used only when the volume expands by more than 35%. Secondly, the remedy is very limited since the pre-Doha (i.e. Uruguay Round) bound duties cannot be exceeded. Thirdly, the restriction on the maximum of the extra duty is even more restricted in the tier of 135-155% volume increase because it is the mid-point between the current and the Uruguay Round levels. And finally, there is an additional restriction that where these triggers are met but the absolute level of imports is "manifestly negligible" in relation to domestic production and consumption, remedies would not be applied [sub-para 124(g)]..

In sub-para 124(h), LDCs are allowed to exceed their Uruguay Round bound tariffs, but only by a maximum of 25 percentage points, and this "entitlement" also applies to price-based measures.

In the February paper, small, vulnerable economies (SVEs) are also allowed this, but only on volume-based measures. In the new paper, this concession to SVEs is removed. The reason for this removal is not given. Thus for the volume-based

triggers and measures, the main positions of the proponents and opponents of SSM are laid out as options by the Chair. They show how far apart the positions are, and how difficult therefore to get an agreement.

Para 126: Price-based trigger

However, on the price-based triggers and measures, the Chair does not place the G33 position alongside that of its opponents. In para 126, the new paper repeats the February paper's proposal that the price has to drop by at least 30% (compared to the average monthly MFN-sourced price for the most recent 3-year period) before the trigger goes off and the SSM can be applied.

This is in contrast to the G33 proposal that the trigger price is the average monthly price for the most recent 3-year period preceding the year of importation.

The G33 had strenuously objected to the Chair's trigger of 30% price fall. However, the Chair has not only retained his figure (although in brackets) but also did not put the G33's price trigger proposal alongside as an option.

Para 127: Price-based remedy (See also table in Annex I of this paper)

In para 127, the Chair's proposed price-based remedy is very restrictive as well. It does not allow full offset (to enable the depressed import price to be raised to the trigger price). Instead, the additional duty shall not exceed 50% of the difference between the import price and the trigger price. This contrasts with the G33 proposal that an additional duty can be up to the difference between the import price and the trigger price, so that the new price after SSM duty can be the trigger price (i.e. the average monthly price for the most recent preceding three-year period).

In addition, within brackets, is the even more restrictive condition that the additional SSM duty must be such that it must not exceed the pre-Doha or Uruguay Round tariff rate, in which case the pre-Doha rate will constitute the limit.

The restrictiveness of these proposed clauses on limiting the additional duty so as not to exceed the pre-Doha (Uruguay Round) bound rates can be seen in the following examples.

Take the case of a product or a tariff line which has a Uruguay Round or pre-Doha bound rate of 110%. The Doha commitment is to reduce the tariff by 9% (perhaps it is a special product). Thus, the Doha bound rate is now 100%.

Assume that the applied rate is same as the bound rate. And that the initial import price at the border is 100 cents, and it has been stable at this level for some time, so it is the reference price also (i.e. the three-year average). Then with the duty at 100%, the price after duty is 200 cents. Assume that the price of the same product

sold by local farmers is 180 cents. The local farmers can compete, since the import price is higher. In the Chair's text, the trigger price is very low, i.e. 70% of the average monthly price. In our example, the trigger price is thus 70 cents.
The following three examples show how inadequate are the SSM trigger and remedy.

In Example 1, assume that the import price falls by 25% to 75 cents. Since this is above the trigger price, no SSM remedy is available. With an import price of 75 cents and the normal duty of 100%, the new import price after duty is 150 cents. This is significantly below the local farmers' product price of 180 cents. The farmers cannot compete with the new import price, and lose their market share. The SSM therefore does not help.

In Example 2, assume that the import price falls to 60 cents. As this is below the trigger price of 70 cents, the SSM can be used. Since the duty is 100%, the price after duty is 120 cents. This competes with the local product whose price is 180 cents. The local farmers lose their market and income. To prevent this, and in order to restore the post-duty price of the import, to 200 cents, the duty must be raised to 233%. (Since the import price is now 60 cents, a duty of 140 cents is needed , or 233% of 60 cents).

But the Doha Round bound rate is only 100%. So an additional duty of 133% is required to fully offset the fall in import price. This 133% should be the additional SSM rate. With this remedy, the post-duty import price will be restored to 200 cents, thus saving the farmers' livelihoods.

But the Chair's proposal (para 127) is that "the additional duty shall not exceed [50 per cent of] the difference between the import price of the shipment concerned and the trigger price [provided that this would not also result in exceeding the pre-Doha Round bound tariff, in which case the latter shall constitute the limit].

The import price is 60 cents, and the trigger price is 70 cents. So, the additional duty can only be 5 cents! And 5 cents is only 8.3% of 60 cents. So, the additional SSM duty is only 8.3% and the new duty is 108.3% (the original Doha 100% plus the 8.3%). This is allowed since 108.3% is below the pre-Doha bound rate of 110%. But the new duty charged (normal duty plus the additional duty allowed through the SSM) goes up by only very little, from 60 cents to 65 cents.

With this new duty, the new post-duty import price is 125 cents (i.e. the import price of 60 cents plus 108% tariff). Without the additional SSM duty, the price would be 120 cents. So, the only contribution the SSM is allowed to make is to add 5 cents to the post-duty import price.

This is grossly inadequate to assist the local farmers, whose product is selling at 180 cents. Faced with imports competing at 125 cents, the local farmers' product is unable to compete, and loses out.

In Example 3, the import price falls from 100 cents to 40 cents. Since the trigger price is 70 cents, the additional SSM duty can only be 15 cents (i.e. 50% of the

difference between import price and trigger price), if the new overall duty does not exceed the Uruguay Round rate. This 15 cents is 37.5% of 40 cents. So, the new duty rate (including SSM additional duty) is 137.5%, instead of 100%. The new duty value is 55 cents instead of 40 cents. And the SSM post-duty price would be 95 cents instead of 80 cents. But this is still a disaster for the local farmers, whose price is 180 cents.

However, this is not all. There is the extra restriction by the Chair, that the pre-Doha bound rate cannot be exceeded. Since the bound rate is 110%, the new SSM duty can only be 110% of 40 cents, which is 44 cents.

Thus, even if the price falls from 100 cents to 40 cents, the Chair's text allows the additional duty to go up from 100% to only 110%. The actual new duty is 44 cents. The post-duty import's price is 84 cents - not even the 95 cents which it would be if there was no restriction on not exceeding the pre-Doha rate.

If there was no SSM in place, the import price after duty is 80 cents (i.e. 100% duty on 40 cents). With the heavily restricted SSM, the import prices after duty is 84 cents. The difference in this case is only 4 cents. It is miniscule, compared to what has to be done to assist the local farm. Thus, the SSM is practically useless in preventing the local farmers from losing their income, since their product sells at 180 cents.

These examples show the lack of usefulness of the SSM mechanism, given the Chair's conditions that (1) the trigger price must be 30% below the average price before SSM can apply; (2) the additional duty shall not exceed 50% of difference between the import price and trigger price; and (3) the pre-Doha rate cannot be exceeded.

This makes it almost meaningless to have the SSM. It is also discriminatory as the present Special Agricultural Safeguard (SSG), to which most developed countries but only a few developing countries have recourse to, does not have such a limitation (that the levels of the previous Round cannot be exceeded). The Chair's new paper proposes that the SSG be allowed to continue.

This limitation is also not in the normal safeguard agreement. Yet, the SSM is supposed to be required because of the inadequacy of the normal safeguard. By imposing so many restrictions on the SSM, it would appear that the Chair's proposal would make it less useful to use than the normal safeguard itself, and thus rendering the SSM to be of little or no practical use.

The limitation (of the new duty not allowed to exceed the Uruguay Round rate) also means that most special products (which are the most important products for developing countries in terms of farmers' livelihoods and food security, and which will have no or a smaller reduction in bound tariffs) will not benefit from the SSM.

This is because: (a) Those special products with zero reduction will not benefit at all; (b) Other SPs will have only small tariff reductions, thus when there is a price depression enough to trigger the SSM, the remedy is so limited (it cannot allow the

Uruguay Round rates to be exceeded) that the SSM would be almost useless for this category of SPs.

Para 129: Only MFN trade to be covered (Also see Annex 2 of this paper)

On para 129, the new paper states that the calculation of the triggers and the application of the measures shall be on the basis of MFN trade only.

This is a major turn-around from the February paper (para 134), in which the Chair gave developing countries the option whether or not to include preferential trade in the triggers and remedy. This paragraph was also not within square brackets, indicating the Chair's confidence that there is agreement.

The February paper only asked for consistency. Where preferential trade is included in calculating the triggers, the additional SSM duties shall be applied also to preferential trade, and where preferential trade is excluded from the application of remedies, that preferential trade shall not have been included when calculating volume and price triggers.

During the Room E discussions of the past months, the inclusion or non-inclusion of products affected by bilateral or regional trade agreements became a source of contention. The G33 and its members strongly defended the Chair's text and the right of countries to include FTA products in the remedy, and this stand was opposed by some few countries.

Instead of retaining his text, or placing the two views side by side as alternative options, the Chair has decided to do a turn-around to place a position opposite to his original position in the new paper, and without square brackets, thus indicating agreement when there is none.

This is a setback for SSM proponents, because a large part of agricultural import surges may come from their reduced tariffs arising from FTAs, and especially since FTAs and their implementation will become more important in future, for example, for ACP countries that are negotiating economic partnership agreements with the EU.

According to the trade expert Bhagirath Lal Das, "the damage to a country's agriculture in the context of SSM should be considered with respect to imports from all sources and similarly the relief should also be targetted to the imports from all sources, irrespective of whether the country has a FTA. Thus, all imports, including those from the FTA countries, should count both for the trigger and relief."

Once the SSM is agreed to in the WTO, FTAs, including the operation of the existing FTAs, would be considered to be guided by it.

According to Das, the use of SSM does not have to be specifically included in an FTA for the SSM to be operational as between the FTA contracting parties.

Whenever an FTA is silent over any matter, the normal WTO rules will operate. Thus, if SSM is not explicitly prohibited in an FTA or if the protection against import of agricultural products is not explicitly restricted to certain specified measures, there will be nothing wrong in using SSM between the FTA contracting parties once SSM gets into the WTO framework.

Given the above analysis, it would be favourable to SSM proponents if the Chair's paper had retained the February text on this issue. Instead, the new paper explicitly does the opposite, to restrict the use of SSM to only MFN trade, and thus exclude products affected by FTAs.

Conclusion

If the opponents' option in para 124 is adopted, and if the other paragraphs proposed by the Chair are adopted, the SSM would be an ineffective instrument. There may be an illusion, projected to the public, that developing countries now have a new instrument to promote food security and farmers' livelihoods, but instead it would be of no or little operational value. Thus, the G33 positions on the various paragraphs should be retained. On para 129, the Chair's February 2008 text on MFN and preferential trade should be brought back.

Annex 1: Scenarios on use and effect of SSM with conditions in Chair's 19 May 2008 text

	Import price (cents)	Increase in Duty		Final Duty		Import Price after adding duty (cents)	Retail price of local product (cents)
		%	(cents)	%	(cents)		
A. Original Situation	100			100	100	200	180
B. Import price falls 25%							
B1. Situation before using SSM	75			100	75	150	180
B2. Situation with required duty increase	75	67	50	167	125	200	180
B3. Situation allowed by WTO text	75	0	0	100	75	150	180
C. Import price falls 40%							
C1. Situation before using SSM	60			100	60	120	180
C2. Situation with required duty increase	60	133	80	233	140	200	180
C3. Situation allowed by WTO text	60	8	5	108	65	125	180
D. Import price falls 60%							
D1. Situation before using SSM	40			100	40	80	180
D2. Situation with required duty increase	40	300	120	400	160	200	180
D3. Situation allowed by text (if no pre-Doha tariff cap)	40	37.5	15	137.5	55	95	180
D4. Situation allowed by text (with pre-Doha cap)	40	10	4	110	44	84	180

EXPLANATORY NOTE TO TABLE:

A: In original situation, the Doha bound rate is 100% (having been reduced from 110%), the import price is 100 cents and the import price after adding duty is 200 cents, which is higher than the local product's price of 180. The local product can compete with imports as its price is lower.

B: A 25% fall in import price requires duty to increase from 100% to 167% (an additional duty of 67%) so that the import price after duty remains at 200 cents. However, the text does not allow any extra duty to be imposed, because the trigger is set at 30% price decline.

C: A 40% fall in import price requires duty to increase from 100% to 233% (an additional duty of 133%) to retain import price after duty at 200 cents. However, the text allows only an extra 8% duty which brings import price after duty to 125 cents. This is far below the local product price of 180, thus having adverse effect on the local farm produce.

D: A 60% fall in the import price requires duty to increase from 100% to 400% (an additional duty of 300%) to retain import price after duty at 200 cents. If the text does not impose a tariff cap at the pre-Doha (i.e. Uruguay Round) tariff level, it would allow an extra 37.5% duty which brings import price after duty to 95 cents, which is still far below the local product price. However, the text imposes a pre-Doha tariff cap. As the pre-Doha rate is 110%, this allows only an extra 10% duty, which brings import price after duty to 84 cents, well below the local product price of 180 cents; thus the local product is severely affected by imports..

Annex 2

SSM and FTA import

(Bhagirath Lal Das) 23.9.2007

It is not unusual in the multilateral rule making process to come across situations when multiple conflicting objectives have to be reconciled through a proper balance. The correct and practical approach in such situations of dilemma is first to identify the core concern and core objective and then to work out how the other elements, seemingly in conflict with them, can be positioned properly.

In the case of SSM in agriculture, the core concern is the sustainability of agriculture in the developing countries and the core objective is to give protection to it from imports in difficult times.

Imports of an agricultural product from "any country" can contribute to the damage to the local production. Thus it will not be rational and realistic to exclude imports from "special relation countries", for example, from "FTA countries". Of course, the situation is somewhat different when a set of countries have totally merged their trade and production economy, for example, the EU countries. In that case, the damage is to be assessed in this integrated unit "as a whole". And the relief is also for the integrated unit "as a whole". (There are some provisions in the current rules for "injury to domestic production in a region of a country", but then the relief is also focussed to imports exclusively in that region.).

Thus so long as a country is a separate trade and production unit for agriculture, the damage to country's agriculture in the context of SSM should be considered with respect to the imports from all sources and similarly the relief should also be targetted to the imports from all sources, irrespective of whether the country has a special bilateral or plurilateral agreement of any type, for example, through FTA. Thus all imports, including those from the FTA countries, should count both for the trigger and relief.

Then the question may arise how to get to that relief when FTAs may not have a provision for such relief. It is not an insurmountable problem. Once the membership of the WTO have agreed to the new SSM, it will amount to a political commitment to it. Thus FTAs, including the operation of the existing FTAs, would be considered to be guided by it. Besides, as a technical and legal precaution, a stipulation could be made in the agreement on SSM in the current negotiation that the SSM provision would be operational, "irrespective of any provision to the contrary in FTAs contracted under Article XXIV of the GATT 1994 or under the Enabling Clause (the rather long technical name will have to be mentioned)".

It is relevant to keep in mind that the use of SSM does not have to be specifically included in an FTA for the SSM to be operational as between the FTA contracting parties. Whenever an FTA is silent over any matter, the normal WTO rules will operate. Thus if SSM is not explicitly prohibited in an FTA or if the protection against import of agricultural products is not *explicitly restricted* to certain specified measures, there will be nothing wrong in using SSM between the FTA contracting parties once SSM gets into the WTO framework.

Annex 3

What is “special” about agriculture and the SSM?

A major point of contention in the WTO discussions on SSM is the interpretation or understanding of the term “special” in SSM. The chair’s paper seems to take the position that “special” means that the SSM can and should be used only in “special circumstances”, and thus should be somehow restricted in frequency (of numbers) or reserved only for rare and abnormal conditions, and with strict conditions for triggers and very limited remedies.

In fact, when developing countries initiated their move and called for an SSM, even in the run-up to the WTO’s Seattle Ministerial Conference in 1999, it was on the basis that this safeguard measure in agriculture for developing countries was needed and was “special” in that normal safeguards as established in the WTO Agreement on Safeguards are inadequate to take care of the special circumstances of agriculture in developing countries. A special safeguard mechanism was required in order to enable them to invoke it and use it more easily and effectively for agricultural products, given the large proportion of their population engaged in agriculture.

The rationale for having a safeguard in the trading system is a recognition of the need to protect domestic producers from injury or threat of injury resulting from imports.

The use of the normal safeguard requires the fulfilment of several conditions, including that the authorities undertake investigation procedures to determine that there is injury or threat of injury to domestic producers.

Recognizing that circumstances in agriculture are different from those for industrial products, the Uruguay Round established a clause for a special safeguard (SSG) in the WTO Agreement on Agriculture.

The SSG makes it easier for the safeguard to be used in agriculture; for example, the normal safeguard requires evidence of injury before action can be taken, while the SSG in the AoA does not require such evidence.

However, the SSG was available for use only by those countries that undertook the exercise of “tariffication” in the Uruguay Round. This included many of the developed countries but only a small proportion of the developing countries (only 22). To redress this, the developing countries are now insisting that a new SSM be established which can be used by developing countries.

Agriculture in developing countries requires such a special safeguard because of factors such as the following:

(1) It is a very important sector economically and socially in most developing countries, which thus have to address the needs of food security, livelihood security and rural development.

(2) There are many thousands or millions of small producers – unlike in the case of industry where there are only a few producers – and also vast diversity among them located in vastly diverse regions. Thus, injury is easier to demonstrate in the case of industry than it is for agriculture.

(3) There can be very strong fluctuations and swings in prices of agricultural products and imports, and

these can take place more suddenly and more frequently than in the case of industrial products, hence the need for quicker action.

(4) It is important to prevent social and economic damage wrought by imports in agriculture in developing countries, rather than be allowed to act only after the serious damage happens. Therefore a special safeguard is needed that enables action to be taken upfront (when there are initial signs of import surge or price decline sufficient to trigger a possible SSM measure) rather than a normal safeguard that requires serious injury to take place before action is allowed. This is especially because of special circumstances in agriculture in developing countries. For example:

(a) Unlike in industry, the production cycle in agriculture does not allow for sudden stopping and restarting of production; if agricultural production is halted or reduced because of a fall in sales, and demand picks up again after some time after a normal safeguard action remedy is applied, the farmers have to wait till the next planting season to expand output. Moreover, if the decreased demand persists for some time, the farmer may have to switch to another crop, and it would be difficult for him to return to the original crop even after the normal safeguard is applied because too much time has elapsed. Thus, prevention or quick action through the SSM is needed.

(b) Also, if demand for the domestic product is reduced (because of increased imports), the small farmer in developing countries finds it difficult to increase storage of his product due to lack of storage facilities and to the perishability of agricultural products (unlike in industry, where the factory can increase its inventory, which it can then run down when there is an increase in sales after the normal safeguard remedy is applied). Thus, preventive action through the SSM is required as the normal safeguard would not be sufficient to address the problem.

Because of these and other special circumstances in agriculture, a "special" safeguard is needed. The term "special" should therefore not be interpreted to mean that the modalities should seek to restrict the use or treatment of the SSM to "special cases" or that it should only be used in special circumstances, which seems to be an underlying theme in some sections of the chair's modalities paper (for example, in paragraph 104, which states that the SSM is meant to be used only in special situations, or in paragraph 111, which states that some members want the treatment of the SSM to be restricted to raising additional duty only to the Uruguay Round bound rate).