



Safeguards Without Compensation — A New Normal?

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Bilateral Trade

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Mexico's push for exclusion from the United States' solar safeguard measure, which jumped into the news this week, raises a point of potential interest for the IELP Blog audience.

The escape clause / efficient breach theory of safeguards holds that a WTO Member can temporarily retract a trade concession, hiking tariffs and thereby

providing an opportunity for orderly adjustment by its domestic producers, while preserving the balance of concessions by compensating affected trading partners during the time the tariff umbrella is up. There is a general 3-year grace period for compensation, but that has long since lapsed in the case of the solar safeguard measure which has been in place for nearly 7 years without compensation being provided to anyone. The silence on this point, both from governments and from trade geeks, has been rather odd.

While all WTO members have been entitled to compensation for their trade losses resulting from the solar safeguard measure since Day 1 of Year 4, Mexico – by virtue of the NAFTA and the USMCA – has been entitled to compensation (or else exclusion from the measure) since Day 1 of Year 1.

According to the news reports, Mexico is currently seeking not compensation but exclusion from the measure ... consistent with instructions President Biden included in his February 2022 proclamation extending the measure for four additional years. The issue has taken on increased importance with the measure's recently-restored coverage of bifacial solar modules, which dominate Mexico's solar exports to the United States. Suddenly, the measure has, in respect of intra-North American trade, a more painful bite.

If an exclusion is not quickly implemented, the compensation which Mexico could demand (and lawfully help itself to) would not be trivial. During the four-year reference period prior to the safeguard measure, 2013-2017, Mexico accounted for roughly 10% of U.S. solar panel imports. During the safeguard measure's time in

force, Mexico's share of U.S. imports has fallen dramatically. Switching to absolute numbers and looking at the last calendar year (2023), if Mexico had been supplying 10% of U.S. imports (as during the reference period), the value of its solar exports would have been about \$1.4 billion. Actual Mexico-to-U.S. shipments in 2023 were roughly \$400 million. So the current run rate, in regard to Mexico's trade losses as traditionally measured, is about \$1 billion/year. Suspension of concessions on south-bound trade flows of that magnitude could be expected to cause a bit of a stir.

There are many contested items in the Mexico-U.S. bilateral trade agenda at the moment. This solar issue sticks out as one where Mexico has undisputable legal (treaty-based) rights, which its neighbor to the north is not respecting. A simple exclusion would be good for Mexico but also – given the \$1 billion/year price tag if Mexico should decide to stop sleeping on its rights – would avoid an awkward problem for Uncle Sam.

The broader question of compensation's disappearance from the public discussion on safeguards merits attention in its own right. Is this the new normal? And if so, what aspect of the safeguard system might disappear next ... adjustment plans? I had always thought — and have been telling law students for the last ~22 years — that these elements of the safeguard system were fundamental ones, even if it is the safeguard tariffs themselves that garner most public attention.

To read the full commentary as it was published on the International Economic Law and Policy Blog, managed

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